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THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

MARCH 10, 2017 and JUNE 22, 2017

IN THE

# Supreme Court of Nebraska

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## NEBRASKA REPORTS

## VOLUME CCXCVI

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PEGGY POLACEK
OFFICIAL REPORTER

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PUBLISHED BY
THE STATE OF NEBRASKA
LINCOLN
2023

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Michael G. Heavican, Chief Justice
John F. Wright, Associate Justice
Lindsey Miller-Lerman, Associate Justice
William B. Cassel, Associate Justice
Stephanie F. Stacy, Associate Justice
Max Kelch, Associate Justice
Jeffrey J. Funke, Associate Justice

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## COURT OF APPEALS
## DURING THE PERIOD OF THESE REPORTS

Frankie J. Moore, Chief Judge
Everett O. Inbody, Associate Judge
Michael W. Pirtle, Associate Judge
Francie C. Riedmann, Associate Judge
Riko E. Bishop, Associate Judge
David K. Arterburn, Associate Judge

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Peggy Polacek ..... Reporter
Teresa A. Brown ..... 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* |
|---|---|
| William B. Zastera | Papillion |
| George A. Thompson | Papillion |
| Michael A. Smith | Plattsmouth |
| Stefanie A. Martinez | Papillion |

**Third District**

*Counties in District:* Lancaster

| *Judges in District* | *City* |
|---|---|
| John A. Colborn | Lincoln |
| Jodi 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 |
| W. Mark Ashford | Omaha |
| Peter C. Bataillon | Omaha |
| Gregory M. Schatz | Omaha |
| J Russell Derr | Omaha |
| James T. Gleason | Omaha |
| Thomas A. Otepka | Omaha |
| Marlon A. Polk | Omaha |
| W. Russell Bowie III | Omaha |
| Leigh Ann Retelsdorf | Omaha |
| Timothy P. Burns | Omaha |
| Duane C. Dougherty | Omaha |
| Kimberly Miller Pankonin | Omaha |
| Shelly R. Stratman | Omaha |
| Horacio J. Wheelock | 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 |
| Mary C. Gilbride | Wahoo |
| James C. Stecker | Seward |
| Rachel A. Daugherty | Aurora |

# JUDICIAL DISTRICTS AND DISTRICT JUDGES

**Sixth District**

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

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

**Seventh District**

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

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

**Eighth District**

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

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

**Ninth District**

*Counties in District:* Buffalo and Hall

| *Judges in District* | *City* |
|---|---|
| Teresa K. Luther | Grand Island |
| William T. Wright | Kearney |
| Mark J. Young | Grand Island |
| John H. Marsh | Kearney |

**Tenth District**

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

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

**Eleventh District**

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

| *Judges in District* | *City* |
|---|---|
| Donald E. Rowlands | North Platte |
| James E. Doyle IV | Lexington |
| David Urbom | McCook |
| Richard A. Birch | 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 Dobrovolny | Gering |
| Derek C. Weimer | Sidney |
| Travis P. O'Gorman | Alliance |

# 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 |
| John F. Steinheider | Nebraska City |
| Todd J. Hutton | Papillion |
| Stefanie A. Martinez | Papillion |

**Third District**

*Counties in District:* Lancaster

| *Judges in District* | *City* |
|---|---|
| Laurie Yardley | Lincoln |
| Timothy C. Phillips | Lincoln |
| Matthew L. Acton | Lincoln |
| Holly J. Parsley | Lincoln |
| Thomas E. Zimmerman | Lincoln |
| Rodney D. Reuter | Lincoln |
| John R. Freudenberg | Lincoln |

**Fourth District**

*Counties in District:* Douglas

| *Judges in District* | *City* |
|---|---|
| Lawrence E. Barrett | Omaha |
| Marcena M. Hendrix | Omaha |
| Darryl R. Lowe | Omaha |
| John E. Huber | Omaha |
| Jeffrey 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 F. Shearer | Omaha |

**Fifth District**

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

| *Judges in District* | *City* |
|---|---|
| Frank J. Skorupa | Columbus |
| Patrick R. McDermott | David City |
| Linda S. Caster Senff | Aurora |
| C. Jo Petersen | Seward |
| Stephen R.W. Twiss | Central City |

# JUDICIAL DISTRICTS AND COUNTY JUDGES

**Sixth District**

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

| *Judges in District* | *City* |
|---|---|
| C. Matthew Samuelson | Blair |
| Kurt Rager | Dakota City |
| Douglas L. Luebe | Hartington |
| Kenneth 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* |
|---|---|
| Alan L. Brodbeck | O'Neill |
| James J. Orr | Valentine |
| Tami K. Schendt | Broken Bow |

**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 Paine | McCook |
| Michael E. Piccolo | North Platte |
| Jeffrey M. Wightman | Lexington |

**Twelfth District**

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

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

## SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

Douglas County

| *Judges* | *City* |
|---|---|
| Douglas F. Johnson | Omaha |
| Elizabeth Crnkovich | Omaha |
| Wadie Thomas | Omaha |
| Christopher Kelly | Omaha |
| Vernon Daniels | 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 |

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## WORKERS' COMPENSATION COURT AND JUDGES

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

## ATTORNEYS
## Admitted Since the Publication of Volume 295

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No. S-15-1148: **In re Interest of Imelda H**. Affirmed. Funke, J.

No. S-16-052: **Bodnar v. Bodnar**. Affirmed. Heavican, C.J.

No. S-16-280: **State v. Jefferson**. Affirmed. Cassel, J.

No. S-16-304: **Morrison v. Nebraska Dept. of Corr. Servs**. Affirmed. Miller-Lerman, J.

No. S-16-346: **State v. Belk**. Affirmed. Wright, J.

No. S-16-347: **In re Estate of Chapman**. Appeal dismissed. Heavican, C.J.

Nos. S-16-605, S-16-633: **In re Conservatorship of Trobough**. Appeal in No. S-16-605 dismissed in part, and in part reversed and remanded with directions. Appeal in No. S-16-633 dismissed. Per Curiam.

No. S-16-763: **In re Interest of Skyleeya M**. Appeal dismissed. Kelch, J.

No. S-16-812: **In re Interest of Dante S**. Appeal dismissed. Kelch, J.

No. S-16-901: **State v. Bohy**. Affirmed. Wright, J.

No. S-16-938: **In re Interest of Cassandra B. & Moira B**. Appeal dismissed. Kelch, J.

# LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-16-325: **McGill Restoration v. Lion Place Condo. Assn**. Appeal dismissed. See § 2-107(A)(2).

No. S-16-445: **Vulcraft v. Board of Adjustment**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-16-569: **Main Street Hospitality v. Perkins**. Appeal dismissed.

No. S-16-589: **Hart v. State ex rel. Neb. Real Estate Comm**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. S-16-711: **State v. Nesbitt**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2),

No. S-16-899: **Moes v. Moes**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. S-16-1009, S-16-1010: **State v. Jessop**. Affirmed. See § 2-107(A)(1).

No. S-16-1022: **State v. Mason**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-16-1192: **Pope v. Cruickshank**. Motion of appellee for summary dismissal sustained; appeal dismissed as moot upon death of appellant.

No. S-16-1192: **Pope v. Cruickshank**. Motion of appellee for summary affirmance overruled as moot. See § 2-107(B)(1) and (2).

No. S-17-051: **In re Adoption of Jaelyn B**. Appeal dismissed for failure to file briefs.

No. S-17-206: **Freeman v. Hoffman-Laroche, Inc**. Appeal dismissed. See § 2-107(A)(2).

No. S-17-316: **State v. Thomas**. Appeal dismissed. See §§ 2-101(B)(4) and 2-107(A)(2).

No. S-17-340: **State v. Collins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-17-384: **In re Estate of Lorenz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-17-430: **State v. Thomas**. Appeal dismissed. See § 2-107(A)(2).

# LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-13-887: **State v. McSwine**, 24 Neb. App. 453 (2017). Petition of appellant for further review denied on March 23, 2017.

No. A-15-317: **State v. Washington**. Petition of appellant for further review denied on April 19, 2017.

No. S-15-610: **Putnam v. Scherbring**. Petition of appellees for further review sustained on March 13, 2017.

No. A-15-651: **Ulferts v. Prokop**. Petition of appellant for further review denied on March 29, 2017.

No. A-15-775: **Ponec v. Guy Strevey & Assocs**. Petition of appellant for further review denied on March 23, 2017.

No. A-15-792: **State v. Obley**. Petition of appellant for further review denied on April 12, 2017.

No. A-15-825: **In re Trust of Giventer**. Petition of appellant for further review denied on April 19, 2017.

No. S-15-897: **State v. Huff**, 24 Neb. App. 551 (2017). Petition of appellant for further review sustained on May 2, 2017.

No. A-15-946: **In re Interest of Elijah P. et al.**, 24 Neb. App. 521 (2017). Petition of appellee for further review denied on June 6, 2017.

No. A-15-977: **In re Estate of Ackerman**, 24 Neb. App. 588 (2017). Petition of appellant for further review denied on May 30, 2017.

No. A-15-980: **VanEiser, LLC v. Nebraska Bank of Commerce**. Petition of appellant for further review denied on June 13, 2017.

No. A-15-988: **WBE Company v. State**. Petition of appellant for further review denied on March 8, 2017.

No. A-15-994: **State v. Johnson**. Petition of appellant for further review denied on April 4, 2017.

No. A-15-1007: **Bouzis v. Bouzis**. Petition of appellee for further review denied on April 18, 2017.

No. A-15-1024: **Perea v. Gomez**. Petition of appellant for further review denied on May 10, 2017.

No. A-15-1034: **CACH, LLC v. deNourie**. Petition of appellant for further review denied on April 6, 2017.

No. A-15-1037: **Jacob v. Cotton**. Petition of appellant for further review denied on April 6, 2017.

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No. A-15-1067: **SFI LTD. Partnership 53 v. Ray Anderson, Inc**. Petition of appellant for further review denied on May 11, 2017.

No. A-15-1086: **State v. Magallanes**. Petition of appellant for further review denied on March 27, 2017, as untimely. See § 2-102(F)(1).

No. A-15-1113: **State v. Pigee**. Petition of appellant for further review denied on April 10, 2017.

No. A-15-1118: **Mitchell v. Mansfield**. Petition of appellant for further review denied on April 10, 2017.

No. A-15-1161: **State v. McCrickert**, 24 Neb. App. 496 (2017). Petition of appellant for further review denied on March 23, 2017.

Nos. A-15-1180, A-15-1221: **State v. Engstrom**. Petitions of appellant for further review denied on April 10, 2017.

No. A-15-1184: **Ammon v. Nagengast**, 24 Neb. App. 632 (2017). Petition of appellant for further review denied on June 5, 2017.

No. A-15-1233: **State v. Edwards**. Petition of appellant pro se for further review denied on March 10, 2017.

No. A-16-012: **In re Conservatorship & Guardianship of Lindhurst**. Petition of appellant for further review denied on April 6, 2017.

No. A-16-150: **Boyer v. Boyer**, 24 Neb. App. 434 (2017). Petition of appellant for further review denied on March 7, 2017.

No. A-16-211: **Central Platte NRD v. Smith**. Petition of appellant for further review denied on May 8, 2017.

No. A-16-251: **State v. Wabashaw**. Petition of appellant for further review denied on June 2, 2017.

No. S-16-255: **State v. Rivera**. Petition of appellant for further review sustained on May 8, 2017.

No. S-16-267: **Hintz v. Farmers Co-op Assn.**, 24 Neb. App. 561 (2017). Petition of appellee for further review sustained on April 19, 2017.

No. A-16-282: **Ehrke v. Mamot**. Petition of appellant for further review denied on June 7, 2017.

No. A-16-287: **Gray v. Nebraska Dept. of Corr. Servs**. Petition of appellant for further review denied on May 16, 2017.

No. A-16-289: **State v. Milton**. Petition of appellant for further review denied on May 2, 2017.

No. S-16-327: **Mumin v. Frakes**. Petition of appellant for further review sustained on May 10, 2017.

No. A-16-368: **State on behalf of Natalya B. & Nikiah A. v. Bishop A.**, 24 Neb. App. 477 (2017). Petition of appellant for further review denied on March 29, 2017.

PETITIONS FOR FURTHER REVIEW

Nos. A-16-387, A-16-388: **State v. Hawks**. Petitions of appellant for further review denied on March 7, 2017.

No. A-16-411: **Onuachi v. Harry S. Peterson Co**. Petition of appellant for further review denied on May 30, 2017.

No. A-16-428: **In re Interest of Damerio C. et al**. Petition of appellant for further review denied on April 7, 2017.

No. A-16-430: **Zellner v. Latham**. Petition of appellant for further review denied on April 4, 2017.

No. A-16-458: **State v. Mead**. Petition of appellant for further review denied on March 8, 2017.

No. A-16-468: **State v. Rosas**. Petition of appellant pro se for further review denied on May 16, 2017.

No. A-16-475: **State v. Schmidt**. Petition of appellant for further review denied on May 10, 2017.

No. A-16-477: **Kiser v. Grinnell**. Petition of appellant for further review denied on April 10, 2017.

No. A-16-505: **State v. Heldt**. Petition of appellant for further review denied on June 6, 2017.

No. A-16-528: **State v. Herrin**. Petition of appellant for further review denied on June 5, 2017.

No. A-16-540: **In re Interest of Paul J. et al**. Petition of appellant for further review denied on March 6, 2017. See § 2-102(F)(1).

No. S-16-550: **State v. Mendez-Osorio**. Petition of appellant for further review sustained on March 16, 2017.

No. A-16-553: **In re Interest of Hindryk B**. Petition of appellant for further review denied on March 29, 2017.

No. A-16-578: **Rosberg v. Skorupa**. Petition of appellant for further review denied on April 26, 2017.

No. A-16-581: **Rosberg v. Vaughan**. Petition of appellant for further review denied on April 26, 2017.

No. A-16-584: **State v. Kennedy**. Petition of appellant for further review denied on April 10, 2017.

No. A-16-592: **State v. Blankenship**. Petition of appellant for further review denied on March 3, 2017.

No. A-16-601: **State v. Kincaid**. Petition of appellant for further review denied on June 14, 2017.

No. A-16-669: **State v. Porter**. Petition of appellant for further review denied on May 2, 2017.

No. A-16-692: **Thanawalla v. Thanawalla**. Petition of appellant for further review denied on April 19, 2017.

No. A-16-720: **Fraction v. Rookstool**. Petition of appellant for further review denied on May 17, 2017.

PETITIONS FOR FURTHER REVIEW

No. A-16-749: **State v. Segundo**. Petition of appellant for further review denied on April 10, 2017.

No. A-16-767: **Onuachi v. Alliance Group**. Petition of appellant for further review denied on March 16, 2017.

No. A-16-776: **Lombardo v. Sedlacek**. Petition of appellant for further review denied on March 10, 2017.

No. A-16-781: **State v. Schultz**. Petition of appellant for further review denied on April 10, 2017.

No. A-16-802: **Giandinoto v. Giandinoto**. Petition of appellant for further review denied on June 5, 2017.

No. A-16-808: **State v. Reinig**. Petition of appellant for further review denied on May 10, 2017.

No. A-16-838: **State v. Klingelhoefer**. Petition of appellant for further review denied on March 10, 2017.

No. A-16-917: **Olson v. Koch**. Petition of appellant for further review denied on March 10, 2017.

No. A-16-957: **State v. Kodad**. Petition of appellant for further review denied on May 2, 2017.

No. A-16-960: **Seier v. Niewohner Bros**. Petition of appellant for further review denied on April 6, 2017.

Nos. A-16-971, A-16-977: **State v. Newman**. Petitions of appellant for further review denied on May 8, 2017.

Nos. A-16-1053, A-16-1055: **State v. Wood**. Petitions of appellant for further review denied on March 7, 2017.

No. A-16-1084: **Castonguay v. Retelsdorf**. Petition of appellant for further review denied on May 16, 2017.

No. A-16-1090: **State v. Reising**. Petition of appellant for further review denied on April 21, 2017.

No. A-16-1090: **State v. Reising**. Petition of appellant pro se for further review denied on April 21, 2017.

No. A-16-1140: **Gardner v. Rensch**. Petition of appellant for further review denied on June 2, 2017.

No. A-16-1145: **State v. Rice**. Petition of appellant for further review denied on May 17, 2017.

Nos. A-16-1155, A-17-015: **State v. Sheldon**. Petitions of appellant for further review denied on June 6, 2017.

No. A-16-1175: **State v. Trevino**. Petition of appellant for further review denied on April 17, 2017.

No. A-16-1176: **State v. Shirley**. Petition of appellant for further review denied on April 26, 2017.

No. A-16-1177: **Rosberg v. Riesberg**. Petition of appellant for further review denied on March 17, 2017. See § 2-107(A)(2).

PETITIONS FOR FURTHER REVIEW

No. A-16-1199: **State v. Alford**. Petition of appellant for further review denied on May 30, 2017.

No. A-16-1209: **Prokop v. Ritnour**. Petition of appellant for further review denied on March 27, 2017, as untimely. See § 2-102(F)(1).

No. A-16-1211: **State v. Gardner**. Petition of appellant for further review denied on March 27, 2017, as untimely. See § 2-102(F)(1).

No. A-17-023: **State v. Gardner**. Petition of appellant for further review denied on April 19, 2017.

No. A-17-063: **State v. Castonguay**. Petition of appellant for further review denied on May 16, 2017.

No. A-17-094: **State on behalf of Michael A. v. Samar A**. Petition of appellant for further review denied on March 7, 2017, for lack of jurisdiction. See, §§ 2-102(F)(1) and 2-101; Neb. Rev. Stat. § 25-2301.02 (Reissue 2016).

No. A-17-253: **State v. Alvarado**. Petition of appellant for further review denied on June 6, 2017.

Nebraska Supreme Court
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# Medicine Creek LLC, appellee and cross-appellant, v. Middle Republican Natural Resources District, appellant and cross-appellee.

892 N.W.2d 74

Filed March 10, 2017. No. S-16-209.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Natural Resources Districts: Political Subdivisions: Legislature.** A natural resources district, as a political subdivision, has only that power delegated to it by the Legislature, and a grant of power to a political subdivision is strictly construed.
4. **Natural Resources Districts.** A natural resources district possesses and can exercise the following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; and third, those essential to the declared objects and purposes of the district—not simply convenient, but indispensable.
5. **Administrative Law.** When a board or tribunal is required to conduct a hearing and receive evidence, it exercises judicial functions in determining questions of fact.

6. **Administrative Law: Waters: Natural Resources Districts: Appeal and Error.** Any person aggrieved by an order of a natural resources district issued pursuant to the Nebraska Ground Water Management and Protection Act may appeal the order, and the appeal shall be in accordance with the Administrative Procedure Act.
7. **Administrative Law: Final Orders: Courts: Appeal and Error.** In reviewing final administrative orders under the Administrative Procedure Act, the district court functions not as a trial court but as an intermediate court of appeals.
8. **Administrative Law: Appeal and Error.** In a review de novo on the record, the district court is not limited to a review subject to the narrow criteria found in Neb. Rev. Stat. § 84-917(6)(a) (Reissue 2014), but 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.
9. **Administrative Law: Evidence: Judicial Notice: Appeal and Error.** The Administrative Procedure Act does not authorize a district court reviewing the decision of an administrative agency to receive additional evidence, whether by judicial notice or other means.
10. **Appeal and Error: Words and Phrases.** Plain error is error uncomplained of at trial, plainly evident from the record, and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
11. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Frontier County: David Urbom, Judge. Reversed and remanded for further proceedings.

Jon S. Schroeder, of Schroeder & Schroeder, P.C., for appellant.

Stephen D. Mossman, of Mattson Ricketts Law Firm, for appellee.

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

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

Cassel, J.

## INTRODUCTION

The Middle Republican Natural Resources District (MRNRD) denied a landowner's request for a variance to drill a new well. Upon the landowner's appeal, the district court reversed MRNRD's decision. Because the district court committed plain error by applying the wrong standard of review, we reverse, and remand for reconsideration under the proper standard.

## BACKGROUND

Medicine Creek LLC, a Nebraska limited liability company, filed a request for a variance from MRNRD's moratorium on new well drilling. MRNRD denied the variance but stated that Medicine Creek "may request a [sic] adjudicatory hearing to appeal this decision." Medicine Creek did so, and a hearing officer presided over a hearing during which three individuals testified and numerous exhibits were received. Following the presentation of evidence, MRNRD's Board of Directors (Board) voted to deny the variance.

Medicine Creek filed a complaint with the district court for Frontier County. It sought judicial review pursuant to Neb. Rev. Stat. § 46-750 (Reissue 2010) and the Administrative Procedure Act (APA). Medicine Creek alleged that the Board improperly denied its variance request based on a rule applicable to transfers. Medicine Creek also requested declaratory and injunctive relief based on its allegation that two of MRNRD's rules violated its equal protection and due process rights.

The district court conducted a bench trial, during which it received the record from MRNRD's hearing. It also received 100 additional exhibits and heard testimony from the three individuals who testified before the Board. The court determined that MRNRD's rules and regulations as applied to Medicine Creek's request did not violate Medicine Creek's equal protection and due process rights. It found that

MRNRD's decision "was not supported by the evidence, does not conform to the law and was therefore arbitrary." The court reversed the decision denying the variance and directed MRNRD to grant the variance.

MRNRD filed a timely appeal, and Medicine Creek filed a cross-appeal. We moved the case to our docket.[1]

## ASSIGNMENTS OF ERROR

MRNRD assigns that the district court erred in holding that its decision to deny Medicine Creek's request for a variance was not supported by the evidence, did not conform to the law, and was arbitrary.

On cross-appeal, Medicine Creek assigns that in the event we reverse the decision of the district court, the court erred in (1) not finding that the application of MRNRD's rules and regulations violated Medicine Creek's equal protection and due process rights, (2) not finding that the rules and regulations were facially unconstitutional, and (3) not issuing declaratory and injunctive relief against the unconstitutional rules and regulations.

## 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.[2]

[2] A judgment or final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the APA for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[3]

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

[2] *Guardian Tax Partners v. Skrupa Invest. Co.*, 295 Neb. 639, 889 N.W.2d 825 (2017).

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

## ANALYSIS

### Jurisdiction

In an amicus curiae brief, the Nebraska Groundwater Coalition asserts that the district court lacked jurisdiction for two reasons. We find no merit to either argument.

First, the amicus argues that Medicine Creek lacked standing. The amicus asserted that the Nebraska Secretary of State's website showed Medicine Creek's corporate status as inactive at the time of trial. This is not in our record. There is nothing in the record showing that Medicine Creek was ever dissolved or otherwise lacked a legally cognizable interest in the outcome of this litigation.

Second, the amicus asserts that denial of a variance request is not subject to judicial review. This follows, it argues, because the Legislature has not authorized natural resources districts to conduct adjudicative proceedings regarding requests for variances. The amicus contends that although § 46-750 provides that "[a]ny person aggrieved by any order of the district . . . may appeal the order," an order denying a variance request is ministerial or legislative in nature and not appealable.

[3,4] A natural resources district, as a political subdivision, has only that power delegated to it by the Legislature, and a grant of power to a political subdivision is strictly construed.[4] A natural resources district possesses and can exercise the following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; and third, those essential to the declared objects and purposes of the district—not simply convenient, but indispensable.[5]

A statute addresses some of the powers of a natural resources district.[6] The Legislature authorized a natural resources district

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[4] *Wagoner v. Central Platte Nat. Resources Dist.*, 247 Neb. 233, 526 N.W.2d 422 (1995).

[5] *Id.*

[6] See Neb. Rev. Stat. § 46-707 (Cum. Supp. 2016).

to "[a]dopt and promulgate rules and regulations necessary to discharge the administrative duties assigned in the [Nebraska Ground Water Management and Protection Act]."[7] Among the rules and regulations adopted by MRNRD was a rule stating that requests for a variance would be acted upon at a formal adjudicatory hearing. The same rule dictated that this hearing would be advertised in the legal newspaper of the district. And another section of the same statute provides in part that

> a district may assess a fee against a person requesting a variance to cover the administrative cost of *consideration of the variance*, including, but not limited to, costs of copying records and the *cost of publishing a notice in a legal newspaper of general circulation in the county or counties of the district, radio announcements, or other means of communication* deemed necessary in the area where the property is located.[8]

By authorizing published notice, the Legislature contemplated a public hearing on a request for a variance.

[5] In holding a hearing and receiving evidence, the Board acted in a judicial manner. In cases where we have considered if an administrative decision was made in the exercise of "judicial" functions such that it was reviewable by petition in error, we stated that "a board, tribunal, or officer exercises a judicial function 'if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner.'"[9] We defined adjudicative facts as those "'which relate to a specific party and are adduced from formal proof.'"[10] We have also stated that when a board or tribunal is required to conduct a hearing and receive evidence, it exercises "judicial functions" in determining questions of fact.[11] Here, the Board acted in a judicial

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[7] § 46-707(1)(a).

[8] § 46-707(3) (emphasis supplied).

[9] *Kocontes v. McQuaid*, 279 Neb. 335, 348, 778 N.W.2d 410, 421 (2010).

[10] *Id.* at 348-49, 778 N.W.2d at 421.

[11] *McNally v. City of Omaha*, 273 Neb. 558, 731 N.W.2d 573 (2007).

manner when it considered Medicine Creek's request for a variance. It held a hearing and received formal proof regarding the merits of the request. We conclude that the order denying Medicine Creek's request for a variance was judicial in nature and was appealable to the district court.

## District Court's Standard of Review

[6] The district court initially stated the correct standard for its review under § 46-750 and the APA. It correctly recognized that any person aggrieved by an order of a natural resources district issued pursuant to the Nebraska Ground Water Management and Protection Act[12] may appeal the order and that the appeal shall be in accordance with the APA.[13] And it properly recited an APA statute stating that "the review shall be conducted by the court without a jury de novo on the record of the agency."[14]

But the district court veered to the wrong standard when it analyzed our decision in *Wagoner v. Central Platte Nat. Resources Dist.*[15] The district court read *Wagoner* as requiring it to review MRNRD's decision for errors appearing on the record. And at oral argument, Medicine Creek argued this same interpretation. They misread *Wagoner*.

*Wagoner* set forth the same two standards that we have long applied in APA reviews. An appeal from the district court looks for errors appearing on the record.[16] That standard applies to our review of the district court's order. But the district court reviews a natural resources district's decision de novo on the record of the natural resources district.[17]

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

[13] See § 46-750.

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

[15] *Wagoner v. Central Platte Nat. Resources Dist., supra* note 4.

[16] See *id*.

[17] See *id*.

And in this case, the district court clearly applied the wrong standard. The court found that MRNRD's decision "was not supported by the evidence, does not conform to the law and was therefore arbitrary." This articulated the standard for errors appearing on the record rather than the de novo standard. In doing so, the court erroneously limited its review.

[7-9] The district court was required to conduct a de novo review on the record of MRNRD. In reviewing final administrative orders under the APA, the district court functions not as a trial court but as an intermediate court of appeals.[18] In a review de novo on the record, the district court is not limited to a review subject to the narrow criteria found in § 84-917(6)(a), but 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.[19] And the APA does not authorize a district court reviewing the decision of an administrative agency to receive additional evidence, whether by judicial notice or other means.[20]

[10] The use of an incorrect standard of review in this situation is plain error and requires us to remand the cause to the district court. Plain error is error uncomplained of at trial, plainly evident from the record, and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.[21] A trial court's use of the wrong standard affects our review:

> "It is a logical impossibility for this court to review the district court judgment for errors appearing on the record if the district court incorrectly limited its review

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[18] *Timmerman v. Neth*, 276 Neb. 585, 755 N.W.2d 798 (2008).

[19] *Schwarting v. Nebraska Liq. Cont. Comm.*, 271 Neb. 346, 711 N.W.2d 556 (2006).

[20] *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

[21] *State ex rel. Unger v. State*, 293 Neb. 549, 878 N.W.2d 540 (2016).

> and, thus, failed to make factual determinations, as it must under a de novo on the record review. The district court's and this court's standards of review are interdependent."[22]

Many years ago in nearly identical circumstances, we held that a district court's application of the former limited standard of review constituted plain error and required that the cause be remanded to the district court for a de novo review of the record.[23] We follow the same course here.

[11] Because we must remand the cause for a new review by the district court under the correct standard, we need not reach Medicine Creek's cross-appeal. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[24] Upon remand, the district court should address Medicine Creek's constitutional claim to the extent necessary in light of its disposition of the APA review.

## CONCLUSION

We note plain error in the district court's application of the wrong standard of review. We therefore reverse the court's order and remand the cause to the district court for a de novo review of MRNRD's record.

Reversed and remanded for
further proceedings.

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[22] *Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 460, 558 N.W.2d 303, 305 (1997), quoting *Bell Fed. Credit Union v. Christianson*, 237 Neb. 519, 466 N.W.2d 546 (1991).

[23] See *Law Offices of Ronald J. Palagi v. Dolan, supra* note 22.

[24] *Adair Asset Mgmt. v. Terry's Legacy*, 293 Neb. 32, 875 N.W.2d 421 (2016).

Nebraska Supreme Court
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# Greg Hill of Furnas County et al., appellants, v. State of Nebraska and Nebraska Department of Natural Resources, a state agency, appellees.

894 N.W.2d 208

Filed March 10, 2017. Nos. S-16-558, S-16-560.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. **Motions to Dismiss: Pleadings: Appeal and Error.** When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.
3. **Property.** A takings analysis begins with an examination of the nature of the owner's property interest.
4. **Property: Title: Statutes.** No compensation is owed in a takings claim if the State's affirmative decree simply makes explicit what already inheres in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.
5. **Irrigation.** Rights of irrigation in Nebraska exist only as they have been created and defined by the law and are therefore limited in their scope by the language of their creation.
6. **Irrigation Districts: Waters.** The adjudication of a water right gives to an irrigation district and its predecessors in interest a vested right to the use of the waters appropriated, subject to the law at the time the vested interest was acquired and such reasonable regulations subsequently adopted by virtue of the police power of the state.
7. **Waters: Irrigation.** The law gives to every citizen of the state the right to appropriate for beneficial purposes the unappropriated public waters of the state, and it protects him or her in the enjoyment of this appropriation after his or her right is once vested. An appropriator takes this right, however, subject to the rights of all prior and

subsequent appropriators, and he or she cannot infringe upon their rights and privileges.

8. **States: Federal Acts.** A compact, having received Congress' blessing, counts as federal law.
9. **Agriculture: Crops: Irrigation.** The inability to withdraw enough water to grow a crop does not amount to being deprived of all economic use of the land.
10. **Administrative Law: Waters: Natural Resources Districts.** Nebraska has two separate systems for the distribution of its water resources: One allocates surface water, and the other allocates ground water. The Department of Natural Resources regulates surface water appropriators, see Neb. Rev. Stat. § 61-201 et seq. (Reissue 2009 & Cum. Supp. 2016), and ground water users are statutorily regulated by the natural resources districts through the Nebraska Ground Water Management and Protection Act, see Neb. Rev. Stat. § 46-701 et seq. (Reissue 2009 & Cum. Supp. 2016).
11. **Administrative Law: Waters: Jurisdiction.** Neb. Rev. Stat. § 46-715 (Cum. Supp. 2016) limits the Department of Natural Resources' jurisdiction to surface water.

Appeals from the District Court for Furnas County: James E. Doyle IV, Judge. Affirmed.

David A. Domina, of Domina Law Group, P.C., L.L.O., for appellants.

Douglas J. Peterson, Attorney General, Justin D. Lavene, Emily K. Rose, and Kathleen A. Miller for appellees.

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

Heavican, C.J.

## I. INTRODUCTION

In 2013 and 2014, the Nebraska Department of Natural Resources (DNR) issued orders and sent closing notices to holders of surface water permits for natural flow and storage in the Republican River Basin (Basin). Appropriators Greg Hill, Brent Coffey, James Uerling, and Warren Schaffert, representing themselves and a class of farmers who irrigate with water delivered by the Frenchman-Cambridge Irrigation District

(FCID), subject to Nebraska's allocation of water under the Republican River Compact (Compact), filed suit, alleging two regulatory takings claims against the State of Nebraska and the DNR.

The district court consolidated the claims for the 2013 and 2014 crops, dismissed both claims, and denied the appropriators' requests for leave to amend. The appropriators appeal. We affirm.

We find that the Compact, as federal law, supersedes the appropriators' property interests. We further find that the DNR does not have a duty to regulate ground water; thus, a failure by the DNR to regulate ground water pumping that affects the Basin does not give rise to a cause of action for inverse condemnation.

## II. BACKGROUND

Under the Nebraska Ground Water Management and Protection Act, the DNR is required to conduct an annual forecast to determine whether the State's projected water supply from the Basin and projected consumption is sufficient to comply with the Compact.[1] The DNR conducted such a forecast on January 1, 2013, and again on January 1, 2014. The DNR's forecasts for both years indicated that the State's consumption would exceed its allocation under the Compact. Therefore, in each of those years, the DNR issued an order referred to as a "Compact Call" in the Basin and issued closing notices on all natural flow and storage permits.

The FCID owns water rights for surface water natural flow within the Basin for irrigation purposes. The appropriators allege that as a result of the DNR's orders to close the natural waterflow and preclude the release of storage water, "'the entirety of FCID's surface water appropriation bypassed [the appropriators] and was diverted for the public use of satisfying Nebraska's obligation to the state of Kansas under the Compact.'"

[1] See Neb. Rev. Stat. § 46-715(6) (Cum. Supp. 2016).

The appropriators brought these actions on behalf of themselves and a class of water users consisting of "[a]ll FCID water users in 2013 [and 2014] who did not receive their full water allocation supply due to the acts, omissions, and takings of [the State and the DNR] and who suffered damages due to diminished or eliminated crop production yields of growing crops." In their complaints, the appropriators alleged that each holds prior appropriation rights to surface water and that in each crop year, there was available surface water within Nebraska's allocated share of the Basin's waters which was not needed to meet Nebraska's obligations under the Compact. The appropriators further alleged that the available water was taken from the appropriators and given to Kansas, in excess of the requirements of the Compact, and constituted inverse condemnation of their water rights.

### 1. Basin "Interstate Compact"

Nebraska, the states of Kansas and Colorado, and the United States of America are parties to the Compact. The FCID and all class members own surface water appropriations allowing diversion of surface water from the Basin for beneficial use. The Basin has been the subject of the Compact since 1943.

In *Kansas v. Nebraska*,[2] the U.S. Supreme Court described the river:

> The Republican River originates in Colorado; crosses the northwestern corner of Kansas into Nebraska; flows through much of southwestern Nebraska; and finally cuts back into northern Kansas. Along with its many tributaries, the river drains a 24,900-square-mile watershed, called the Republican River Basin.

The U.S. Supreme Court described the Compact as

> apportion[ing] among the three States the "virgin water supply originating in" . . . the . . . Basin. . . . "Virgin

[2] *Kansas v. Nebraska*, 574 U.S. 445, 449, 135 S. Ct. 1042, 191 L. Ed. 2d 1 (2015).

> water supply," as used in the Compact, means "the water supply within the Basin," in both the River and its tributaries, "undepleted by the activities of man." Compact Art. II. The Compact gives each State a set share of that supply—roughly, 49% to Nebraska, 40% to Kansas, and 11% to Colorado—for any "beneficial consumptive use." *Id.*, Art. IV; see *id.*, Art. II (defining that term to mean "that use by which the water supply of the Basin is consumed through the activities of man"). In addition, the Compact charges the chief water official of each State with responsibility to jointly administer the agreement. See *id.*, Art. IX. Pursuant to that provision, the States created the Republican River Compact Administration (RRCA). The RRCA's chief task is to calculate the Basin's annual virgin water supply by measuring stream flow throughout the area, and to determine (retrospectively) whether each State's use of that water has stayed within its allocation.[3]

In 2002, the Compact was modified before the U.S. Supreme Court via a "Final Settlement Stipulation" (FSS) approved by the Court.[4] Under the FSS, the parties agreed to use the Compact's administration accounting procedures and the ground water model to determine Nebraska's compliance with the Compact. Based on those accounting procedures, Nebraska must use 5-year averaging in normal allocation years and 2-year averaging during "water short" years. Nebraska is obligated by the Compact to limit its consumption of the Basin's waters to its annual allotment.

After the FSS was adopted, the Nebraska Legislature enacted the Nebraska Ground Water Management and Protection Act (hereinafter Act).[5] Under the Act, the DNR and the Basin's three natural resources districts "shall jointly develop an

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[3] *Id.*, 574 U.S. at 449-50.

[4] *Id.*, 574 U.S. at 451.

[5] See Neb. Rev. Stat. § 46-701 et seq. (Reissue 2010 & Cum. Supp. 2016).

integrated management plan."[6] And, "[i]n developing an integrated management plan, the effects of existing and potential new water uses on existing surface water appropriators and ground water users shall be considered."[7] The Act also requires that the "ground water and surface water controls proposed for adoption in the integrated management plan . . . (b) be sufficient to ensure that the state will remain in compliance with applicable state and federal laws and with any applicable interstate water compact or decree . . . ."[8]

The Act further requires that under the monitoring plans imposed by the Act, the DNR must consult with the natural resources districts to ensure compliance with the Compact. In addition, the DNR shall

> forecast on an annual basis the maximum amount of water that may be available from streamflow for beneficial use in the short term and long term in order to comply with the requirement of subdivision (4)(b) of this section [the Compact]. This forecast shall be made by January 1, 2008, and each January 1 thereafter.[9]

### 2. Relevant Sections of Nebraska Constitution

The appropriators rely on the following sections of the Nebraska Constitution.

Neb. Const. art. I, § 21: "The property of no person shall be taken or damaged for public use without just compensation therefor."

Neb. Const. art. XV, § 4: "The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want."

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[6] § 46-715(1)(a).

[7] § 46-715(2).

[8] § 46-715(4).

[9] § 46-715(6).

Neb. Const. art. XV, § 5: "The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section."

Neb. Const. art. XV, § 6:

> The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. Provided, no inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user.

### 3. Procedural Background

#### (a) District Court Actions

The appropriators filed their initial action with respect to the 2013 crop year in July 2014. The operative complaint as to that crop year was filed on April 10, 2015. On October 30, 2015, the appropriators filed a complaint with respect to the 2014 crop year.

Other than the crop years at issue, for our purposes, both complaints were identical and alleged that (1) water was taken from the appropriators which was within Nebraska's allocation under the Compact, subject to capture in the Basin's streams, not required or used for compliance with the Compact, and not taken for consumptive beneficial use for any superior or prior legal use and (2) water was taken from the appropriators as a result of the DNR's failure to curtail excessive ground water

pumping which has depleted the Basin's streams by preventing water from reaching them. The appropriators claimed they suffered a loss of crop production as a result of the DNR's actions and omissions.

On April 30, 2015, the State and the DNR filed a motion to dismiss the appropriators' amended complaint regarding the 2013 crop year. On September 28, the court entered an order denying in part and in part sustaining the State and the DNR's motion to dismiss. On October 28, the State and the DNR filed a motion for clarification and/or a motion for reconsideration and a motion to extend the time to answer.

### (b) May 19, 2016, Order of Dismissal

A hearing on various outstanding motions was held January 14, 2016. On May 19, the district court issued its consolidated order. As relevant, that order first vacated that portion of its September 28, 2015, order denying the State and the DNR's motion to dismiss, then granted the State and the DNR's motions to dismiss both of the appropriators' causes of action.

## III. ASSIGNMENTS OF ERROR

The appropriators assign, restated and consolidated, that the trial court erred in holding that (1) the DNR's streamflow administration under the Compact was not a taking and that thus, the regulatory action did not interfere with a legitimate property interest under Neb. Const. art. I, § 21, and art. XV, § 6, and (2) the DNR did not have a duty to regulate ground water in these cases.

## IV. STANDARD OF REVIEW

[1,2] A district court's grant of a motion to dismiss is reviewed de novo.[10] When reviewing an order dismissing a

[10] *Walentine, O'Toole v. Midwest Neurosurgery*, 285 Neb. 80, 825 N.W.2d 425 (2013).

complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.[11]

## V. ANALYSIS

### 1. Whether DNR's Streamflow Administration Resulted in Taking Under Neb. Const. art. I, § 21, and art. XV, § 6

The appropriators argue that their property rights are superior to the Compact and that the State's regulation amounts to a permanent physical invasion. We reject both of these assertions.

#### (a) Nature of Appropriators' Property Interests

We first address the appropriators' allegation that their property rights are superior to the Compact. During oral argument, the appropriators maintained that they hold prior appropriation rights to use the water and that those rights "do not refer to any Compact" and "are not conditioned on changes or compliance in a Compact that didn't exist" at the time the water use permits were issued. We conclude that the appropriators' rights to use the water are subject to the Compact and are thus not a compensable property interest when the right to use is limited to ensure Nebraska's compliance under the Compact.

The appropriators' arguments on appeal are based on the assumption that the appropriators have compensable property rights. But because we conclude that the appropriators do not have such rights, their takings argument must fail.

[3-7] A takings analysis begins with an examination of the nature of the owner's property interest.[12] No compensation is owed in a takings claim if the State's affirmative decree simply

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[11] *DMK Biodiesel v. McCoy*, 285 Neb. 974, 830 N.W.2d 490 (2013).

[12] See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

makes explicit what already inheres in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.[13] "Rights of irrigation in the state exist only as they have been created and defined by the law and are therefore limited in their scope by the language of their creation."[14]

> The adjudication of the water right gave to the [irrigation district] and its predecessors in interest a vested right to the use of the waters appropriated, subject to the law at the time the vested interest was acquired and such reasonable regulations subsequently adopted by virtue of the police power of the state.[15]

Additionally,

> [t]he law gives to every citizen of the state the right . . . to appropriate for beneficial purposes the unappropriated public waters of the state, and it protects him in the enjoyment of this appropriation after his right is once vested. He takes this right, however, subject to the rights of all prior and subsequent appropriators, and he cannot infringe upon their rights and privileges.[16]

*Hinderlider v. La Plata Co.*[17] is instructive. In that case, the plaintiff owned a ditch by which it diverted water from the La Plata River in Colorado for irrigation, but the flow was altered by the state to comply with an interstate compact. The State of Colorado shut the headgate of the plaintiff's ditch pursuant to the requirements of the La Plata River Compact entered into by Colorado and New Mexico. The compact

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[13] See *id.*

[14] *In re Complaint of Central Neb. Pub. Power*, 270 Neb. 108, 111, 699 N.W.2d 372, 375 (2005).

[15] *State v. Birdwood Irrigation District*, 154 Neb. 52, 55, 46 N.W.2d 884, 887 (1951).

[16] *Farmers Canal Co. v. Frank*, 72 Neb. 136, 158, 100 N.W. 286, 294 (1904).

[17] *Hinderlider v. La Plata Co.*, 304 U.S. 92, 58 S. Ct. 803, 82 L. Ed. 1202 (1938).

provided that each state should receive a definite share of water, but that when the flow of the river was low, the "use of the waters may be so rotated between the two States."[18]

The *Hinderlider* Court held that the plaintiff's "right adjudicated by the decree" for water apportionment from the river was a "property right."[19] But the Court held that "the Colorado decree could not confer . . . rights in excess of Colorado's share of the water of the stream; and its share was only an equitable portion thereof."[20] Thus, "the apportionment made by the [c]ompact cannot have taken . . . any vested right."[21] The Court further determined that "the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact."[22]

Also instructive is *Badgley v. City of New York*.[23] There, the Second Circuit relied on *Hinderlider* and held that a state's administration of water in order to comply with a water compact precluded damage claims for diminished waterflow. The court reasoned that awarding damages to riparian right owners was inappropriate because such "would hobble or possibly even destroy the effect of Supreme Court decrees or Congressionally approved interstate water compacts by subjecting those who rely upon the provisions of the decrees or interstate compacts to unreasonable damage burdens."[24] Moreover, the result would be "inherently inconsistent with the supremacy of the Supreme Court's decree of equitable apportionment."[25]

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[18] *Id.*, 304 U.S. at 97.

[19] *Id.*, 304 U.S. at 102.

[20] *Id.*

[21] *Id.*, 304 U.S. at 108.

[22] *Id.*, 304 U.S. at 106.

[23] *Badgley v. City of New York*, 606 F.2d 358 (2d Cir. 1979).

[24] *Id.* at 366.

[25] *Id.*

This court has addressed similar situations in regard to ground water. In *Spear T Ranch v. Knaub*,[26] this court addressed a dispute over the depletion of stream water due to ground water pumping. We held that "[a] right to appropriate surface water . . . is not an ownership of property. Instead, the water is viewed as a public want and the appropriation is a right to use the water."[27] The court held that that the plaintiff had no action in conversion or trespass, "'since the plaintiff has no private property interest in groundwater, at least not prior to capture.'"[28]

In *Bamford v. Upper Republican Nat. Resources Dist.*,[29] this court held that a natural resources district's cease and desist order preventing landowners and tenant farmers from withdrawing ground water from their wells until issuance of additional allocation did not amount to a taking of their land. The court reasoned that

> ground water, as defined in § 46-657, is owned by the public, and the only right held by an overlying landowner is in the use of the ground water. [Citation omitted.] Furthermore, *placing limitations upon withdrawals of ground water in times of shortage is a proper exercise of the State's police power.*[30]

In *Keating v. Nebraska Public Power Dist.*,[31] the Eighth Circuit applied the legal reasoning set forth in *Spear T Ranch* and found that the appellants' permits to use surface water in the Niobrara Watershed created property interests that were limited by the "rights granted by the permit and is subject to

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[26] *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005).

[27] *Id.* at 185, 691 N.W.2d at 127.

[28] *Id.*

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

[30] *Id.* at 313, 512 N.W.2d at 652 (emphasis supplied).

[31] *Keating v. Nebraska Public Power Dist.*, 660 F.3d 1014, 1018 (8th Cir. 2011).

constraints articulated by the permit." The court then held that "when the DNR determines that the watershed no longer has the capacity to supply all permit holders, appellants no longer have a legitimate claim of entitlement to use the surface water and thus do not suffer a deprivation of a property right."[32]

The Eighth Circuit reasoned that on the face of the permits, the holders of permits "'may be denied the use of water during times of scarcity.'"[33] Furthermore, "[u]nder Nebraska law, the DNR is charged with administering the prior appropriation system, which necessarily requires the DNR to determine the capacity limits of a given stream and to determine what restrictions must be imposed to enforce the appropriation system."[34] Therefore, since "the issuance of Closing Notices does not impact the property right bestowed by the permit to use the surface water when there is sufficient capacity, the appellants are not deprived of that property right."[35]

[8] In the current cases, the DNR determined that 2013 and 2014 constituted a water short period and it decreased allocation according to its predictions. We reject the appropriators' argument that the Compact is an inferior use to the use rights given to the appropriators under their permits. The U.S. Supreme Court held that the "Compact, having received Congress's blessing, counts as federal law."[36] As federal law, the allocations set forth under the Compact are the supreme law in Nebraska and the DNR must ensure Nebraska remains within its allocation under the Compact. Therefore, the appropriators' right to use water is subject to the superior obligation of the State to ensure compliance with the Compact.

While Nebraska law treats ground water differently from stream water, and there is no evidence in the record whether

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[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Kansas v. Nebraska, supra* note 2, 135 S. Ct. at 1053.

the permits articulated constraints on their face, *Spear T Ranch* is instructive in the current case. This court's holding in *Spear T Ranch* shows the limits to a property right to water appropriation under Nebraska law. Because of the limitations of a "use" property right, certain causes of action are not available for ground water, "'at least not prior to capture.'"[37] *Bamford* similarly concerns ground water, but it is applicable in the current case because it indicates that the State has a right to place restrictions on water usage during water short periods.

The right to use stream water is a "vested right," but it is inherently "subject to the law at the time the vested interest was acquired and such reasonable regulations subsequently adopted by virtue of the police power of the state."[38] We find that the DNR's decisions to decrease allocations in 2013 and 2014 were affirmative decrees which make explicit what already inheres in the title itself.[39] Based on our reasoning in *Bamford*, we hold that under the Compact and the applicable Nebraska statutes mentioned above, placing "limitations upon withdrawals" during a year which the DNR predicted would be a water short year is a "proper exercise of the State's police power."[40] In this case, there is no suggestion that the DNR has exercised this power arbitrarily, capriciously, or unreasonably.

Under the Act and the FSS set forth in *Kansas v. Nebraska*,[41] the DNR must not administer water in "real time" to ensure that the percentage allotted to Nebraska is met. Rather, the DNR is obligated only to ensure that Nebraska "will remain

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[37] See *Spear T. Ranch v. Knaub, supra* note 26, 269 Neb. at 185, 691 N.W.2d at 127.

[38] *State v. Birdwood Irrigation District, supra* note 15, 154 Neb. at 55, 46 N.W.2d at 887.

[39] See *Lucas v. South Carolina Coastal Council, supra* note 12.

[40] See *Bamford v. Upper Republican Nat. Resources Dist., supra* note 29, 245 Neb. at 313, 512 N.W.2d at 652.

[41] *Kansas v. Nebraska, supra* note 2.

in compliance with" the Compact.[42] Therefore, we agree with the district court that the DNR fulfilled its duties under the Compact and Nebraska statutes, which are within the reasonable exercise of the State's police power and are within the DNR's jurisdiction over streamflow administration. The DNR applied the limits under the Compact to the appropriators' permits, which was a property interest subject to such reasonable regulations by the State. Therefore, the appropriators have not been deprived of a compensable property interest due to the stream water regulations by the DNR.

(b) Whether DNR's Regulation Amounts to Permanent Physical Invasion

The appropriators next argue that the DNR's regulatory actions amount to a permanent physical invasion of their property and that such regulation deprives them of all economically beneficial use of that property.

We turn first to the appropriators' contention that the DNR's regulatory actions amount to a permanent physical invasion of their property. The appropriators rely on several cases to support this contention. One such case is *Casitas Mun. Water Dist. v. U.S.*,[43] in which the Federal Circuit held that "the government-caused diversion" of water away from the plaintiff's land in which the government "directly appropriated [the plaintiff's] water for its own use" should be analyzed as a physical taking. The court further held that "[w]here the government plays an active role and physically appropriates property, the *per se* taking analysis applies."[44]

The appropriators cite *Garey v. Nebraska Dept. of Nat. Resources*[45] to support the proposition that the duty to pay

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[42] § 46-715(4)(b).

[43] *Casitas Mun. Water Dist. v. U.S.*, 543 F.3d 1276, 1296 (Fed. Cir. 2008).

[44] *Id.* at 1295.

[45] *Garey v. Nebraska Dept. of Nat. Resources*, 277 Neb. 149, 759 N.W.2d 919 (2009).

just compensation applies to the right to use and derive profits from the water at issue here. In addition, they cite *Western Fertilizer v. City of Alliance*[46] and *Dishman v. Nebraska Pub. Power Dist.*[47] in support of their argument that they are entitled to compensation for the deprivation of their rights to use water for a beneficial purpose as a result of the Compact.

We find these cases to be inapplicable. *Casitas* does not address water appropriation subject to an interstate compact. The holding in *Casitas* applies when the "government plays an active role and physically appropriates property."[48] And, as discussed above, in the current case, the DNR did not appropriate property. Rather, the appropriators' property rights to use the water are subject to the DNR's enforcement of compliance with the Compact. Therefore, this case, and the other cases cited by the appropriators on this point, are not dispositive.

In addition, we note that *Garey* involves a property tax levy and the waters of the Basin, but does not address water rights in terms of a taking. Neither *Western Fertilizer* nor *Dishman* involve damages alleged to have been caused by decreased water appropriations as a result of a water compact. Therefore, we find that the DNR's regulation does not amount to a permanent physical invasion.

[9] We turn next to the appropriators' argument that they have been deprived of "'"all economically beneficial use" of [their] property.'"[49] We find that the appropriators have not alleged facts that show they have been deprived of all economically beneficial use of their property due to the DNR's actions. As we held in *Bamford*, the inability to "withdraw enough

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[46] *Western Fertilizer v. City of Alliance*, 244 Neb. 95, 504 N.W.2d 808 (1993).

[47] *Dishman v. Nebraska Pub. Power Dist.*, 240 Neb. 452, 482 N.W.2d 580 (1992).

[48] *Casitas Mun. Water Dist. v. U.S., supra* note 43, 543 F.3d at 1295.

[49] Brief for appellants at 18.

water to grow a corn crop" does not amount to being deprived of all economic use of the appropriators' land.[50]

Further, the appropriators have shown there was a decrease in production during the 2013 and 2014 growing seasons on the appropriators' land, but the data indicates there was still production on the land. It does not appear, as the appropriators allege, that the farmland has been converted into permanent "dryland" because of a "total deprivation of beneficial use of land for irrigation purposes."[51] We therefore reject the appropriators' contention that the DNR's regulation of stream water led to a deprivation of all economically beneficial use of their property. The appropriators' first assignment of error is without merit.

### 2. Whether Alleged Failure of DNR to Curtail Ground Water Pumping Results in Taking

The appropriators argue that because ground water and surface water are hydraulically connected, the DNR's failure to regulate ground water pumping depleted streamflow in the Basin and amounted to a taking. The appropriators contend that ground water pumping allows the State to do indirectly what it is forbidden to do directly. Conversely, the State and the DNR argue that the DNR has no authority to administer the Basin's ground water users for the benefit of surface water appropriators. The district court agreed that the DNR had no such authority and that the appropriators had not stated a claim for inverse condemnation.

[10] This court has consistently held that the DNR has no authority to regulate ground water. In *In re Complaint of Central Neb. Pub. Power*,[52] this court held that "the [DNR]

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[50] *Bamford v. Upper Republican Nat. Resources Dist., supra* note 29, 245 Neb. at 314, 512 N.W.2d at 652.

[51] Brief for appellants at 32.

[52] *In re Complaint of Central Neb. Pub. Power, supra* note 14, 270 Neb. at 117, 699 N.W.2d at 378.

has no independent authority to regulate ground water users or administer ground water rights for the benefit of surface water appropriators." The court reasoned that "Nebraska has two separate systems for the distribution of its water resources: One allocates surface water, and the other allocates ground water."[53] Furthermore, "[t]he [DNR] regulates surface water appropriators, see [Neb. Rev. Stat.] § 61-201 et seq. [(Reissue 2009 & Cum. Supp. 2016)], and ground water users are statutorily regulated by the natural resources districts through the . . . Act . . . ."[54]

The Nebraska Constitution does not address the use of ground water, and historically, the regulation of ground water has been governed by the rule of reasonable use.[55] The court further stated:

> [T]he Legislature has not developed an appropriation system that addresses direct conflicts between users of surface water and ground water that is hydrologically connected. . . . [T]he lack of an integrated system was reinforced by the fact that different agencies regulate ground water and surface water.[56]

In *Spear T Ranch v. Nebraska Dept. of Nat. Resources*,[57] this court addressed whether a surface water appropriator had a claim against the DNR for failing to protect surface water appropriators from hydrologically connected ground water users. Spear T Ranch, Inc. (Spear T), claimed that the DNR had "negligently failed to protect its appropriations by controlling the amount of ground water taken from the [creek]."[58] This court declined to find that the DNR had a "duty which

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[53] *Id.* at 116-17, 699 N.W.2d at 378.

[54] *Id*. at 117, 699 N.W.2d at 378.

[55] *Id.*

[56] *Id.* at 117-18, 699 N.W.2d at 378-79.

[57] *Spear T Ranch v. Nebraska Dept. of Nat. Resources*, 270 Neb. 130, 699 N.W.2d 379 (2005).

[58] *Id.* at 132, 699 N.W.2d at 381.

would require the [DNR] to resolve conflicts between surface water appropriators and ground water users."[59] We concluded that the DNR "has no common-law or statutory duty to regulate the use of ground water in order to protect Spear T's surface water appropriations."[60] Therefore, we held that the DNR's "action or inaction did not amount to a taking or damages as alleged by Spear T. Because Spear T had no property that was damaged or taken by the [DNR], Spear T could not assert a cause of action for inverse condemnation."[61]

The appropriators cite the Compact which, as the U.S. Supreme Court explained in *Kansas v. Nebraska*, requires that ground water pumping is counted toward water consumption permitted by the Compact.[62] As stated above, the DNR has jurisdiction over "all matters pertaining to water rights for irrigation, power, or other useful purposes except as such jurisdiction is specifically limited by statute."[63] Under § 46-715(b), the DNR regulation must "be sufficient to ensure that the state will remain in compliance with applicable state and federal laws and with any applicable interstate water compact or decree or other formal state contract or agreement pertaining to surface water or ground water use or supplies."[64]

However, as the State and the DNR argue, § 46-715 indicates that the DNR has jurisdiction over only surface water, while the natural resources districts have jurisdiction over ground water. Section 46-715 provides that the DNR and the natural resources districts "shall jointly develop an integrated management plan for such river basin, subbasin, or reach."[65] And, "[i]n developing an integrated management plan, the

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[59] *Id.* at 136, 379, 699 N.W.2d at 384.

[60] *Id.* at 138, 699 N.W.2d at 385.

[61] *Id.* at 139, 699 N.W.2d at 386.

[62] See *Kansas v. Nebraska, supra* note 2.

[63] Neb. Rev. Stat. § 61-206(1) (Reissue 2009).

[64] § 46-715(4)(b).

[65] § 46-715(5)(b).

effects of existing and potential new water uses on existing surface water appropriators and ground water users shall be considered."[66] The "integrated management plan shall include . . . (c) one or more of the ground water controls authorized for adoption by natural resources districts pursuant to section 46-739; (d) one or more of the surface water controls authorized for adoption by the department pursuant to section 46-716."[67] Section 46-739 further outlines the authorized controls and procedures for the DNR to manage ground water.

Based on the terms of the FSS and the U.S. Supreme Court's opinion in *Kansas v. Nebraska*, Nebraska must account for stream flow depletion due to its ground water pumping.[68] The DNR has jurisdiction over "all matters pertaining to water rights for irrigation, power, or other useful purposes," but "such jurisdiction is specifically limited by statute."[69]

[11] We find that § 46-715 limits the DNR's jurisdiction to surface water. This court's opinions in *Spear T Ranch v. Nebraska Dept. of Nat. Resources*,[70] *In re Complaint of Central Neb. Pub. Power*,[71] and *Spear T Ranch v. Knaub*[72] provide further support that the DNR does not have jurisdiction over ground water due to Nebraska's "two separate systems for the distribution of its water resources."[73] Therefore, while the FSS requires that ground water be accounted for, this does not grant jurisdiction to the DNR over ground water. Instead, jurisdiction over ground water remains with the natural resources districts. We note that § 46-715(2)

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[66] § 46-715(2).

[67] *Id.*

[68] See *Kansas v. Nebraska, supra* note 2.

[69] § 61-206(1).

[70] *Spear T Ranch v. Nebraska Dept. of Nat. Resources, supra* note 57.

[71] *In re Complaint of Central Neb. Pub. Power, supra* note 14.

[72] *Spear T Ranch v. Knaub, supra* note 26.

[73] See *In re Complaint of Central Neb. Pub. Power, supra* note 14, 270 Neb. at 117, 699 N.W.2d at 378.

requires natural resources districts to include "one or more of the ground water controls . . . pursuant to section 46-739" in an integrated management plan and to consider "the effects of existing and potential new water uses on existing surface water appropriators and ground water users." Because the DNR does not have jurisdiction to regulate ground water, it does not have the power or duty to regulate ground water. Therefore, we affirm the district court's conclusion that "an alleged failure to exercise such nonexistent power or duty does not give rise to a cause of action for inverse condemnation." The appropriators' second assignment of error is without merit.

## VI. CONCLUSION

The district court did not err in dismissing both of the appropriators' claims, because (1) the Compact, as federal law, supersedes the appropriators' property interests and (2) the DNR does not have a duty to regulate ground water; thus, a failure by the DNR to regulate ground water pumping that affects the Basin does not give rise to a cause of action for inverse condemnation.

Affirmed.

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

# State of Nebraska, appellee, v. Michael T. Jackson, appellant.

892 N.W.2d 67

Filed March 10, 2017. No. S-16-643.

1. **Postconviction: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.
3. **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.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, even where no party has raised the issue.
5. **Postconviction: Appeal and Error.** A defendant is entitled to bring a second proceeding for postconviction relief only if the grounds relied upon did not exist at the time the first motion was filed.
6. ____: ____. There are two circumstances which provide a new ground for relief constituting an exception to the procedural bar to a successive postconviction proceeding: (1) where the defendant brings a motion for postconviction relief based on ineffective assistance of trial or direct appeal counsel which could not have been raised earlier and (2) where the defendant brings a successive motion for postconviction relief based on newly discovered evidence that was not available at the time the prior motion was filed.
7. **Postconviction.** The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.

8. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** When a district court denies postconviction relief without conducting an evidentiary hearing, an appellate court must determine whether the petitioner has alleged facts that would support the claim and, if so, whether the files and records affirmatively show that he or she is entitled to no relief.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Affirmed.

Jerry M. Hug and Alan G. Stoler, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, Erin E. Tangeman, and, on brief, Stacy M. Foust for appellee.

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

Cassel, J.

## I. INTRODUCTION

Michael T. Jackson appeals from an order denying his second motion for postconviction relief. Jackson was procedurally barred in asserting all but one of his claims, and he failed to allege sufficient facts to support his remaining claim. We affirm.

## II. BACKGROUND

Jackson was convicted of first degree murder, attempted first degree murder, and two counts of use of a deadly weapon to commit a felony. He was sentenced to life imprisonment on the murder conviction and various terms of imprisonment on the other convictions. In our opinion on direct appeal, we recounted the underlying facts and circumstances and affirmed his convictions and sentences.[1]

After his direct appeal concluded, Jackson filed his first motion for postconviction relief and alleged several claims of ineffective assistance of trial counsel, ineffective assistance of

[1] *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998).

appellate counsel, and prosecutorial misconduct. The district court granted an evidentiary hearing, but after the hearing, it overruled Jackson's motion. On appeal, we affirmed the denial of postconviction relief.[2]

Jackson was represented by one attorney at trial, a second attorney on direct appeal, a third attorney for the first postconviction motion, and a fourth attorney on the appeal from the denial of the first postconviction motion.

Represented by a fifth attorney, Jackson filed a second motion for postconviction relief. He alleged numerous claims in his motion, which we summarize as follows: (1) The trial court committed reversible plain error in instructing the jury on seven separate jury instructions, (2) he received ineffective assistance of both trial counsel and appellate counsel, (3) there was prosecutorial misconduct, (4) his appellate counsel had a conflict of interest, (5) there was a denial of due process through the negligence of postconviction counsel and appellate postconviction counsel, and (6) there was a denial of due process and right to a fair trial through the misconduct of David Kofoed, the former supervisor of the Crime Scene Investigation Division for the Douglas County sheriff's office.

In support of Jackson's claim concerning Kofoed's misconduct allegedly occurring in the division's crime laboratory, Jackson argued that of the two investigating officers who conducted a search of the vehicle he was known to be driving, only one noticed "'red stains'" on some of the clothing found in the trunk of the vehicle. He specifically alleged Kofoed's history of tampering with evidence and falsifying reports and argued that it was only after Kofoed and the other initial investigating officer inventoried the items found in the trunk that the officer noted apparent bloodstains. He also argued that the "Crime Lab, and as a result, Kofoed," had vials of the murder victim's blood for months before the clothing was tested and revealed the presence of the victim's blood.

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[2] *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

Therefore, Jackson suggested that Kofoed, or another officer, planted the victim's blood on Jackson's clothing that was found in the vehicle.

In the same motion, Jackson petitioned in the alternative for relief under the common-law writ of error coram nobis. He alleged that the above claims all presented matters of fact that were "effectively unavailable to him at the time of trial" and that would have prevented the judgment had they been known at the time.

The district court denied Jackson's motion. The court found that Jackson's claims concerning jury instructions, ineffective assistance of counsel, prosecutorial misconduct, and appellate counsel's conflict of interest were procedurally barred. The court also found that Jackson was not entitled to relief on his claims concerning postconviction counsel. It noted that Jackson argued the claims as a denial of due process but that he provided no supporting authority for this argument. Therefore, the court concluded that his claims were grounded in ineffective assistance of postconviction counsel. And there is no relief for ineffective assistance of postconviction counsel.[3] Finally, the court denied Jackson's claim concerning the involvement of Kofoed in the crime laboratory investigation. The court found that Jackson merely alleged Kofoed's involvement and history of fabricating evidence and that this was insufficient to support a claim. Furthermore, the court noted that no evidentiary hearing was warranted, especially since "the original investigating officer noticed 'red stain type discolorations' on the clothing before Kofoed was involved."

Jackson now appeals to this court.

## III. ASSIGNMENTS OF ERROR

Jackson assigns, restated, that the district court erred in determining that (1) he was procedurally barred in his claims that certain jury instructions given at trial were reversible

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

error, (2) he was procedurally barred in his claim that appellate counsel had a conflict of interest, and (3) he was not entitled to an evidentiary hearing on his claim of evidence tampering and outrageous governmental conduct.

Jackson did not assign error to the district court's denial of his request for a writ of error coram nobis. Thus, we do not address the denial of this alternative motion.

## IV. STANDARD OF REVIEW

[1,2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.[4] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.[5]

[3] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.[6]

## V. ANALYSIS

### 1. Jurisdiction

[4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, even where no party has raised the issue.[7] Relying on the procedure in *State v. Smith*[8] and based solely on official negligence, the district court effectively extended the time for appeal. Such orders must be supported by evidence.[9] Although we have no bill of exceptions,

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[4] *State v. Ely*, 295 Neb. 607, 889 N.W.2d 377 (2017).

[5] *Id.*

[6] *State v. Robertson*, 294 Neb. 29, 881 N.W.2d 864 (2016).

[7] *In re Interest of Luz P. et al.*, 295 Neb. 814, 891 N.W.2d 651 (2017).

[8] *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

[9] See *In re Interest of Luz P. et al., supra* note 7.

the order persuades us that it had the necessary support. We have jurisdiction of Jackson's appeal.

### 2. Denial of Postconviction Relief

[5,6] A defendant is entitled to bring a second proceeding for postconviction relief only if the grounds relied upon did not exist at the time the first motion was filed.[10] We have recognized two circumstances which provide a new ground for relief constituting an exception to this procedural bar: (1) where the defendant brings a motion for postconviction relief based on ineffective assistance of trial or direct appeal counsel which could not have been raised earlier and (2) where the defendant brings a successive motion for postconviction relief based on newly discovered evidence that was not available at the time the prior motion was filed.[11]

#### (a) Procedurally Barred Claims

Jackson apparently concedes that his claims concerning jury instructions are procedurally barred because postconviction counsel "fail[ed] to properly present these specific issues to the courts on his first Motion for Postconviction relief."[12] To avoid the procedural bar, he asks this court to reconsider our decision in *State v. Hessler*.[13] In *Hessler*, we reaffirmed our determination that postconviction relief cannot be obtained on the basis of ineffective assistance of postconviction counsel. However, Jackson offers no persuasive authority and we see no reason to reconsider our holding in *Hessler*. We will continue to enforce our well-established procedural rules.

[7] The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.[14]

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[10] See *State v. Williams*, 295 Neb. 575, 889 N.W.2d 99 (2017).

[11] See *State v. Hessler, supra* note 3.

[12] Brief for appellant at 10.

[13] *State v. Hessler, supra* note 3.

[14] *State v. Ely, supra* note 4.

Jackson's claims concerning jury instructions and his claim of appellate counsel conflict of interest could have been raised earlier. Therefore, Jackson was procedurally barred from raising these claims in his second motion for postconviction relief. Jackson's first two assignments of error are without merit.

### (b) Claim of Crime Laboratory Misconduct

[8] When a district court denies postconviction relief without conducting an evidentiary hearing, an appellate court must determine whether the petitioner has alleged facts that would support the claim and, if so, whether the files and records affirmatively show that he or she is entitled to no relief.[15]

Jackson claims that he was entitled to an evidentiary hearing to establish that evidence used against him was planted or fabricated by Kofoed or another crime laboratory official. In his motion, Jackson alleged that there were inconsistent statements about blood on clothing that was found in the trunk of the vehicle Jackson had been driving. He further alleged that Kofoed was involved in discovering and matching the blood to that of the homicide victim and that Kofoed had access to samples of the victim's blood before the clothing was tested. In light of these circumstances, Jackson argued that there were enough similarities to Kofoed's pattern of fabricating evidence in other cases to doubt the reliability of the blood evidence.

In *State v. Cook*,[16] another case involving an allegation that Kofoed tampered with evidence, we found that "[s]imply alleging Kofoed's involvement in the investigation and his history of fabricating evidence is not sufficient on its own to support a claim for postconviction relief." In reaching this conclusion, we reviewed our decision in *State v. Edwards*,[17]

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[15] *Id.*

[16] *State v. Cook*, 290 Neb. 381, 390, 860 N.W.2d 408, 414 (2015).

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

where we granted an evidentiary hearing on a defendant's claim that Kofoed tampered with evidence, and noted that we did so "when the allegations made by the defendant were similar to Kofoed's unlawful conduct in two prior investigations."[18]

Like the situation in *Cook*, the facts and allegations in this case do not suggest unlawful conduct similar to Kofoed's two prior investigations. Here, "'red stain type discolorations'" were found on the clothing before Kofoed was ever involved. And, when Kofoed was called to document the evidence, he worked alongside the officers already on the scene. The reporting officer, not Kofoed, characterized the red stains as blood and noted in his report that the blood found on the clothing was along the rear pocket and seam of a pair of jeans and along the right rear hip area of a shirt and coat. This report was created the day after the homicide, several hours before the victim's blood samples were retrieved and placed into evidence at the crime laboratory. And, Kofoed was not the one to send the clothing and blood samples into evidence.

These facts distinguish the instant case from the situation in *Edwards*. Jackson's allegations do not resemble Kofoed's pattern of "finding" blood in obscure places, keeping evidence for days before another investigator could test it, and allegedly submitting swabs of evidence instead of the evidence itself.[19] Thus, the evidence does not support Jackson's theory that the blood was planted by Kofoed in the time before the clothing was tested and after he had access to the victim's blood samples.

Jackson also offered the depositions of two witnesses who claimed to see him within an hour of the homicide and who stated that they did not see blood on the clothing he was wearing. But that does not mean that it was not there. As the State correctly argues, the report identified blood on the rear

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[18] *State v. Cook, supra* note 16, 290 Neb. at 389, 860 N.W.2d at 414.

[19] See, e.g., *id*.; *State v. Edwards, supra* note 17.

pocket of the jeans and the rear hip area of the shirt and coat. Given this location, the witnesses could have failed to notice it or to recognize that it was blood. Without more factual allegations, this leaves only Jackson's allegation of Kofoed's history and involvement in the investigation of his case. On its own, this fails to support a claim for postconviction relief.

We agree with the district court's conclusion that no evidentiary hearing was required. Jackson's last assignment of error lacks merit.

## VI. CONCLUSION

Jackson's claims concerning jury instructions and appellate counsel conflict of interest were known and could have been raised in prior proceedings. As such, they are procedurally barred. Jackson also failed to allege sufficient facts to support his claim of Kofoed's crime laboratory misconduct. For these reasons, we affirm the denial of Jackson's second motion for postconviction relief.

Affirmed.




**Nebraska Supreme Court**

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

-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Corleone M. McCurry, appellant.

891 N.W.2d 663

Filed March 17, 2017. No. S-15-1114.

1. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial will not be disturbed on appeal in the absence of an abuse of discretion.
2. **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.
3. **Jury Instructions: 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.
4. ____: ____. 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.
5. **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.
6. **Constitutional Law: Due Process.** The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
7. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the

same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

8. **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.
9. **Motions for Mistrial: Motions to Strike: Appeal and Error.** Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material.
10. **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.
11. **Hearsay.** Testimony regarding an out-of-court identification is hearsay.
12. **Criminal Law: Constitutional Law: Due Process: Rules of Evidence.** Whether rooted directly in the Due Process Clause of the 14th Amendment or in the Compulsory Process or Confrontation Clauses of the 6th Amendment, the federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. However, the accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.
13. **Sentences: Weapons.** Neb. Rev. Stat. § 28-1205(3) (Reissue 2016) mandates that a sentence for the use of a deadly weapon in the commission of a felony be served consecutively to any other sentence imposed and concurrently with no other sentence.
14. **Sentences: Appeal and Error.** An appellate court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced.

Appeal from the District Court for Douglas County: Thomas A. Otepka, Judge. Convictions affirmed, sentences

affirmed in part and in part vacated, and cause remanded for resentencing.

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

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

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

Miller-Lerman, J.

## NATURE OF CASE

Corleone M. McCurry appeals his convictions and sentences in the district court for Douglas County for first degree murder, use of a firearm to commit a felony, and possession of a firearm by a prohibited person. On appeal, McCurry claims, inter alia, that the court erred when it refused his proposed instruction regarding eyewitness identification and when it refused his requested instruction stating that the jury need not unanimously reject a greater offense before considering lesser offenses. He also claims there was not sufficient evidence to support his conviction for first degree murder. We affirm McCurry's three convictions and his life sentence for first degree murder. However, we note that the district court erred when it ordered McCurry's sentence for the use conviction to be served concurrently with his sentence for the possession conviction; we vacate those sentences and remand the cause to the district court for resentencing on those convictions.

## STATEMENT OF FACTS

On June 25, 2014, Timothy Marzettie was shot and killed at his residence in Omaha, Nebraska. Witnesses told police officers investigating the shooting that the shooting occurred during a home invasion by two intruders. Investigators identified McCurry as a suspect in the shooting, and McCurry was arrested on June 29. The State charged McCurry with first

degree murder and use of a firearm to commit a felony; the State later added a charge of possession of a firearm by a prohibited person.

At McCurry's trial, the State presented evidence, including testimony by police officers and forensic analysts who participated in the investigation of the shooting. Other witnesses included a woman who was babysitting her grandson in the house next door to Marzettie's on June 25, 2014. She testified that late that night, she was on an enclosed porch smoking a cigarette when she saw a car pull up and stop in front of Marzettie's house. Three men got out of the car, and the witness saw them lift the hood of the car. She saw one of the men urinating in the bushes, while the other two men walked up the driveway to Marzettie's house. The witness later heard a woman screaming, a baby crying, and a single gunshot; the car left after the gunshot was fired. The witness testified that the incident happened quickly and that she heard the gunshot approximately 5 minutes after the car pulled up. She did not identify the men beyond describing them as "three black males"; she described the car as a "[f]our-door, smaller car" that was "dark-colored," possibly maroon red.

The main witnesses for the State were three women: Patricia Riley, Jessica Simpson, and Cherita Wright. Riley and Simpson were both in Marzettie's house at the time of the shooting. Wright was not in the house at the time, but she knew both McCurry and Marzettie, and she testified regarding interactions between the two men.

*Patricia Riley's Testimony.*

Riley testified that she lived with Marzettie and that she was pregnant with his child at the time that he was killed. In addition to having an intimate personal relationship with Marzettie, Riley worked for him as a prostitute. She described Marzettie as a "pimp," and she testified that other women had worked for Marzettie, including Wright, with whom Riley had become friends.

On the night of June 25, 2014, Riley was at the house with Marzettie. Also in the house were Marzettie's infant daughter from another woman and Simpson; Riley had first met Simpson a few days earlier. Riley and Marzettie were in the living room of the house with his daughter, and Simpson was outside the front of the house smoking a cigarette. Riley heard a voice from outside the front of the house, and when Marzettie walked outside to see who was speaking to Simpson, Riley heard someone asking "where is Cherita?" Riley could not see the person who was speaking, but she saw a "dark car" parked in front of the house. Riley went outside to get Marzettie's daughter, who was with Marzettie. She testified that Marzettie and another man were "kind of arguing back and forth" and that Marzettie was telling the man that "Cherita was not there." Riley did not immediately get a good look at the other man because she was focused on getting the child inside, but she "noticed that it was a black male with dark clothing."

After Riley put the child down in a portable crib in a bedroom, she returned to the living room. Marzettie and the other man were still "going back and forth" about the whereabouts of "Cherita." The other man stated that he had dropped "Cherita" off at the house earlier in the day and that she had called him to come and pick her up. Riley testified that "Cherita was not there" and that "[s]he hadn't been there in months." Marzettie came into the house saying that he was going to get his cell phone so that he could make a call to prove that "Cherita" was not there.

Riley testified that before Marzettie could go back outside, the other man "pulled the gun out and came in the house after him." The man pointed the gun at Marzettie, and Marzettie said that he did not know where "Cherita" was. While Marzettie was telling the man to leave, another man ran into the house and grabbed Marzettie and pushed him onto a couch. Riley tried to pull the second man off Marzettie, but Simpson pulled Riley off the man, because Riley was 9 months pregnant. Riley then went to a bedroom in order to call the 911 emergency

dispatch service and to calm Marzettie's daughter, who had begun crying. While Riley was on her cell phone with the dispatcher, she heard a gunshot. She then heard Simpson pounding on the bedroom door and telling Riley "to open the door because they shot him." Riley went out to the living room and saw Marzettie "laying [sic] on the floor face down holding his chest." The two men who had come into the house were gone, and police officers arrived at the house soon thereafter.

Regarding her observation of the intruders, Riley testified that the man with the gun was wearing a "[b]lack shirt . . . dark pants and a hat, a black hat." Riley "didn't really see [the] face" of the second man who came in, but she saw he was wearing blue jeans and a red shirt with "some white detail on the shirt." Riley testified that both men were black. Riley stated that she was "[m]aybe two arms' lengths" away from the man with the gun when she observed him in the living room. Riley also testified that she had seen a third person standing outside the house by the "dark red maroon" car but that the third person did not come inside the house and she "couldn't see that far down to tell anything about the person."

The State asked Riley, "[T]he party in all black that came into the residence that night that you saw with the gun, do you see him here in the courtroom today?" Riley replied that she did, and she then identified McCurry. The State asked Riley whether she had ever seen McCurry before that night. She replied that "[a] couple of weeks before that" she had "ran into him and [Wright] outside" a hotel. Riley spoke with Wright because "she was a friend." During the conversation with Wright, Riley had a brief exchange with McCurry who was an "arm's length or so away" from her. McCurry told Riley that she "should basically leave [her] baby's dad alone and just to fuck with him." Riley "just kind of laughed it off and shrugged it off." Riley testified that she believed that the time at the hotel was the first time that she had met McCurry.

On cross-examination, Riley admitted that she had originally told police that the first time she met McCurry was at

a restaurant rather than at a hotel. She testified that she lied to the police about the location because she was engaging in prostitution at the hotel and was afraid she would get herself into trouble if she told the police the truth of the location. Riley also admitted that her interaction with McCurry at the hotel lasted only a few minutes and that she was trying to ignore him most of that time.

On further cross-examination, Riley admitted that during the 911 call, she was asked if she knew who had fired the gunshot and she said she did not know. She also acknowledged that in a pretrial deposition, she had testified that on the night of the shooting, she did not recognize either of the intruders. Riley further acknowledged that after the shooting but before she went to be interviewed by investigators, she tried to contact Wright by telephone and through her Facebook page. She also looked at Wright's Facebook page to see if she could determine the identity of the man who had come to the house looking for Wright. Riley testified that after she had talked with police, Marzettie's adult son had shown her a picture of McCurry that he had found on Facebook and "asked if it was him." Riley did not testify as to her response.

On redirect, Riley testified that although she did not immediately recognize the two men who came into the house, the man with the gun looked familiar and that she "knew [she] had seen his face before but just couldn't put a name with the face."

*Jessica Simpson's Testimony.*

Simpson testified that she had become acquainted with Marzettie in 2010 or 2011. In June 2014, she came to Omaha to retrieve a vehicle and visit family. While in Omaha, she contacted Marzettie and eventually ended up staying at his house. Simpson was at the house on the night of June 25. Around 10:30 p.m., she went outside to smoke a cigarette. Simpson saw a "[d]ark four-door sedan" pull up and park at the end of the driveway. The driver rolled down his window

and asked for "Cherita." Simpson did not recognize the name, so she spoke to Marzettie through a window and asked him "who Cherita was." Marzettie came outside, and the driver and a back seat passenger got out of the vehicle. Simpson did not recognize either person, but she described them as "black males." Simpson saw another passenger in the front seat, but she did not see him get out of the vehicle. The back seat passenger stayed by the vehicle, while the driver walked toward the house, "asking for Cherita, saying to tell Cherita to come out."

When Riley came outside to get Marzettie's daughter, Simpson went inside with Riley. Simpson stayed in the front of the house, while Riley went to the bedroom to put the child down in the portable crib. Marzettie came inside to get his cell phone and tried to make a call, but did not appear to get an answer. Marzettie yelled out the door that "Cherita" was not there. The driver of the car came inside, and Simpson saw that he was carrying a gun in his hand. She also noted that he was wearing "[a]ll black . . . [b]lack jeans, black T-shirt, black hat." Simpson testified that he and Marzettie were arguing and that she saw Marzettie run from him.

Simpson testified that the back seat passenger, who was wearing "[b]lack jeans, red shirt, red hat," came inside the house and that he and the driver punched Marzettie. Simpson saw Marzettie being pushed down on a couch and heard him "begging not to get shot." During the confrontation, Simpson heard the driver ask Marzettie "if he remembered getting into it with him at the club." At one point, the passenger left the house and Marzettie stood up and pushed the gun out of the driver's hand. The gun flew near Simpson, and she moved away. The driver was able to retrieve the gun before Marzettie could reach it. Simpson then saw the driver point the gun, and she heard a gunshot. After the gunshot, Simpson saw the driver run out of the house, closing the door behind him. Simpson saw Marzettie fall to the floor, and she ran to the bedroom to get Riley. The door was closed, so Simpson

banged on the door and told Riley, who was on her cell phone with the police, to come out. The two women went to tend to Marzettie, and Simpson saw that he had a gunshot wound to his chest.

During cross-examination, Simpson testified that the first statement she gave regarding the shooting was when she was questioned by detectives at the police station. In response to questioning by McCurry, Simpson stated that detectives had shown her photographs of individuals. The State objected when McCurry asked Simpson, "[D]id you identify anyone?" The State argued in a sidebar to the bench that it was not permissible to ask questions about photographic lineups, and McCurry argued in response that Simpson's expected testimony—that she was not able to identify anyone—was not hearsay. The court sustained the State's objection but allowed McCurry to make an offer of proof outside the jury's presence.

In the offer of proof, McCurry offered a photographic lineup spread of six individuals, one of whom was McCurry, and he alleged that the photographs were shown to Simpson. McCurry claimed that Simpson would testify that she was not able to identify anyone from the photographic lineup but that she said that one of the men, who was not McCurry, looked familiar. After the offer of proof and further argument, the court again sustained the State's objection. The court noted that the evidence may have been permissible to impeach Simpson's credibility if Simpson had identified McCurry as the man who shot Marzettie, but that the State had not asked Simpson to identify McCurry. After the offer of proof and the court's ruling, McCurry resumed his cross-examination of Simpson before the jury. During the cross-examination, McCurry asked Simpson, "[Y]ou have been unable to identify anyone who was in that house at that time, other than . . . Marzettie and the people you already know; is that true?" Simpson replied, "That's true, correct."

Later in the trial, the State called as a witness an officer who had questioned Simpson at the police station. During

cross-examination of the officer, McCurry made another offer of proof to the effect that the officer would testify that he had shown Simpson the photographic lineup and that she was unable to identify McCurry, but thought that one of the other men looked familiar. The State objected based on hearsay and relevance, and the court again determined that the evidence was inadmissible.

*Cherita Wright's Testimony.*

Wright testified that she met McCurry at a strip club where she worked. She developed an arrangement with McCurry wherein he provided transportation and use of a cell phone to assist her in pursuing work as a prostitute. Wright testified that the arrangement had started "maybe a month or two" before June 25, 2014, and that in that time, she and McCurry developed a friendship and a casual sexual relationship. She testified that one of the vehicles he used to transport her was a "maroon four-door car."

During Wright's testimony regarding her relationship with McCurry, the State asked, "[I]n the times you're spending with . . . McCurry, did you ever have the occasion to see him with a firearm?" McCurry objected before Wright could answer. In a sidebar, McCurry moved for a mistrial. He argued that because McCurry was a felon, his possession of a firearm was a crime, and that therefore, evidence he had a firearm was evidence of other crimes under Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 2016). McCurry argued that because the State had not requested a hearing as required under rule 404, the evidence was not admissible and the State's attempt to elicit such evidence required declaration of a mistrial. The State argued in response that the evidence was relevant to the present crime, because Wright would testify that a couple weeks prior to June 25, 2014, she had seen McCurry with a gun and that he had put it under the hood of the maroon car. After considering the arguments, the court sustained McCurry's objection to the question but overruled his motion for mistrial.

The court instructed the jury to disregard the State's previous question and to not speculate as to the answer.

Wright further testified that she had met Marzettie in 2009 or 2010 and that she had worked for him as a prostitute "off and on through the years." Wright's arrangement with Marzettie was that he "ran the show," meaning she gave him the money she earned while he "controlled" and "set up everything." Wright testified that during the time she knew Marzettie, the two occasionally had an "intimate relationship" and that she would sometimes stay at his house. She testified that she would be at Marzettie's house "[s]ometimes . . . once a week or twice" and "[s]ometimes I didn't go over for months at a time." Wright came to know and become friends with Riley through Marzettie, and at one time, she had lived in the house with Marzettie and Riley.

Wright testified that 2 or 3 weeks before June 25, 2014, she and McCurry went drinking at a strip club in Council Bluffs, Iowa. While at the strip club, she saw and spoke with Marzettie. Wright testified that Marzettie and McCurry "got into an altercation" and that she "was in the middle of it." After the altercation, Wright left the strip club with Marzettie and he took her to a hotel, where they spent the night together.

Wright testified that sometime after the altercation at the strip club, but before June 25, 2014, McCurry drove her to a hotel where she was to engage in prostitution. While at the hotel, she ran into Riley and the two of them had a conversation which lasted "probably five minutes." Wright testified that McCurry was present during at least part of her conversation with Riley.

Wright testified that on the morning of June 25, 2014, she had McCurry drive her to see Riley; she had planned to see Riley the night before, but decided to put it off until the morning because she was "too drunk." Wright asked McCurry to drop her off at a corner near the house in which Riley lived with Marzettie. She testified that she had McCurry drop her off down the street from Marzettie's house, because she wanted

to avoid any contact between McCurry and Marzettie. After McCurry drove away, Wright knocked on the door of the house but no one was home. Wright left and got a ride with a "random white man" to her aunt's house. Wright stayed at her aunt's house until that evening when her cousin got off work and took Wright to her house. Wright called McCurry, and he told her that "an altercation had went down again" between McCurry and Marzettie. McCurry said that Marzettie "had gotten got" but that McCurry did not want to talk about it over the telephone and he ended the call after a couple of minutes. Wright spoke with McCurry again in the early morning hours of the next day and he told her that "he got into it with [Marzettie] and that they got him" but that "it really had nothing to do with" Wright. McCurry asked Wright whether Riley knew McCurry's name, and he told Wright to tell Riley "to be quiet." During cross-examination, Wright testified that during the call, she "asked [McCurry] who did it, and he just said one of his homies."

*Other Evidence.*

The State presented further evidence, including evidence that after McCurry was arrested, police officers executed a search warrant at the residence where McCurry had been staying. Among the items found during the search was a plastic bag that contained, inter alia, a black shirt, dark jean shorts, and McCurry's driver's license. A black hat was found in the search.

The State's evidence also included recordings of telephone calls McCurry made while he was in jail. In the recordings, McCurry stated, inter alia, that he had gone to a house looking for "the girl, Cherita," that he had earlier dropped "Cherita" off near that house, and that the house was the house of a "guy [he] already had fought . . . like 3 or 4 weeks ago at the club."

*Jury Instructions.*

At the jury instruction conference, McCurry offered an instruction regarding eyewitness identification testimony. The

full text of McCurry's proposed instruction is set forth in the analysis section below. The court refused McCurry's proposed instruction regarding eyewitness identification testimony.

McCurry objected to a portion of the court's instruction regarding the elements of the murder charge. The court's instruction was a "step instruction" based on NJI2d Crim. 3.1, and a section of the instruction titled "Effect of Findings" provided that the jury must "separately consider in the following order" the crimes of first degree murder, second degree murder, and manslaughter. McCurry proposed an alternate "Effect of Findings" section which provided, inter alia, that the jury need not be unanimous in rejecting a greater offense before it considered whether the defendant was guilty of a lesser offense. The district court overruled McCurry's objection to its instruction and refused to substitute McCurry's proposed "Effect of Findings" section.

*Conclusion of Trial.*

The jury found McCurry guilty of first degree murder, use of a firearm to commit a felony, and possession of a firearm by a prohibited person. The court sentenced McCurry to life imprisonment for first degree murder, 30 to 50 years' imprisonment for use of a firearm to commit a felony, and 20 to 30 years' imprisonment for possession of a firearm by a prohibited person. The court ordered the sentence for the use conviction to be served consecutively to the life sentence for murder, and it ordered the sentence for the possession conviction to be served concurrently with the sentence for the use conviction.

McCurry appeals his convictions.

## ASSIGNMENTS OF ERROR

McCurry claims that the district court erred when it (1) overruled his motion for mistrial after the State asked Wright if she had ever seen McCurry in possession of a firearm, (2) refused his proposed jury instruction on eyewitness identification, (3) overruled his objection to the step instruction and

refused his requested instruction stating that the jury need not be unanimous in rejecting a greater offense before considering lesser offenses, (4) sustained the State's objection to his proposed evidence to the effect that when Simpson was shown a photographic lineup she was unable to identify McCurry as one of the intruders, and (5) violated his constitutional right to present a complete defense when it refused to admit his proposed evidence regarding Simpson's inability to identify him from a photographic lineup. McCurry also claims that there was not sufficient evidence to support his conviction for first degree murder.

## STANDARDS OF REVIEW

[1] The decision whether to grant a motion for mistrial will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Chauncey*, 295 Neb. 453, 890 N.W.2d 453 (2017).

[2] Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *State v. Martinez*, 295 Neb. 1, 886 N.W.2d 256 (2016).

[3,4] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Hinrichsen*, 292 Neb. 611, 877 N.W.2d 211 (2016). 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. *Id*.

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

[6] The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *State v. Ballew*, 291 Neb. 577, 867 N.W.2d 571 (2015).

[7] In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Pester*, 294 Neb. 995, 885 N.W.2d 713 (2016).

## ANALYSIS

### *District Court Did Not Abuse Its Discretion When It Overruled McCurry's Motion for Mistrial.*

McCurry first claims that the district court erred when it overruled his motion for mistrial after the State asked Wright if she had ever seen McCurry in possession of a firearm. We conclude that the court did not abuse its discretion when it overruled McCurry's motion for mistrial.

As discussed above, McCurry objected when the State asked Wright whether she had ever seen McCurry in possession of a gun. During a sidebar conference, he also moved for a mistrial. The court sustained McCurry's objection to the question but overruled the motion for mistrial. The court instructed the jury to disregard the State's question and to not speculate as to the answer.

[8,9] A mistrial is properly granted in a criminal case where an event occurs during the course of a trial that is of such a nature that its damaging effect cannot be removed by proper

admonition or instruction to the jury and thus prevents a fair trial. *State v. Chauncey*, 295 Neb. 453, 890 N.W.2d 453 (2017). The defendant must prove that the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice. *Id*. However, error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material. *Id*.

In the present case, Wright did not answer the State's question; the district court sustained McCurry's objection to the question, and the court instructed the jury to disregard the question and to not speculate as to the answer. McCurry's appellate arguments are essentially a contention that there was a possibility of prejudice. Contrary to McCurry's contention, we believe that the court's admonishment was sufficient to overcome any potential prejudice resulting from the State's question, and we therefore conclude that the court did not abuse its discretion when it overruled McCurry's motion for mistrial.

*District Court's Refusal of McCurry's Proposed Eyewitness Identification Instruction Was Not Reversible Error.*

McCurry next claims that the district court erred when it refused his proposed jury instruction on eyewitness identification. We conclude that the court's refusal of the instruction was not reversible error.

At the jury instruction conference, McCurry offered an instruction regarding eyewitness identification testimony. The proposed instruction provided as follows:

> The value of identification testimony depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.
>
> In evaluating such testimony you should consider all of the factors mentioned in these instructions concerning your assessment of the credibility of any witness, and

you should also consider, in particular, whether the witness had an adequate opportunity to observe the person in question at the time of the offense. You may consider, in that regard, such matters as the length of time the witness had to observe the person in question, the prevailing conditions at that time in terms of visibility or distance and the like, and whether the witness had known or observed the person in earlier times.

You should also consider whether the identification made by the witness after the offense was the product of the witness's own recollection. You may consider, in that regard, the strength of the identification, and the circumstances under which the identification was made, and the length of time that elapsed between the occurrence of the crime and the next opportunity the witness had to see [McCurry].

You may also take into account that an identification made by picking [McCurry] out of a group of similar individuals is generally more reliable than one which results from the presentation of [McCurry] alone to the witness.

If the identification by the witness may have been influenced by the circumstances under which [McCurry] was presented to the witness for identification, you should scrutinize the identification with great care.

You may take into account any occasions in which the witness failed to make an identification of [McCurry], or made an identification that was inconsistent with her identification at trial.

The court refused McCurry's proposed instruction.

The court gave the following instruction with regard to witness credibility:

You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. In determining the weight which the testimony of the witnesses is entitled to receive, you should consider:

1. Their interest in the result of the suit, if any;
2. Their conduct and demeanor while testifying;
3. Their apparent fairness or bias or relationship to the parties, if any such appears;
4. Their opportunity for seeing or knowing the things about which they have testified;
5. Their ability to remember and relate accurately the occurrences referred to in their evidence;
6. The extent to which they are corroborated, if at all, by circumstances or the testimony of credible witnesses;
7. The reasonableness or unreasonableness of their statements;
8. Evidence of previous statements or conduct inconsistent with their testimony at this trial; and
9. All other evidence, facts, and circumstances proved tending to corroborate or contradict such witnesses.

McCurry argues on appeal that the court's refusal to give his proposed instruction regarding eyewitness identification was reversible error, because the identity of the person who shot Marzettie was a crucial issue in this case.

[10] 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. Rothenberger*, 294 Neb. 810, 885 N.W.2d 23 (2016). In this case, we need not determine whether McCurry's tendered instruction is a correct statement of the law, because we determine that based on the evidence in this case, the instructions given by the court were adequate and McCurry was not prejudiced by the court's refusal to give his proposed instruction on eyewitness identification.

The only eyewitness in this case who identified McCurry was Riley. Simpson was also an eyewitness and was able to describe the person who shot Marzettie; however, she did

not identify McCurry as that person and she admitted that she had been unable to identify the persons who came into Marzettie's house. Therefore, Riley is the only witness to whom McCurry's proposed instruction regarding eyewitness identification might apply.

In *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012), we recognized precedent of other courts to the effect that it is reversible error to refuse to give an eyewitness identification instruction where the government's case rests solely on questionable eyewitness identification. However, in *Freemont*, we determined that a proposed eyewitness identification instruction was not warranted by the evidence, because identifying witnesses knew the defendant, there was no indication of racial bias in their identifications, and the identifications were corroborated by other witnesses and by circumstantial evidence. We further determined in *Freemont* that the defendant could not establish prejudice as a result of the court's refusal of the proposed instruction, because the court gave a general witness credibility instruction which "was sufficient to protect against any prejudice related to the reliability of the eyewitness identifications." 284 Neb. at 201, 817 N.W.2d at 296.

The present case differs from *Freemont* in that there were no other eyewitness identifications to corroborate Riley's identification of McCurry and Riley's identification of McCurry was based on having met him once for a short time rather than from having known him well. However, McCurry does not assert that Riley had difficulty identifying McCurry due to racial differences or that the evidence indicates that Riley was identifying a person she had never seen before; cross-racial identification and identification of a stranger are concerns typically addressed by eyewitness identification instructions like the one proposed by McCurry.

We also note that although Riley's identification of McCurry was not explicitly corroborated by other eyewitnesses, there was circumstantial evidence to corroborate

her identification; such circumstantial corroborating evidence includes Simpson's description of the person who shot Marzettie and the clothes the person was wearing and the recording of McCurry's telephone calls from jail in which McCurry indicated that he had gone to Marzettie's house looking for Wright. This case does not require us to adopt an eyewitness identification instruction, and instead, we conclude that the general credibility instruction given by the court adequately addressed the issues. For example, the jury was instructed to determine witness credibility by considering, inter alia, the witnesses' "opportunity for seeing or knowing the things about which they have testified" and the "extent to which they are corroborated, if at all, by circumstances or the testimony of credible witnesses." McCurry's concerns were adequately met, because as illustrated, the jury was instructed to consider Riley's basis for identifying McCurry as well as the corroboration or lack of corroboration by other eyewitness identifications when determining whether her identification testimony was credible.

Based on the evidence and the general witness credibility instruction given in this case, McCurry has not shown that he was prejudiced by the court's refusal of his proposed eyewitness identification instruction. We therefore conclude that the court's refusal of the instruction was not reversible error, and we reject this assignment of error.

*District Court's Use of Step Instruction and Refusal of McCurry's Proposed Alternate Instruction Were Not Reversible Error.*

McCurry next claims that the district court erred when it overruled his objection to the court's step instruction and refused his proposed instruction stating that the jury need not acquit McCurry of the greater offense before considering lesser offenses. We conclude that the court's use of its instruction and refusal of McCurry's requested instruction were not reversible error.

McCurry objected to the "Effect of Findings" portion of the district court's instruction regarding the elements of the murder charge. The court's instruction was based on NJI2d Crim. 3.1, and the "Effect of Findings" portion of the instruction given by the court provided as follows:

> You must separately consider in the following order the crimes of Murder in the First Degree, Murder in the Second Degree, and Manslaughter. For Murder in the First Degree, you must decide whether the State proved each element beyond a reasonable doubt. If the State did so prove each element, then you must find [McCurry] guilty of Murder in the First Degree and stop. If you find that the State did not so prove, then you must proceed to consider the next crime in the list, Murder in the Second Degree. You must proceed in this fashion to consider each of the crimes in sequence until you find [McCurry] guilty of one of the crimes or find him not guilty of all of them.

McCurry proposed an alternate "Effect of Findings" section which concluded with the following: "Although your final verdict must be unanimous, during your preliminary deliberations and discussions, you are not required to be unanimous before considering whether [McCurry] is guilty of a lesser offense (i.e. murder in the second degree, intentional manslaughter or unintentional manslaughter)." The court overruled McCurry's objection to its instruction and refused to substitute McCurry's proposed "Effect of Findings" section.

McCurry asserts that one of his defenses in this case was that even if the jury found that he killed Marzettie, the act was manslaughter rather than murder because it was the result of a sudden quarrel provocation. He argues that it was therefore crucial to his defense that the jury consider whether the killing was manslaughter, that is, whether it occurred upon a sudden quarrel, rather than first or second degree murder. He argues that because the instruction required the jury to find that he was not guilty of first degree murder before it could consider

whether he was guilty of a lesser offense, such as intentional manslaughter, the jury could find him guilty of first degree murder without having considered whether the killing occurred upon a sudden quarrel.

We considered and rejected a similar argument in *State v. Hinrichsen*, 292 Neb. 611, 877 N.W.2d 211 (2016). In *Hinrichsen*, the court determined that when finding the defendant guilty of first degree murder, the jury found beyond a reasonable doubt that the defendant acted with deliberate and premeditated malice and that "the jury necessarily simultaneously found beyond a reasonable doubt that there was no sudden quarrel provocation, i.e., that [the defendant] did not act without due deliberation and reflection." 292 Neb. at 633, 877 N.W.2d at 227. The court concluded that the "crucial question of whether [the defendant] acted with deliberate and premeditated malice, or instead acted without due deliberation and reflection, was very much presented to the jury even if the jury was not directly instructed that sudden quarrel provocation negates malice." *Id*. at 633-34, 877 N.W.2d at 227. Although the court rejected the defendant's contentions in *Hinrichsen*, we stated that in future first degree murder cases in which evidence of provocation has been adduced by a defendant, courts should clarify the definition of "deliberate" by explicitly stating that "'[a]n act is not deliberate if it is the result of sudden quarrel provocation.'" 292 Neb. at 636, 877 N.W.2d at 228. We note that the present case was tried before the decision in *Hinrichsen* was filed.

Although the decision in *Hinrichsen* forecloses McCurry's argument, we add the further observation that there was no evidence which would warrant an instruction on provocation. The testimony of witnesses regarding how the shooting of Marzettie occurred indicated that the shooter and another person came into the house and fought with Marzettie for some time before the shooting, that the altercation started outside the house, and that the shooter was carrying a gun when he entered the house. McCurry notes evidence that Marzettie knocked

the gun out of the shooter's hand and that the shooter shot Marzettie after retrieving the gun. McCurry suggests that the facts after the gun was knocked out of the shooter's hand represent a new incident. We reject this suggestion. The evidence does not show that a sudden quarrel began when Marzettie knocked the gun out of the shooter's hand, but, instead, that occurrence was part of an ongoing altercation. We determine that there was no evidence that would have established sudden quarrel provocation in this case.

We conclude that the court did not err when it refused McCurry's alternate "Effect of Findings" instruction, which was designed to advise the jury to consider lesser offenses, one of which includes the concept of sudden quarrel provocation. Based on the reasoning in *Hinrichsen*, McCurry was not prejudiced by the refusal, because the jury necessarily rejected sudden quarrel provocation when it found him guilty of first degree murder. McCurry was not prejudiced by refusal of the instruction, because there was no evidence in this case that McCurry was provoked into killing in the manner he did and the evidence in this case did not warrant McCurry's proposed instruction designed to focus the jury on provocation. We reject this assignment of error.

*District Court Did Not Err When It Sustained Hearsay Objection to Evidence Regarding Simpson's Failure to Identify McCurry in a Photographic Lineup.*

McCurry next claims that the district court erred when it sustained the State's objection to McCurry's proposed evidence to the effect that when Simpson was shown a photographic lineup, she was unable to identify McCurry as one of the intruders. We conclude that the court did not err when it sustained the State's objection based on hearsay.

Simpson testified on cross-examination that detectives had shown her photographs of individuals. The State objected when McCurry asked Simpson, "[D]id you identify anyone?" The

court sustained the State's objection but allowed McCurry to make an offer of proof outside the jury's presence. McCurry made an offer of proof to the effect that, if permitted, Simpson would testify that she was shown a photographic lineup and that she was not able to identify anyone from the lineup, but that she said one of the men, who was not McCurry, looked familiar. The court again sustained the State's objection, and the court noted that the evidence may have been permissible to impeach Simpson's credibility if Simpson had identified McCurry. In later cross-examination, McCurry asked Simpson, "[Y]ou have been unable to identify anyone who was in that house at that time, other than . . . Marzettie and the people you already know; is that true?" Simpson replied, "That's true, correct."

Later in the trial, the officer who had questioned Simpson at the police station testified. During cross-examination of the officer, the State objected and McCurry made another offer of proof to the effect that the officer would testify that he had shown Simpson the photographic lineup and that she was unable to identify McCurry but thought that one of the others looked familiar. The State again objected based on hearsay and relevance, and the court again determined that the proposed cross-examination evidence was inadmissible.

[11] In ruling that the evidence was inadmissible, the district court cited *State v. Scott*, 284 Neb. 703, 824 N.W.2d 668 (2012), and *State v. Salamon*, 241 Neb. 878, 491 N.W.2d 690 (1992). In *Scott*, we cited *Salamon* for the proposition that "testimony regarding an out-of-court identification is hearsay." 284 Neb. at 718, 824 N.W.2d at 684. In *Salamon*, we compared Nebraska hearsay rules to federal rules of evidence and stated as follows:

> [W]hile federal Rule 801(d)(1)(C) classifies a witness' pretrial identification as a nonhearsay statement, Nebraska Rule 801(4)(a)[, Neb. Rev. Stat. § 27-801(4)(a) (Reissue 2016),] does not contain such classification and provision and, in fact, makes no mention whatsoever

> concerning witness identification as a nonhearsay statement. None of the other Nebraska Rules of Evidence or other Nebraska statutes authorize admissibility of a witness' pretrial identification of a defendant as a nonhearsay statement or statement otherwise exempted or excluded from the operation and purview of the "hearsay rule," Rule 802, [see Neb. Rev. Stat. § 27-802 (Reissue 2016),] prohibiting admission of hearsay. Consequently, in the absence of admissibility authorized under the Nebraska Evidence Rules or by other statute, a witness' pretrial statement identifying a defendant as the perpetrator of a crime is hearsay pursuant to Rule 801(3) and, therefore, is inadmissible as the result of Rule 802. This is not to say that a witness' pretrial identification of a defendant may never be admissible. Never say never. A witness' pretrial identification may be admissible in certain circumstances encompassed within the Nebraska Evidence Rules, for example, for the purpose of impeachment. See Neb. Evid. R. 613[, Neb. Rev. Stat. § 27-613 (Reissue 2016)]. . . . Whether Rule 801(4)(a) is amended to authorize admissibility of a witness' pretrial identification of a defendant remains to be seen and is a legislative matter involving the Nebraska Evidence Rules.

241 Neb. at 890-91, 491 N.W.2d at 698. We note that since *Salamon* was decided in 1992, the Legislature has not amended Neb. Evid. R. 801(4)(a), Neb. Rev. Stat. § 27-801(4)(a) (Reissue 2016), in order to classify a witness' pretrial identification as a nonhearsay statement.

McCurry argues that the present case is distinguishable from *Salamon* and *Scott*, because in those cases, the out-of-court statement was offered to prove the truth of the matter asserted; that is, the person who was identified was the perpetrator of the offense. He argues that in the present case, he was not trying to prove the truth of an assertion, but, instead, was trying to show that Simpson "made no identification of him as being at the scene" and that, instead, she "tentatively identified a

different person in the photo spread." Brief for appellant at 33. McCurry's argument is unconvincing.

In his offer of proof, the record shows that McCurry sought to put before the jury evidence that when Simpson was shown the photographic lineup, she made the statements that she was not able to identify any of the men as the shooter and that she thought one of the other men looked familiar. Thus, inherent in McCurry's own argument, he was attempting to prove the truth of these statements; that is, Simpson was not able to identify McCurry and she thought another man looked familiar.

It follows that the evidence McCurry sought to offer was hearsay and that characterization of the evidence as a witness' pretrial identification, or nonidentification, did not remove the evidence from being treated as hearsay under Nebraska law. Further, as the district court noted, the evidence was not admissible for purposes of impeachment, because during her testimony, Simpson did not make an in-court identification of McCurry and, therefore, there was no need to impeach an identification. We conclude that the district court did not err when it determined that the evidence McCurry sought to put before the jury was inadmissible under Nebraska hearsay law. We reject this assignment of error.

*District Court Did Not Violate McCurry's Constitutional Rights When It Sustained Objection to Evidence Regarding Simpson's Failure to Identify McCurry in a Photographic Lineup.*

McCurry claims that even if the evidence regarding Simpson's failure to identify him from a photographic lineup was inadmissible under Nebraska hearsay law, the district court violated his due process and compulsory process rights and his right to present a complete defense when it refused to admit such evidence. We reject this claim.

[12] We have stated that whether rooted directly in the Due Process Clause of the 14th Amendment or in the Compulsory Process or Confrontation Clauses of the 6th Amendment, the

federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. *State v. Ballew*, 291 Neb. 577, 867 N.W.2d 571 (2015). However, the accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. *Id*. As we concluded above, the district court did not err when it concluded that the evidence regarding Simpson's failure to identify him from a photographic lineup was inadmissible as hearsay under Nebraska's standard rules of evidence.

McCurry notes that in *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006), the U.S. Supreme Court stated that while state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials, the defendant's right to present a complete defense is abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve. McCurry asserts that Nebraska is one of only two states that does not follow the federal rules by classifying a witness' pretrial identification as a nonhearsay statement. He argues that "in light of the . . . overwhelming number of jurisdictions that allow evidence of pretrial identification, the absence of this exception to the hearsay rule is an arbitrary evidentiary rule" and that therefore, under *Holmes*, the application of Nebraska's evidentiary rule in this case abridged his constitutional right to present a complete defense. Brief for appellant at 36.

We disagree. The fact that Nebraska's rule on this subject is not in accordance with the majority of other jurisdictions does not in and of itself make the rule arbitrary or disproportionate to the purposes such rules are designed to serve. Furthermore, as we noted in *State v. Salamon*, 241 Neb. 878, 491 N.W.2d 690 (1992), "[w]hether Rule 801(4)(a) is amended to authorize admissibility of a witness' pretrial identification of a defendant . . . is a legislative matter"; since *Salamon* was

decided in 1992, the Legislature has chosen not to change the rule to conform to other jurisdictions.

We further note that the application of this rule of evidence in this case did not abridge McCurry's right to present a complete defense, because he was not prevented from arguing to the jury that Simpson had witnessed the shooting but was unable to identify McCurry as the shooter. As noted above, Simpson never identified McCurry and, on cross-examination, McCurry was able to elicit testimony from her to the effect that she had not been able to identify the persons who came into Marzettie's house that night. Simpson's nonidentification was in evidence. Therefore, to the extent the fact that Simpson was unable to identify McCurry as being the perpetrator was important to his defense, he was not prevented from arguing it to the jury.

McCurry's right to a meaningful opportunity to present a complete defense did not entitle him to present evidence that was otherwise inadmissible under standard rules of evidence, including hearsay rules. Furthermore, exclusion of the specific evidence at issue did not prevent McCurry from presenting a defense based on Simpson's failure to identify him. We therefore conclude that the district court did not violate McCurry's constitutional rights when it ruled the evidence inadmissible. We reject this assignment of error.

*There Was Sufficient Evidence to Support McCurry's Conviction for First Degree Murder.*

In his final assignment of error, McCurry claims that there was not sufficient evidence to support his conviction for first degree murder. McCurry does not argue that there was not sufficient evidence for the jury to find that he killed Marzettie; instead, he argues that manslaughter is the highest degree of homicide the evidence in this case supports. We conclude that, viewing the evidence in the light most favorable to the prosecution as we must, see *State v. Pester*, 294 Neb. 995,

885 N.W.2d 713 (2016), there was sufficient evidence from which the jury could have found McCurry guilty of first degree murder.

McCurry argues that testimony given by the eyewitnesses, Riley and Simpson, described "a sudden quarrel that erupted between the intruders and the deceased." Brief for appellant at 38. He claims that an argument ensued between the intruders and Marzettie after the intruders entered the house and "one of the intruders introduced a gun into the altercation." *Id.* at 39. He also states the evidence shows that neither Riley nor Simpson saw the actual shooting and that Simpson testified that the shooter and Marzettie "scrambled to gain possession" of the gun after it landed on the floor. *Id.* at 38.

We disagree with McCurry's characterization of the evidence. We first note that there was sufficient evidence to identify McCurry as the person who shot Marzettie. In the telephone calls McCurry made while he was in jail, he stated that he had gone to a house looking for "Cherita," that he had earlier dropped her off near the house, and that the house was the house of a "guy [he] already had fought . . . like 3 or 4 weeks ago at the club." This was consistent with the testimony of Wright and others to the effect that McCurry had been in a fight with Marzettie at a club, that McCurry had dropped Wright off near Marzettie's house earlier on the day of the shooting, and that one of the people who intruded into Marzettie's house said he was looking for "Cherita." Although neither Riley nor Simpson said they actually saw the shooting as it happened, Simpson testified that she saw one of the intruders pointing the gun at Marzettie immediately before the shot was fired. Simpson's description of the shooter and the clothes he wore matched the description given by Riley of the intruder she identified as McCurry. The description of the clothing also matched the description of clothing found in a search of the residence where McCurry had been staying; several items of the clothing were found in a plastic bag that also contained McCurry's driver's license.

Given the foregoing, there was sufficient evidence for the jury to find that McCurry killed Marzettie purposely and with deliberate and premeditated malice. Contrary to McCurry's claim that the evidence showed that the altercation did not start until the men were inside the house, Riley testified that Marzettie and another man were "kind of arguing back and forth" when they were still outside and that after Marzettie came into the house, the other man "pulled the gun out and came in the house after him" and pointed the gun at Marzettie. Simpson also testified that the man was carrying a gun in his hand when he entered the house. Simpson testified as follows: She heard the man and Marzettie arguing; she saw Marzettie run from him; she heard Marzettie "begging not to get shot"; she heard the other man ask Marzettie "if he remembered getting into it with him at the club"; after Marzettie knocked the gun out of the man's hand, she saw the man retrieve the gun before Marzettie could reach it; and she saw the man point the gun at Marzettie right before she heard a gunshot.

As we noted above in connection with McCurry's claim regarding the "Effect of Findings" section of the elements instruction, the evidence did not support a finding of a sudden quarrel provocation. Reminiscent of our earlier discussion, McCurry again contends that the evidence shows a sudden quarrel that erupted inside the house and that involved a struggle over a gun. To the contrary, testimony by Riley and Simpson indicated that the altercation had been going on for some time before the shooting, that the shooter had the gun in hand when he entered the house, and that Marzettie was running from the other man and begging not to be shot. We determined above that, although there was evidence that Marzettie knocked the gun out of the man's hand, the context of such evidence does not indicate that this act provoked a sudden quarrel, but, instead, that it was part of an ongoing altercation. In addition, Simpson's testimony that the other man asked Marzettie "if he remembered getting into it with him at the club" would indicate that the present altercation and shooting

was a continuation of or the result of that earlier confrontation and did not come up suddenly.

In sum, the evidence noted above supported a finding that McCurry shot and killed Marzettie purposely and with deliberate and premeditated malice. Viewing the evidence in the light most favorable to the prosecution, the evidence supported the jury's finding that McCurry was guilty of first degree murder. We reject this assignment of error.

*District Court Erred When It Ordered McCurry's Sentence for the Use Conviction and His Sentence for the Possession Conviction to Be Served Concurrent With One Another.*

As a final matter, we note error in the district court's sentencing which requires us to vacate the sentences and remand the cause to the court for resentencing. As noted above, the court ordered McCurry's sentence for use of a firearm to commit a felony to be served consecutively to his life sentence for murder, and it ordered McCurry's sentence for possession of a firearm by a prohibited person to be served concurrently with his sentence for the use conviction. We conclude that the court erred when it ordered the sentence for the possession conviction to be served concurrently with the sentence for the use conviction.

[13] McCurry was convicted of use of a firearm to commit a felony pursuant to Neb. Rev. Stat. § 28-1205(1) (Reissue 2016). Section 28-1205(3) provides, "The crimes defined in this section shall be treated as separate and distinct offenses from the felony being committed, and sentences imposed under this section shall be consecutive to any other sentence imposed." We have held that § 28-1205(3) mandates that a sentence for the use of a deadly weapon in the commission of a felony be served consecutively to any other sentence imposed and concurrently with no other sentence. Under the plain language of § 28-1205, the court must order a sentence for use of a firearm to run consecutively to a sentence for the

underlying felony offense and the sentence for use may not run concurrently to any other sentence. See *State v. Ramirez*, 287 Neb. 356, 842 N.W.2d 694 (2014). In this case, the court did not have the authority to order McCurry's sentence for use of a firearm conviction to be served concurrently with any other sentence, including his sentence for the possession of a firearm conviction.

[14] An appellate court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced. *State v. Ramirez, supra*. Therefore, we vacate the sentences imposed for the use conviction and the possession conviction on the basis that they were ordered to be served concurrently with one another. We note that we do not vacate the life sentence for first degree murder. We remand the cause with directions to the district court to resentence McCurry such that the sentence for the conviction for use of a firearm to commit a felony runs consecutively to any other sentences imposed and not concurrently with any other sentence.

For completeness, we note that McCurry was convicted of possession of a firearm by a prohibited person pursuant to Neb. Rev. Stat. 28-1206 (Reissue 2016) rather than possession of a firearm in the commission of a felony pursuant to § 28-1205(2). Therefore, on remand, while the court does not have discretion to order the sentence for the possession conviction to run concurrently with the sentence for the use conviction, the court does have discretion to determine whether the sentence for the possession conviction shall be served concurrently with the life sentence for murder or whether it shall be served consecutively to both the sentence for the use conviction and the sentence for the murder conviction.

## CONCLUSION

Having rejected McCurry's assignments of error, we affirm his convictions for first degree murder, use of a firearm to commit a felony, and possession of a firearm by a prohibited

person. We also affirm McCurry's life sentence for first degree murder. However, we note error in the court's sentencing order in which it ordered the sentence for use of a firearm to commit a felony to be served concurrently with another sentence, i.e., possession of a firearm by a prohibited person. We therefore vacate those sentences and remand the cause for resentencing on those convictions in accordance with this opinion.

Convictions affirmed, sentences affirmed in part and in part vacated, and cause remanded for resentencing.




**Nebraska Supreme Court**

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

-- Nebraska Reporter of Decisions

# Midwest Renewable Energy, LLC, appellant, v. American Engineering Testing, Inc., et al., appellees.

894 N.W.2d 221

Filed March 17, 2017. No. S-16-122.

1. **Judgments: States.** Whether the law of Nebraska or that of another state controls the disposition of an issue by a Nebraska court is an issue of law.
2. **Jurisdiction: Statutes.** Subject matter jurisdiction and statutory interpretation present questions of law.
3. **Equity: Quiet Title.** A quiet title action sounds in equity.
4. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court resolves questions of law and fact independently of the trial court's determinations.
5. **Corporations: Partnerships.** In cases concerning limited liability companies, courts look to the principles of corporate law when addressing areas of similar functions, because a limited liability company is a hybrid of the partnership and corporate forms.
6. **Corporations: Actions.** At common law, a corporation's capacity to sue or be sued terminates when the corporation is legally dissolved.
7. **Corporations: Limitations of Actions: Abatement, Survival, and Revival.** Where a survival statute continues the existence of a corporation for a certain period after its dissolution for purposes of defending and prosecuting suits, no action can be maintained by or against it after the expiration of that period.
8. **Abatement, Survival, and Revival.** A survival statute operates on the right or claim itself.
9. **Corporations: States.** The internal affairs doctrine is a conflict-of-laws principle which recognizes that only one state should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise, a corporation could be faced with conflicting demands.

10. **Corporations.** Neb. Rev. Stat. § 21-155 (Reissue 2012) incorporates the comments of the Revised Uniform Limited Liability Company Act, which it was patterned after.
11. **Corporations: States.** Neb. Rev. Stat. § 21-155 (Reissue 2012) codifies the internal affairs doctrine, Restatement (Second) of Conflict of Laws § 302 (1971), for limited liability companies.
12. **Corporations: States: Limitations of Actions.** The Restatement (Second) of Conflict of Laws § 302 (1971) applies during the life of the corporation and the winding-up process only. Once the effective date of dissolution has passed and the corporation is legally dissolved, however, the Restatement (Second) of Conflict of Laws § 299 (1971) governs.
13. **Corporations: States.** Under Neb. Rev. Stat. § 21-155 (Reissue 2012), courts apply the dictates of the Restatement (Second) of Conflict of Laws § 299 (1971) to require that the laws of a fully dissolved foreign limited liability corporation's state of incorporation governs its amenability.
14. **Statutes: States.** When the interpretation of another state's statute is a question of first impression, courts must interpret the statute by applying the statutory interpretation standards of that state.
15. **Judgments: Liens.** The lien of a judgment is merely an incident of the judgment and may not exist independently of the judgment. It cannot be assigned unless the judgment which it secures is also transferred.
16. **Judgments: Actions: Assignments.** A judgment, as a chose in action, is assignable.
17. **Assignments: Words and Phrases.** An assignment is a transfer vesting in the assignee all of the assignor's rights in the property which is the subject of the assignment.
18. **Assignments: Actions.** The assignee of a chose in action acquires no greater rights than those of the assignor, and takes it subject to all the defenses existent at the time.
19. **Assignments: Actions: Parties.** The assignee of a chose in action is the proper and only party who can maintain the suit thereon. The assignor loses all right to control or enforce an assigned right against the obligor.
20. **Parties.** Neb. Rev. Stat. § 25-323 (Reissue 2016) makes it the court's duty to require an indispensable party be added to the litigation sua sponte when one is absent and statutorily deprives a court of the authority to determine a controversy absent all indispensable parties.
21. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction includes a court's power to hear and determine a case in the general class or category to which the proceedings in question belong, but it also includes a court's power to determine whether it has the authority to address a

particular question within a general class or category that it assumes to decide or to grant the particular relief requested.

22. **Jurisdiction: Parties: Waiver.** The absence of an indispensable party to a controversy deprives the court of subject matter jurisdiction to determine the controversy and cannot be waived.
23. **Jurisdiction: Appeal and Error.** When a lower court lacks the power, that is, the subject matter jurisdiction, to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
24. **Parties: Equity: Appeal and Error.** When it appears that all indispensable parties to a proper and complete determination of an equity cause were not before the district court, an appellate court will remand the cause for the purpose of having such parties brought in.
25. **Parties: Words and Phrases.** Necessary parties are parties who have an interest in the controversy, and should ordinarily be joined unless their interests are separable so that the court can, without injustice, proceed in their absence.
26. ____: ____. 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.
27. **Parties: Equity: Final Orders.** All persons whose rights will be directly affected by a decree in equity must be joined as parties in order that complete justice may be done and that there may be a final determination of the rights of all parties interested in the subject matter of the controversy.
28. **Parties: Words and Phrases.** All persons interested in the contract or property involved in a suit are necessary parties, and all persons whose interests therein may be affected by the decree in equity are indispensable parties.

Appeal from the District Court for Lincoln County: Richard A. Birch, Judge. Vacated and remanded with direction.

Dean J. Jungers for appellant.

William J. Troshynski, of Brouillette, Dugan & Troshynski, P.C., L.L.O., for appellees.

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

Funke, J.

## I. INTRODUCTION

This appeal concerns a quiet title action brought in the district court for Lincoln County by the appellant, Midwest Renewable Energy, LLC (Midwest Renewable), against several entities and all known and unknown parties claiming an interest in its real property located in Lincoln County, Nebraska. Western Ethanol Company, LLC (Western Ethanol), was one of the named parties alleged to claim an interest in the real estate.

Western Ethanol obtained a judgment lien on Midwest Renewable's Lincoln County property after transcribing a California judgment against Midwest Renewable with the district court and filing a writ of execution on that judgment. Before Midwest Renewable filed its quiet title action, Western Ethanol dissolved and transferred its assets to its members. Douglas Vind, the managing member of Western Ethanol, claimed that Western Ethanol transferred the Midwest Renewable judgment to him, but he was never made a party to the litigation.

After a trial on the merits, the court ruled that Western Ethanol's judgment had been assigned to Vind and that the judgment lien against the real estate owned by Midwest Renewable in Lincoln County was still valid and subsisting. The court then dismissed with prejudice Midwest Renewable's action regarding Western Ethanol. Midwest Renewable filed a motion to alter or amend the court's order, which the court substantively overruled. Midwest Renewable appeals.

In order to consider this appeal, we must determine whether Western Ethanol, as a limited liability company, was amenable to the present action; whether Vind was an indispensable party to the controversies; and whether the court had subject matter jurisdiction to determine if the judgment and the judgment lien were assigned and remained valid and subsisting.

We hold that Western Ethanol was amenable to suit under Nevada law. Further, we decide that Vind was an indispensable party to the controversies decided by the court. Accordingly, his absence from the litigation deprived the court of subject matter jurisdiction over the issues of whether the judgment and the judgment lien were assigned and whether they were still valid and subsisting. Because the court erred in not making Vind a party to the action sua sponte, we vacate the court's memorandum opinion and judgment and remand the cause with direction to make Vind a party.

## II. BACKGROUND

Western Ethanol was a limited liability company formed under Nevada law and registered in California. In September 2010, it obtained a judgment against Midwest Renewable in California for $30,066.59, plus interest and costs. Western Ethanol transcribed the foreign judgment with the district court for Lincoln County in November 2010 and filed a writ of execution on the judgment in September 2011.

Western Ethanol filed its articles of dissolution in Nevada on November 12, 2013, and a certificate of cancellation in California on November 21, both effective on December 31. In both documents, Vind attested that Western Ethanol had distributed all of its assets to its members.

In September 2014, Midwest Renewable filed a petition to quiet title claims to its Lincoln County property, an ethanol manufacturing facility in Sutherland, Nebraska. In its petition, Midwest Renewable named nine specific entities, the property, and "'all persons having or claiming any interest in said real estate, real names unknown,'" under Neb. Rev. Stat. § 25-21,113 (Reissue 2016). Western Ethanol was one of the named parties.

On February 5, 2015, Midwest Renewable filed a motion for partial summary judgment against Western Ethanol and a motion for default judgment against all parties who had failed to answer or otherwise plead. Both motions were heard on February 23. At the hearing on Midwest Renewable's

motion for partial summary judgment, an affidavit executed by Vind—alleging that Western Ethanol had transferred its Midwest Renewable judgment to Vind—was entered into evidence. The record does not reflect that Vind filed an assignment of the judgment with the district court in the prior case where the judgment had been transcribed or provided notice of the assignment to Midwest Renewable. Neither Vind, the other parties, nor the court made Vind a party to the litigation.

The court entered a default judgment against three of the named parties and all of the unknown parties for failing to answer the complaint. The court denied Midwest Renewable's motion for partial summary judgment against Western Ethanol. Midwest Renewable settled with the other parties. The matter proceeded to trial against Western Ethanol as the only remaining defendant.

At trial, the court found, under Nevada law, that Western Ethanol could defend itself against the action by entering an appearance and asserting that its judgment lien had been assigned to Vind. The court also found that Western Ethanol had transferred its interest to Vind and that "he was then the interested party."

The court went on to address the merits of the quiet title action, because it determined that "the validity of any lien interest . . . Vind has in real estate of [Midwest Renewable] is dependent upon validity of Western Ethanol's judgment lien against [Midwest Renewable]. . . . Vind's interest in the property flows directly from the interest of Western Ethanol." The court stated that neither Western Ethanol's dissolution nor the failure to provide notice of the assignment to Midwest Renewable canceled the judgment lien. Therefore, the court ruled that the judgment lien "is and continues to be a valid and subsisting judgment lien against real estate owned by [Midwest Renewable] in Lincoln County, Nebraska." Accordingly, the court dismissed the quiet title action against Western Ethanol with prejudice.

Midwest Renewable then filed a motion to alter or amend the judgment, arguing that Nebraska law allows a corporation

to continue defending itself only during the winding-up process and that the court had already quieted the lien in Vind's name when it issued its default judgment against unnamed parties. The court overruled the motion, relying on its earlier order.

## III. ASSIGNMENTS OF ERROR

Midwest Renewable assigns, reordered and restated, as error the court's findings that (1) Western Ethanol owned the judgment in question on the date of trial and (2) the judgment and the judgment lien against Midwest Renewable's Lincoln County property are valid and subsisting. Additionally, it assigns error to (3) the court's dismissal of its complaint against Western Ethanol.

## IV. STANDARD OF REVIEW

[1,2] Whether the law of Nebraska or that of another state controls the disposition of an issue by a Nebraska court is an issue of law.[1] Subject matter jurisdiction and statutory interpretation present questions of law.[2]

[3,4] A quiet title action sounds in equity.[3] On appeal from an equity action, an appellate court resolves questions of law and fact independently of the trial court's determinations.[4]

## V. ANALYSIS

### 1. Western Ethanol Is Amenable Under Nevada Law

Midwest Renewable argues that under Nebraska law, Western Ethanol has dissolved and completed its winding up, so it is no longer a legal entity capable of defending itself.

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[1] *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001), *abrogated in part on other grounds, Sutton v. Killham*, 285 Neb. 1, 825 N.W.2d 188 (2013). See, also, *Coral Prod. Corp. v. Central Resources*, 273 Neb. 379, 730 N.W.2d 357 (2007).

[2] *In re Estate of Evertson*, 295 Neb. 301, 889 N.W.2d 73 (2016).

[3] *Burnett v. Maddocks*, 294 Neb. 152, 881 N.W.2d 185 (2016).

[4] *Id.*

Alternatively, Midwest Renewable contends that if Nevada law applies, Western Ethanol would have to be defended on behalf of its trustees, in their name, because it is no longer a legal entity.

Western Ethanol argues that under Nevada law, it may defend itself against a lawsuit in its name for 2 years after filing its articles of dissolution. It contends that the capacity to sue or be sued after dissolution is part of the winding-up process and that winding up is an internal affair of a limited liability company. Western Ethanol argues that, accordingly, Nevada law should control because Nebraska allows a foreign limited liability company's state of formation to govern its internal affairs.

### (a) Amenability of Western Ethanol Is Dependent on Which State's Survival Statute Applies

[5] We have not addressed the issue of whether a dissolved limited liability company is amenable to suit. However, we have addressed the issue concerning corporations.[5] In cases concerning limited liability companies, we have looked to the principles of corporate law when addressing areas of similar functions, because a limited liability company is "'a hybrid of the partnership and corporate forms.'"[6]

[6] In *Christensen v. Boss*,[7] we considered a corporation's amenability to suit after voluntary dissolution. We stated:

> At common law a corporation's capacity to sue or be sued terminates when the corporation is legally dissolved. . . .
>
> Where a corporation has in fact been dissolved and no longer exists as a legal entity, the rule of its incapacity to

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[5] See, *Van Pelt v. Greathouse*, 219 Neb. 478, 364 N.W.2d 14 (1985); *Christensen v. Boss*, 179 Neb. 429, 138 N.W.2d 716 (1965).

[6] See *Steinhausen v. HomeServices of Neb.*, 289 Neb. 927, 936, 857 N.W.2d 816, 826 (2015).

[7] *Christensen, supra* note 5.

> sue or be sued applies regardless of the mode of dissolution whether by judicial decree or otherwise. . . . In the absence of statutory provisions to the contrary no action at law can be maintained by or against it as a corporate body or in its corporate name.[8]

[7,8] In *Van Pelt v. Greathouse*,[9] we interpreted Nebraska's former survival statute that permitted corporations to maintain actions by or against them after dissolution.[10] We clarified the effect of survival statutes by stating:

> [W]here a [survival] statute continues the existence of a corporation for a certain period after its dissolution for purposes of defending and prosecuting suits, no action can be maintained by or against it after the expiration of that period. In other words, while a statute of limitations relates to the remedy only and not to substantive rights, . . . a survival statute operates on the right or claim itself.[11]

There are two types of survival statutes. The first type "grant[s] corporations the power to sue and be sued as part of their general winding up powers."[12] The second "enabl[es] suits to be brought against, and defended by, a dissolved corporation independent from the corporation's winding up activities and powers."[13] Both types are "a limitation on the existence of the corporation itself."[14]

Both Nebraska and Nevada have survival statutes for limited liability companies. Nebraska's statute extends companies'

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[8] *Id*. at 435, 138 N.W.2d at 720. Accord *Eiche v. Blankenau*, 253 Neb. 255, 570 N.W.2d 190 (1997).

[9] *Van Pelt, supra* note 5.

[10] See Neb. Rev. Stat. § 21-20,104 (Reissue 1983).

[11] *Van Pelt, supra* note 5, 219 Neb. at 486, 364 N.W.2d at 20.

[12] 16A William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 8144 at 313-14 (rev. ed. 2012).

[13] *Id.* at 314.

[14] *Christensen, supra* note 5, 179 Neb. at 439, 138 N.W.2d at 722. See, generally, 16A Fletcher, *supra* note 12, § 8144.

ability to sue and be sued as part of the winding-up powers.[15] Nevada's statute, on the other hand, extends the existence of companies' ability to sue and be sued independently of the winding-up process, even after the winding-up process is complete.[16] Specifically, § 86.505(1) permits a dissolved limited liability company to continue to sue and be sued for 2 years after it has filed its articles of dissolution when the suit could have been initiated before the filing.

Here, Western Ethanol filed its articles of dissolution on November 12, 2013, which began its winding-up process. On December 31, the effective date of the articles of dissolution, Western Ethanol's winding-up process was complete. This action was initiated in September 2014. Accordingly, under Nebraska law, Western Ethanol would no longer be a legal entity capable of defending or enforcing its rights and any judgment against it would be unenforceable. However, under Nevada law, Western Ethanol would be able to defend itself, because its judgment lien was created before its dissolution and this action was initiated within 2 years of Western Ethanol's filing its articles of dissolution.

### (b) Nevada's Survival Statute Applies Under Internal Affairs Doctrine

[9] To determine whether Nebraska's or Nevada's survival statute should apply, we must consider the internal affairs doctrine. The internal affairs doctrine is a conflict-of-laws principle which recognizes that only one state should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise, a corporation could be faced with conflicting demands.[17]

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[15] Neb. Rev. Stat. § 21-148(b) (Reissue 2012).

[16] Nev. Rev. Stat. § 86.505 (2015).

[17] *Johnson v. Johnson*, 272 Neb. 263, 720 N.W.2d 20 (2006).

[10,11] As to limited liability companies, the internal affairs doctrine is codified under Neb. Rev. Stat. § 21-155 (Reissue 2012). Section 21-155 provides: "(ULLCA 801) (a) The law of the state or other jurisdiction under which a foreign limited liability company is formed governs: (1) the internal affairs of the company[.]" While § 21-155 references the Uniform Limited Liability Company Act,[18] the language of the statute and the section number referenced both show, instead, that it was patterned after the Revised Uniform Limited Liability Company Act,[19] which was adopted by Nebraska in 2011.[20] Accordingly, the Legislature incorporated the revised act's comments explaining each section.[21] In the comments to the revised act,[22] the drafters referenced the Restatement (Second) of Conflict of Laws § 302.[23]

The codification of the internal affairs doctrine for corporations, Neb. Rev. Stat. § 21-20,172 (Reissue 2012), also incorporates § 302 of the Restatement through the model code the Legislature adopted.[24] In *Johnson v. Johnson*,[25] we explained § 302 as follows:

> [It] recognizes that the local law of the state of incorporation applies to internal affairs, except in the unusual case where, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties, in which case, the local law of the other state will be applied. Where "internal

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[18] See Unif. Limited Liability Company Act (1996), 6C U.L.A. 393 (2016).

[19] See Rev. Unif. Limited Liability Company Act (2006), 6C U.L.A. 223 (2016).

[20] See 2010 Neb. Laws, L.B. 888.

[21] See *Johnson, supra* note 17.

[22] Rev. Unif. Limited Liability Company Act, *supra* note 19, §§ 106 and 801.

[23] Restatement (Second) of Conflict of Laws § 302 (1971).

[24] See, *Johnson*, *supra* note 17; 4 Model Business Corporation Act Ann. § 15.05(c), official comment (3d ed. 2002).

[25] *Johnson, supra* note 17, 272 Neb. at 272, 720 N.W.2d at 28-29.

> affairs" are concerned . . . the local law of the state of incorporation will be applied unless application of the local law of some other state is required by reason of the overriding interest of that other state in the issue to be decided.

The Restatement (Second) of Conflict of Laws also contains a provision that specifically addresses choice of law in the context of deciding which law should apply to a dissolved corporation's continuation for the purpose of suing or being sued.[26] Section 299 states:

> [S]tatutes commonly provide that for a period of time after the termination or suspension of the corporate existence, suits may be brought by or against the corporation. . . .
>
> A corporation whose existence has been terminated or suspended will usually be permitted to exercise in another state such powers as are accorded it by the state of incorporation even though the other state does not give similar powers to domestic corporations.[27]

Section 299 goes on to also address its interaction with § 302, stating:

> A considerable period of time may elapse between the institution of the proceeding and the effective date of the termination or suspension of the corporate existence. The legal effect of acts done by the corporation during this period of time is determined in accordance with the law selected by application of the rules of §§ 301-302.[28]

[12,13] Accordingly, the Restatement itself clarifies that § 302's exception to the internal affairs doctrine applies during the life of the corporation and the winding-up process only. Once the effective date of dissolution has passed and the corporation is fully dissolved, however, at that point, § 299 is

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[26] Restatement, *supra* note 23, § 299. See, also, Restatement (First) of Conflict of Laws § 158, comment *c*. (1934).

[27] Restatement, *supra* note 23, § 299, comment *e*. at 295-96.

[28] *Id.*, comment *h*. at 297.

applicable. Therefore, under § 21-155, the internal affairs doctrine requires that the law of a fully dissolved foreign limited liability corporation's state of incorporation govern its amenability. This conclusion is supported both by other courts that have adopted the use of § 299 specifically[29] and by courts that have generally held that the law of the state of incorporation should apply to fully dissolved corporations.[30]

Western Ethanol was fully dissolved as of December 31, 2013. Therefore, we apply Nevada's statute to determine Western Ethanol's capacity to sue or be sued. As discussed above, this action commenced within 2 years of Western Ethanol's filing its articles of dissolution. Therefore, it may defend itself in the present action.

### (c) Western Ethanol May Defend Itself in Its Name

Midwest Renewable also argues that Nevada law requires the action be defended in the name of the dissolved company's trustees.

Nev. Rev. Stat. § 86.541(2) (2015) states:

> The manager or managers in office at the time of dissolution . . . are thereafter trustees of the dissolved company, with full power to prosecute and defend suits, actions, proceedings and claims of any kind or character by or against the company . . . and to do every other act to wind up and liquidate its business and affairs, but not for the purpose of continuing the business for which the company was established.

[14] Nevada courts have not interpreted § 86.541. When the interpretation of another state's statute is a question of first impression, we must interpret the statute by applying the standards of Nevada law.[31] Under Nevada law, "[s]tatutory

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[29] *Lilliquist v. Copes-Vulcan, Inc.*, 21 A.3d 1233 (Pa. Super. 2011).

[30] *In re All Cases Against Sager Corp.*, 132 Ohio St. 3d 5, 967 N.E.2d 1203 (2012); 16A Fletcher, *supra* note 12, § 8142.

[31] See *Coral Prod. Corp., supra* note 1.

language must be given its plain meaning if it is clear and unambiguous."[32] Further, the "court 'cannot expand or modify . . . statutory language' to impose requirements the Legislature did not."[33] Additionally, it is a general principle of law that statutes in derogation of the common law are strictly construed.[34] Nevada has recognized that at common law, a corporation's capacity to be sued terminates at dissolution.[35] Accordingly, statutes authorizing postdissolution action against companies should be strictly construed.

The plain language of § 86.541(2) gives trustees the full power to defend suits on behalf of a dissolved company. However, there is no requirement that a dissolved company's defense must be pursued solely by its trustees in their name. We cannot read such a requirement into the statute. Therefore, Western Ethanol is entitled to defend itself in its name.

### 2. District Court Lacked Subject Matter Jurisdiction to Determine Whether Judgment and Judgment Lien Had Been Assigned to Vind and Whether They Were Still Valid and Subsisting, Because Vind Is Indispensable Party to Such Controversies

Midwest Renewable argues that Western Ethanol has no interest in the judgment because it transferred all of its assets, including the judgment, to Vind and its other members on or before December 31, 2013. Accordingly, it contends that Western Ethanol's claim should be quieted against its Lincoln County property. Further, Midwest Renewable argues that as

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[32] *Pacific Western Bank v. Eighth Jud. Dist.*, 132 Nev. 793, 797, 383 P.3d 252, 255 (2016).

[33] *Wingco v. Gov't Emps. Ins. Co.*, 130 Nev. 177, 180, 321 P.3d 855, 856 (2014).

[34] *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 132 Nev. 49, 366 P.3d 1105 (2016).

[35] *Canarelli v. Dist. Ct.*, 127 Nev. 808, 265 P.3d 673 (2011), citing 16A Fletcher, *supra* note 12, § 8142.

a result of the assignment, Vind owns the judgment but his lien on the Lincoln County property was extinguished by the court's default judgment against all unnamed parties.

Western Ethanol asserts that it continues to own the judgment and judgment lien. While it acknowledges that its assets were transferred upon its dissolution, including the judgment transferred to Vind, its position is based on two arguments. First, it contends that a transfer is not an assignment. Second, it argues that a judgment cannot actually be transferred, because it is not an asset. Western Ethanol, however, does admit that a judgment is a chose in action. Additionally, Western Ethanol argues that the judgment and the judgment lien are still valid.

(a) Western Ethanol's Judgment and Judgment Lien Are Assignable

[15,16] The lien of a judgment is merely an incident of the judgment and may not exist independently of the judgment.[36] Accordingly, "[t]he lien [of a judgment] cannot be assigned unless the [judgment] which it secures is [also] transferred."[37] Black's Law Dictionary defines a "chose in action" as the "right to bring an action to recover a debt [or] money."[38] The law is clear that a judgment, as a chose in action, is assignable.[39]

[17] An assignment is a transfer vesting in the assignee all of the assignor's rights in the property which is the subject of the assignment.[40] "An assignment becomes effective when it

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[36] *Mousel Law Firm v. The Townhouse, Inc.*, 259 Neb. 113, 608 N.W.2d 571 (2000), citing 50 C.J.S. *Judgments* § 552 (1997).

[37] *Cache Nat. Bank v. Lusher*, 882 P.2d 952, 961 n.16 (Colo. 1994), citing *Lewis v. Booth*, 3 Cal. 2d 345, 44 P.2d 560 (1935). Accord *Goodman v. Pence*, 21 Neb. 459, 32 N.W. 219 (1887).

[38] Black's Law Dictionary 294 (10th ed. 2014).

[39] *State v. Holt County*, 89 Neb. 445, 131 N.W. 960 (1911). See, also, *Boarman v. Boarman*, 210 W. Va. 155, 556 S.E.2d 800 (2001); 46 Am. Jur. 2d *Judgments* § 431 (2006). Cf. Neb. Rev. Stat. §§ 25-302 to 25-304 (Reissue 2016).

[40] *Krohn v. Gardner*, 248 Neb. 210, 533 N.W.2d 95 (1995). See, also, Black's Law Dictionary 142 (10th ed. 2014) (defining "assign").

is made . . . ."[41] Additionally, notice of the assignment is not essential to the validity of the assignment.[42]

[18,19] However, "the assignee of a chose in action . . . acquires no greater rights than those of the assignor, and takes it subject to all the defenses existent at the time."[43] "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."[44] Accordingly, the assignee is the proper and only party who can maintain the suit thereon.[45] Conversely, "[t]he assignor loses all right to control or enforce an assigned right against the obligor."[46]

Western Ethanol's argument that its judgment could not be assigned is, therefore, without merit. Further, if Midwest Renewable is correct in arguing that Western Ethanol's judgment was assigned, then it is also correct that Western Ethanol has no interest in the judgment or judgment lien. Moreover, any defenses that Midwest Renewable would have against the validity of the judgment or judgment lien would also have been assigned and could be raised only against the assignee. Therefore, Vind would be the only party capable of enforcing or defending the judgment and judgment lien against Midwest Renewable.

### (b) Absence of Indispensable Party Deprives Court of Subject Matter Jurisdiction

The parties did not raise, at trial or on appeal, the issue of whether Vind should have been made a party to this action.

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[41] 6A C.J.S. *Assignments* § 89 at 446 (2016).

[42] *Id.*, § 81; 46 Am. Jur. 2d, *supra* note 39, § 433. See, also, *Holt County, supra* note 39.

[43] *Cronkleton v. Hastings Theatre & Realty Corporation*, 134 Neb. 168, 173, 278 N.W. 144, 147 (1938). See § 25-303.

[44] § 25-302.

[45] *Krohn, supra* note 40. See, also, Neb. Rev. Stat. § 25-301 (Reissue 2016).

[46] *Ryder Truck Rental v. Transportation Equip. Co.*, 215 Neb. 458, 461, 339 N.W.2d 283, 285 (1983). See, also, 46 Am. Jur. 2d, *supra* note 39, § 439.

The district court, however, found that Vind, not Western Ethanol, had the sole interest in the judgment and acknowledged that the parties and Vind failed to make Vind a party to the suit.

[20-22] Neb. Rev. Stat. § 25-323 (Reissue 2016) makes it the court's duty to require an indispensable party be added to the litigation sua sponte when one is absent and statutorily deprives a court of the authority to determine a controversy absent all indispensable parties.[47] Subject matter jurisdiction includes a court's power to hear and determine a case in the general class or category to which the proceedings in question belong, but it also includes a court's power to determine whether it has the authority to address a particular question within a general class or category that it assumes to decide or to grant the particular relief requested.[48] Therefore, the absence of an indispensable party to a controversy deprives the court of subject matter jurisdiction to determine the controversy and cannot be waived.[49]

[23,24] When a lower court lacks the power, that is, the subject matter jurisdiction, to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.[50] "'[W]hen it appears that all indispensable parties to a proper and complete determination of an equity cause were not before the district court, [an appellate court] will remand the cause for the purpose of having such parties brought in.'"[51]

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[47] See, e.g., *Cunningham v. Brewer*, 144 Neb. 211, 16 N.W.2d 533 (1944).

[48] See *In re Interest of Trey H.*, 281 Neb. 760, 798 N.W.2d 607 (2011). See, also, *Robertson v. School Dist. No. 17*, 252 Neb. 103, 560 N.W.2d 469 (1997).

[49] See *Pestal v. Malone*, 275 Neb. 891, 750 N.W.2d 350 (2008).

[50] *In re Estate of Evertson, supra* note 2.

[51] See *Pestal, supra* note 49, 275 Neb. at 896, 750 N.W.2d at 355, quoting *Whitaker v. Gering Irr. Dist.*, 183 Neb. 290, 160 N.W.2d 186 (1968).

### (c) Vind Was Indispensable Party to Determining Whether Judgment and Judgment Lien Were Assigned to Him and Whether They Are Valid and Subsisting

Section 25-323 codifies the concept of compulsory joinder in Nebraska, stating, in relevant part:

> The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in.

[25] The language of § 25-323 tracks the traditional distinction between the necessary and indispensable parties. The South Dakota Supreme Court recently restated the traditional difference between such parties as follows:

> "'[N]ecessary parties[]' [are parties] who have an interest in the controversy, and should ordinarily be joined unless their interests are separable so that the court can, without injustice, proceed in their absence[.] '[I]ndispensable parties[]' [are parties] whose interest is such that a final decree cannot be entered without affecting them, or that termination of controversy in their absence would be inconsistent with equity."
>
> . . . The inclusion of a necessary party is within the trial court's discretion. . . . However, there is no discretion as to the inclusion of an indispensable party.[52]

[26] Similarly, the first clause of our statute makes the inclusion of necessary parties discretionary when a controversy of interest to them is severable from their rights. The second clause, however, mandates the district court order indispensable parties be brought into the controversy. We have long held:

> An indispensable or necessary party to a suit is one whose interest in the subject matter of the controversy is such

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[52] *J.K. Dean, Inc. v. KSD, Inc.*, 709 N.W.2d 22, 25 (S.D. 2005).

> 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.[53]

While our definition of indispensable parties has often treated necessary parties hand in hand, it is clear that this definition was derived from the traditional definition of indispensable parties and applies to the second clause of § 25-323. Therefore, this definition applies to indispensable parties only.

[27,28] We have held that "all persons whose rights will be directly affected by a decree in equity must be joined as parties in order that complete justice may be done and that there may be a final determination of the rights of all parties interested in the subject matter of the controversy."[54] Based on our distinction of parties above, we consider all persons interested in the contract or property involved in the suit to be necessary parties, and all persons whose interests therein may be affected by the decree in equity to be indispensable parties.

Here, Midwest Renewable seeks to quiet the title of all parties interested in its Lincoln County property. It specifically attacked the lien executed on Western Ethanol's judgment by naming Western Ethanol as a party to the action, having no greater information as to the owner of the judgment. Western Ethanol continues to assert that it is the owner of the judgment. However, once Western Ethanol's articles of dissolution and Vind's affidavit were entered into evidence at the hearing on Midwest Renewable's motion for partial summary judgment, a question as to the owner of the judgment and the judgment lien arose.

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[53] *American Nat. Bank v. Medved*, 281 Neb. 799, 806, 801 N.W.2d 230, 237 (2011).

[54] *Reed v. Reed*, 277 Neb. 391, 399, 763 N.W.2d 686, 693 (2009).

The court could not make a determination as to the owner of the judgment and the judgment lien without affecting Vind's ownership rights. Accordingly, he was an indispensable party to that determination. We conclude that the district court erred in not requiring that Vind be made a party to the action before deciding the issue. Therefore, the court lacked subject matter jurisdiction to make a determination as to the owner of the judgment and the judgment lien.

Additionally, as discussed above, if Vind was assigned the judgment and the judgment lien, then he alone could enforce or defend them. Accordingly, the court could not make a determination as to the validity of the judgment or the judgment lien without affecting Vind's rights. Therefore, Vind's absence, as an indispensable party, deprived the court of the subject matter jurisdiction to determine the validity of the judgment and the judgment lien as well.

Moreover, because motions for quiet title sound in equity, dismissing Midwest Renewable's complaint regarding Western Ethanol and failing to add Vind were inconsistent with equity and good conscience, because that prevented a final determination as to whether the lien created by Western Ethanol remained as a cloud on Midwest Renewable's Lincoln County property. Further, it neglected to settle Midwest Renewable's claim that Vind cannot enforce the lien if he owns it, because the court's earlier default judgment against unnamed parties in this case also requires Vind's participation.

Midwest Renewable claims that because it named "all persons . . . real names unknown" as defendants in the caption of its complaint and constructively served such defendants, Vind had constructive notice of the litigation and was thus converted into a party. We do not agree with Midwest Renewable's assessment of the record or the applicable law.

Contrary to Midwest Renewable's assertion, Vind was not an unknown person. As previously mentioned, the hearings on Midwest Renewable's motions for default judgment and partial summary judgment were heard contemporaneously. At that

hearing, Western Ethanol introduced into evidence the affidavit of Vind claiming he was the actual owner of the judgment. Under these circumstances, Vind's interest in the property was readily apparent. In order to properly resolve or rule upon Midwest Renewable's rights, Vind should have been joined as a named party.

## VI. CONCLUSION

Under Nevada law, Western Ethanol remained amenable to this action, because the cause existed prior to its dissolution and the action was commenced within 2 years of the filing of its articles of dissolution. Although Western Ethanol had transferred its judgment and judgment lien upon dissolution, it continues to argue that it owns both. Vind is an indispensable party to the controversy of who owns the judgment and the judgment lien and whether both remain valid and subsisting, because each controversy directly affects his rights as the alleged assignee. Accordingly, Vind's absence deprived the court of subject matter jurisdiction to consider those issues. Therefore, we vacate the court's memorandum opinion and judgment and remand the cause with direction for the district court to order Vind be named a party to this action.

Vacated 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. Dale V. Nollen, appellant.

892 N.W.2d 81

Filed March 17, 2017. No. S-16-133.

1. **Constitutional Law: Sentences.** Whether a sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment presents a question of law.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Sentences: Statutes: Time.** The good time law to be applied to a defendant's sentence is the law in effect at the time the defendant's sentence becomes final.
4. **Judgments: Convictions: Sentences: Final Orders: Time: Appeal and Error.** A defendant's sentence becomes final on the date that the appellate court enters its mandate concerning the defendant's appeal, if there is indeed an appeal. If no appeal is taken from the judgment, that judgment becomes final.
5. **Constitutional Law: Sentences.** A sentence imposed in violation of a substantive constitutional rule is not merely erroneous, but void.
6. **Constitutional Law: States: Minors: Convictions: Sentences: Probation and Parole.** It is unconstitutional for a state to impose a sentence of life imprisonment without parole on a juvenile convicted of a nonhomicide offense.
7. **Minors: Convictions.** Juvenile offenders convicted of nonhomicide crimes must be given some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.
8. **Minors: Sentences: Judgments.** Although the possibility of a sentence of life imprisonment without parole for a juvenile is not foreclosed, a sentencer must take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

9. **Constitutional Law: Sentences: Homicide.** Felony murder is a homicide offense for purposes of Eighth Amendment sentencing analysis.
10. **Constitutional Law: Criminal Law: Sentences.** The Eighth Amendment does not require strict proportionality between crime and sentence, but, rather, forbids only extreme sentences that are grossly disproportionate to the crime.
11. **Sentences: Judgments.** The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Washington County: John E. Samson, Judge. Affirmed.

Adam J. Sipple, of Johnson & Mock, P.C., L.L.O., for appellant.

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

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

Kelch, J.

## I. NATURE OF CASE

In 1983, Dale V. Nollen, at age 17, pled guilty to first degree murder and was sentenced to a mandatory term of life imprisonment. Pursuant to the U.S. Supreme Court decision in *Miller v. Alabama*,[1] this sentence was vacated. Prior to resentencing, a hearing was held, and Nollen produced evidence of certain mitigating factors, as well as evidence of his reform while in prison. Following the hearing, Nollen was resentenced to 90 years' to life imprisonment. Nollen appeals this sentence, alleging, among other things, that the sentence violates the 8th and 14th Amendments to the U.S.

[1] *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

Constitution and the principles set forth in *Miller* and *Graham v. Florida*.[2]

## II. BACKGROUND

### 1. Overview

Nollen was 17 years old in January 1983 when he and a friend, Brian D. Smith, participated in criminal acts which led to the death of Mary Jo Hovendick (Mary Jo). Nollen turned himself in to the police, pled guilty to first degree murder, and was sentenced to mandatory life imprisonment.

In 2010, the U.S. Supreme Court decided *Graham*,[3] in which it held that the Eighth Amendment prohibits the imposition of life imprisonment without parole upon juvenile offenders who have not committed homicide. In 2012, in *Miller*,[4] the Court held that the Eighth Amendment prohibits *mandatory* life imprisonment without parole for juvenile offenders.

In 2013, Nollen filed a motion for postconviction relief, which was granted. The district court vacated Nollen's sentence and ordered a presentence report and comprehensive mental health examination pursuant to Neb. Rev. Stat. § 28-105.02 (Reissue 2016). A resentencing hearing was set for January 4, 2016.

### 2. Resentencing Hearing

At the resentencing hearing, Nollen's counsel argued that Nollen should receive a lesser sentence because of mitigating circumstances at the time of the crime and because Nollen's character had been reformed while he was in prison. In summarizing the evidence presented at the resentencing hearing, we take a chronological approach. We first review the evidence of mitigating circumstances leading up to Nollen's offense. We next review the evidence of the offense, Nollen's

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[2] *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

[3] *Id.*

[4] *Miller v. Alabama, supra* note 1.

confession and conviction, Nollen's time in prison, and the results of a comprehensive mental health examination conducted on Nollen in 2015. Finally, we set forth the facts concerning the district court's disposition of this case.

(a) Mitigating Circumstances

The evidence of mitigating circumstances comes mostly from the presentence report. According to the presentence report, Nollen ran away from home on December 31, 1982—11 days before the events leading to his conviction. Nollen reported that at the time of his offense, his father was an alcoholic and was physically abusive toward Nollen and his mother. His mother was also an alcoholic.

In 1983, Nollen's neighbors gave written statements indicating that there was "constant fighting" within Nollen's home and that Nollen was often left home alone with his younger sister. One neighbor stated that Nollen "always seemed eager to do things with [the neighbor's] family" and would sometimes visit just to "get away from home when there were family problems." Other Blair, Nebraska, citizens were aware of Nollen's parents' drinking problems and that Nollen's homelife was "not very pleasant." Records indicate that the police received several calls regarding the Nollen residence for such things as child abuse and neglect. Due to a fire, however, reports made in connection with those calls are not available.

On January 3 or 4, 1983 (2 to 3 days after Nollen left his home), Nollen dropped out of school. He was in his senior year. Nollen reported that high school was "'rough,'" that he didn't "'fit in,'" and that other students made fun of him for wearing "hand-me-down" clothing.

On January 5, 1983, Smith attended a church choir rehearsal in Blair. According to a statement made by the director of the choir, Nollen went to her and informed her of his plans to run away to Missouri with his friend, Smith. The director and the director's mother, who was an accompanist for the group, asked Nollen if he wanted to talk to the reverend about it. The

director's mother found the reverend, and the three of them talked to Nollen about why he wanted to run away. Nollen talked about "bad family life—parents drinking, parents taking his money, no one ever caring." Although the three adults tried to convince Nollen to finish school and stay home at least until he was 18, Nollen stated that he was "'at the end of [his] rope.'"

(b) The Offense

The following version of the offense is taken primarily from Nollen's 2007 application for commutation, which was admitted into evidence at his resentencing hearing. The application was also admitted into evidence at Smith's resentencing hearing. Accordingly, the facts set forth below are almost identical to those set forth in this court's opinion disposing of Smith's appeal.[5]

On January 11, 1983, Nollen was living with his friend Smith's older brother and the older brother's girlfriend. Nollen had "a bit of a crush" on her and accompanied her to Omaha, Nebraska, for a job interview. On the way back to Blair from Omaha, she asked Nollen if he knew where they could get $50 to pay a gas bill. Nollen thought for a while and came up with the idea to rob a doughnut shop in Blair. He had worked there previously and was familiar with the layout. When Nollen worked there, the money from a day's sales was left in the store overnight and deposited the next morning by the owner. Nollen explained in the application, "[A]ll I would have to do is go in the back door, go down stairs to the basement and wait until everyone left. Then, go upstairs, get the money and leave . . . ." Smith's older brother's girlfriend agreed to the plan, but told Nollen not to tell Smith's older brother because he would not approve.

When Smith's older brother's girlfriend and Nollen returned to Smith's residence, Nollen told Smith about the plan and asked Smith if he wanted to go with him. Smith said he did.

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[5] See *State v. Smith*, 295 Neb. 957, 892 N.W.2d 52 (2017).

At around 3 p.m. on January 11, 1983, Smith and Nollen went into the doughnut shop to see who was working. It was 21-year-old Mary Jo. After Smith and Nollen talked to Mary Jo briefly, they left the doughnut shop through the front door, walked around to the back alley, through a back door of the doughnut shop, and into the basement of the shop.

Smith and Nollen waited in the basement. They "smoked a couple bowls of pot and talked about how pretty Mary Jo is." Nollen made a comment "about the only way [they] would have a chance with her would be to take it." Smith asked Nollen if he wanted to, and Nollen laughed and said "okay." According to Nollen, they got up and walked toward the stairs and Nollen then stopped and said, "[F]___ that, if we did that we would have to kill her so she wouldn't tell on us." Smith and Nollen went back and sat down again.

Smith and Nollen did not talk much for the next hour or so. During that time, Nollen thought about how pretty Mary Jo was and "how nice it would be to have sex with her." Nollen knew Mary Jo from school. Nollen wrote, "She had the reputation of being really quiet, shy - a loner but popular. She never had a boyfriend, so I was thinking if I had sex with her and messed up, she would never know because she has never been with anyone." Nollen "fell asleep thinking about [Mary Jo]," and Smith woke him up about an hour later.

Because neither Smith nor Nollen had a watch, neither one knew how long they had been waiting. Without knowing what time it was, they walked upstairs to see if they could hear anything. They determined that the store was closed, because Mary Jo was in the office. Nollen could hear her counting the money and told Smith that she was getting the money ready for deposit. He explained that this meant that she would take it to the bank and there would be only $20 left in the register (instead of about $200). Nollen asked Smith what he wanted to do, and Smith said, "[L]et's get it all."

Smith ran to the stairs and hid, and Nollen waited by the office door. After Mary Jo saw Nollen, Nollen walked up to

her and put his hand over her mouth so she would not scream. Nollen took her out to the hallway and instructed Smith to go and get the money. Smith got the money and put it in his pockets.

Nollen asked Mary Jo about her car, and she told him where it was. Nollen told Smith that he was going to get the car and that when Nollen honked the horn, Smith was to come out with Mary Jo. Smith complied. After the two of them got into the car with Nollen, he drove off. They stopped at a gas station, and Smith got out and put gas in the car, then went in and paid for it. After they left the gas station, Smith said he wanted to drive, so Smith and Nollen changed places. Smith drove around country roads while Nollen went through Mary Jo's purse, took $20 and gave it to Smith, then threw her purse and its contents out the window.

Mary Jo had been sitting on the center console, so Nollen told her she could sit on his lap and pulled her toward him. Mary Jo slid over and sat on one of Nollen's legs. According to Nollen, he started thinking about having sex with Mary Jo again. He wrote, "It was really intense now, because I could smell her perfume and feel how soft her skin is." Nollen told Smith to pull over, and Smith complied. Nollen forced Mary Jo into the back seat and climbed back there with her. He told Mary Jo to take her clothes off. At first, she did not comply, but then Nollen told her angrily "so she would listen." Eventually Mary Jo complied. Nollen got on top of Mary Jo and penetrated her with his fingers while Mary Jo tried to push him away and asked him to stop. Nollen then tried to penetrate her with his penis, but was unsuccessful because Mary Jo "was pushing on [his] sides." Nollen wrote, "I was mad because I was not getting what I wanted, so I rubbed against her until I got off."

Nollen then asked Smith "if he wanted to come back" with Mary Jo, and Smith said that he did. The two switched places. Nollen said that he could hear Smith telling Mary Jo to kiss him and that he then "turned the radio up and started to figure

out how [they] were going to get out of this." Nollen said he "knew that the only way would be to kill Mary Jo but, [he] did not know how it would happen."

Eventually, Smith and Nollen traded places again, and Smith drove the car back toward Blair. Nollen told Mary Jo to get dressed, and he tied her hands up with a ribbon that had been around her neck. Nollen then got back in the front seat of the car. Smith drove the car through Blair to a trailer park "by the river."

Smith and Nollen got out of the car and looked around. Nollen wrote, "We did not talk but, I think we both knew what was going to happen. I look at the bridge and thought we could throw her over the side. So I told [Smith] that when we get half way [sic] over the bridge to stop [and] he said okay . . . ." When they got halfway across the bridge, Nollen got "really scared" and worried that someone might see, so he told Smith to keep driving. Smith drove across the bridge and turned to go underneath it. They pulled up to a dock by the river. Nollen got out of the car, and Smith followed.

Nollen wrote, "I figured, I would kill her by stabbing her." Nollen asked Smith for a knife that he had taken from the doughnut shop, and Smith gave it to him. Nollen pulled the passenger seat forward and looked at Mary Jo. When Nollen brought the knife toward Mary Jo, she screamed and started crying. Nollen looked at her and told her he was sorry. She kept crying, and Nollen threw the knife into the river and told her, "'[S]ee, I [sic] not going to hurt you.'" Nollen wrote that he looked at Smith and said he could not do it. According to Nollen, "[Smith] shrugged and leaned into the car. The car jumped forward and I jumped back. The car rolled down the dock into the river. I seen the car hit the water and I just stood there." Nollen then told Smith that they "needed to get the hell out of there." The car was still floating in the water when they left.

This version of events is largely consistent with the version that Nollen told the police after he was convicted and

sentenced in January 1983. In 1983, Nollen added that Smith had rolled down the driver's side window all the way. Before Smith put the car into gear to drive into the river, Nollen told Smith to roll it up so that it was open only 3 inches. The passenger's side was also open about 3 inches.

(c) Nollen's Confession and Conviction

The day after the offense, Smith and Nollen went to a bowling alley with Smith's older brother and his girlfriend. After an emotional encounter with Nollen's parents, Nollen hugged Smith's older brother and started shaking. He told Smith, "'I've got to tell him. I've got to tell him.'" Smith told Nollen to go ahead. Nollen told Smith's older brother about how they had robbed the doughnut shop and "killed a girl." Early the next morning, Smith's older brother took Smith and Nollen to the Blair Police Department, where they were arrested.

Before questioning Smith and Nollen, police waited for their parents to arrive. An officer contacted Nollen's mother to tell her that her son was in custody and to ask her to come to the station. She asked what he was being charged with, and the officer advised her that he was being charged with murder but would not explain further over the telephone. She stated, "[Y]ou will or else." The officer explained that he was very busy and could not continue arguing over the telephone. Nollen's mother then asked the officer what he was "trying to pull" and told him he was "pushing [his] luck." The officer thanked her and hung up. Five minutes later, Nollen's father called the officer, demanding the details of the charge. The officer asked the father to come to the station, but he refused.

Eventually, Nollen's parents were persuaded to come to the station. After an officer "read the *Miranda* warnings" to Nollen and his parents, the parents stated that they did not want Nollen to answer any questions without an attorney. Police honored the request and did not ask Nollen any questions.

Prior to Nollen's plea hearing, Nollen was evaluated for competency. The evaluator concluded that Nollen was competent to assist in his own defense. He diagnosed Nollen with "Conduct Disorder-Socialized, Aggressive," noting that "[w]ere [Nollen] 18, [he] would seriously consider a diagnosis of Antisocial Personality Disorder."

On January 24, 1983, Nollen pled guilty to first degree murder, a Class IA felony, which carried a mandatory sentence of life imprisonment. In exchange for Nollen's plea, the county attorney agreed to drop charges of kidnapping, sexual assault, robbery, and burglary. Nollen waived his right to a presentence investigation and was thus sentenced the same day he entered his guilty plea.

(d) Time in Prison

Since Nollen began serving his sentence in 1983, he has earned his diploma through the GED program and earned an associate degree in business administration from a community college. He has also earned a number of institutional programming certificates. Nollen completed an inpatient sex offender program, generic outpatient levels format programming, and substance abuse programming.

At the resentencing hearing, Nollen called three Department of Correctional Services (DCS) employees to testify about the programs he participated in and the employees' impressions of Nollen as an inmate. Their testimony is summarized below.

*(i) David Erickson*

David Erickson began working as an officer for DCS in 1997 and became familiar with Nollen around that time. Sometime during or prior to 2000, Erickson became a housing unit manager and was assigned to manage Nollen's unit. During the 4 to 5 years that Erickson served as Nollen's housing unit manager, Erickson interacted with Nollen on a daily basis and was aware of some of the activities Nollen was involved in. For example, Erickson was aware that Nollen was "heavily involved" in

Bible studies that took place in the yard and also with a Sunday night worship group.

Nollen was also selected to serve as the representative for his unit wing for the unit's "town hall" meetings. In that role, he was responsible for interacting with inmates from his wing to ensure that the wing's grievances were aired. Nollen was selected by staff based on his disciplinary history, his rapport among the staff and inmates in the unit, and his longevity in the unit. Erickson testified that he could not remember a time when Nollen was not the representative for his wing.

Nollen was also selected as one of four or five inmates to work in the unit's supply room. This "high-profile" position requires applicants to interview for the job and go through a vetting process where institutional behavior and programming are considered. According to Erickson, Nollen has held a few other "high-profile" positions, including in a workshop and a medical quarter.

Erickson also testified about Nollen's history of misconduct reports. However, first, Erickson explained the use of "misconduct reports" within the Omaha Correctional Center. He explained that when an inmate is assigned to a housing unit, he or she is given a copy of the housing unit rules. If the inmate violates one of the rules, a misconduct report may be issued. Misconduct reports are issued for such things as loitering in a no-loitering area, use of abusive language, gestures, fighting, et cetera. Erickson testified that it is not uncommon for an inmate to receive 5 to 10 misconduct reports per month.

A printout of Nollen's report history shows that from March 1990 to February 2012 (a period of 22 years), Nollen received five misconduct reports—a number that Erickson described as "extremely minimal." Erickson testified that it was very possible that Nollen had misconduct reports prior to 1990, but that the older reports may not have been added to a newer system.

For the first three instances of misconduct, Nollen received verbal reprimands. According to Erickson, this is one of the

lowest-severity sanctions that can be imposed. Nollen received his fourth misconduct report and a sanction of 10 hours of extra duty for giving another inmate a haircut. Then on February 8, 2012, Nollen received another misconduct report and a sanction of 20 hours' extra duty for "disruption." According to Erickson, Nollen got into a nonphysical argument with a supervisor in one of the shops in which Nollen worked.

When asked how he would describe Nollen as an inmate, Erickson stated that "[H]is behavior has been more than acceptable. I can't recall an issue, basically, any disciplinary matter with him of an aggressive or violent sense . . . . [H]e does not get in trouble. He is very diligent in his duties. He receives above-average work reports." Erickson added that Nollen was a "leader amongst the inmates" and that he communicated positively with other inmates. Erickson testified that Nollen's interactions with staff and other inmates have been of a professional manner.

*(ii) David Hanson*

David Hanson has worked as the "East Gate officer" at the Omaha Correctional Center for the 2½ to 3 years preceding trial. His job includes supervising inmates in the area near the center's east gate, which is where the supply room and all the shops are located. Hanson testified that he interacted with Nollen on a daily basis, discussing such things as the weather, issues with Nollen's family, religious topics, and Nollen's guitar playing.

When asked how Hanson would describe Nollen as an inmate, Hanson said, "Nollen [is] a very cooperative inmate. I've had no issues with him. He's always been very respectful not only of myself, but other individuals, whether it be other inmates, other people that he's working with, or . . . the civilian vendors that come in. His demeanor has been pleasant."

*(iii) Cassandra McCutcheon*

Cassandra McCutcheon is a caseworker whose primary responsibilities concerned the safety and sanitation of the

inmates housed within Nollen's unit. Since 2014, McCutcheon had interacted with Nollen on a daily basis and was familiar with some of the activities that Nollen had been involved in.

McCutcheon testified that Nollen participated in a foster dog program in which he cared for and trained dogs waiting to be adopted from the Nebraska Humane Society. To participate in the program, an inmate must interview for the position and meet certain standards regarding his or her classification and history of misconduct reports. The applicants are then selected by both DCS and the Nebraska Humane Society staff. Out of 160 inmates, Nollen was selected as one of 10 dog handlers. McCutcheon described Nollen as being "very good with dogs" and stated that he was patient, kind, and gentle with the dogs.

As for other evidence of Nollen's time in prison, the State offered an exhibit entitled "Psych Evaluations and Data." The exhibit includes assessments conducted on Nollen while he was incarcerated, including a number of "Multiphasic Sex Inventory" assessments ranging from 1986 to 1997. In its brief on appeal, the State asserts that these assessments suggest that Nollen had sexually deviant interests. In Nollen's reply, he argues that no witness testified "about the accuracy, meaning, and significance" of these random "excerpts" pulled from Nollen's record and that therefore, the State is asking the court to speculate about the almost 20-year-old assessments.[6]

The exhibit also includes a psychological evaluation performed on Nollen in 1993. The psychologist performing the evaluation concluded:

> Nollen appears to have a number of personality features characteristic of an anti-social personality. He is impulsive and egocentric. He tends to lack concern about the welfare of others and has trouble dealing with rules and authority. He appears to be at a stage of treatment where he is aware of some of the problem areas, and is

[6] Reply brief for appellant at 1.

> attempting to deal with such in rather superficial ways. . . . Nollen also has a big problem with the abuse of alcohol. He has shown some interest in self-improvement by taking vocational and college classes, and by participating in mental health programming. He has held the carpentry shop work assignment since 1986. In view of . . . Nollen's achievements and satisfactory institutional adjustment, this study can support the idea of promotion to Minimum A custody.

(e) 2015 Mental Health Examination

In 2015, Dr. Kirk Newring performed a comprehensive mental health examination on Nollen. Newring is a psychologist working in Papillion, Nebraska, specializing in court-involved mental health and behavioral health. In conducting Nollen's examination, Newring attempted to address the following mitigating factors, which are set forth in § 28-105.02(2):

> (a) The convicted person's age at the time of the offense;
>
> (b) The impetuosity of the convicted person;
>
> (c) The convicted person's family and community environment;
>
> (d) The convicted person's ability to appreciate the risks and consequences of the conduct; [and]
>
> (e) The convicted person's intellectual capacity[.]

In addition to evaluating the above factors and how they contributed to Nollen's offense, Newring also assessed Nollen's risk of future violence and future sexual violence. Newring then submitted a report with his findings and conclusions, and he also testified at the resentencing hearing.

*(i) Age*

Nollen was 17 years old at the time of the offense. Newring testified that this was significant for sentencing purposes, because "what we know about neuropsychological development now is that the executive functioning, the decision-making capacities, are not fully formed until a person is age

25." According to Newring, at 17, Nollen's brain was not fully developed and Nollen was thus more likely to act impulsively and take risks.

As evidence of the research on the neuropsychological development of adolescents, Newring attached to his report an amici curiae brief filed by the American Psychological Association, amongst others, in *Graham*.[7] That brief was also an exhibit in *State v. Smith*,[8] and we summarized its content in that case.

*(ii) Impetuosity*

According to Newring, in psychology, "impetuosity" refers to "the person's impulsivity, decision-making, and deliberative processes." Newring testified that juveniles typically tend to be more impulsive than adults because the prefrontal cortex of the brain is not fully developed. The prefrontal cortex is the portion of the brain responsible for executive functioning, decisionmaking, and the weighing of risks and rewards. Newring testified that with the influence of testosterone, "an adolescent male is going to have great difficulty inhibiting or stopping behavior, especially when there's goal-driven behavior, where there's a physical reward, a tangible reward, or a sexual reward clearly present."

Although "the benefit-seeking system is raging" for all adolescents, Newring admitted that most adolescents "don't go out and do the things . . . Nollen did." He testified that risk factors of youthful violence include exposure to violence in the home, substance abuse, "delinquent peer group," and poor school achievement. Newring testified that all risk factors were present in Nollen's case.

On cross-examination, Newring was asked why none of Nollen's siblings, who grew up in the same environment, committed acts such as Nollen. Newring stated that the primary

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[7] *Graham v. Florida, supra* note 2.

[8] See *State v. Smith, supra* note 5.

reason was that "they're women and women tend to engage in violent acts less often than men." But Newring added, "It's my understanding that both [of Nollen's] sisters have had psychological struggles over their entire lives."

According to Newring, Nollen's problem-solving approach at age 17 suggested that Nollen was "an impetuous young man" whose planning and deliberate processes were focused on the next 24 hours or less. Newring explained that as an adolescent, Nollen tended to run away from his problems (e.g., literally running away from home or "pour[ing] booze" on his psychological pain). If he did not run away from his problems, he took short-term solutions (e.g., stealing money, rather than getting a job and saving money). Newring testified that Nollen's way of dealing with his problems suggested that Nollen's underdeveloped brain allowed him to see only immediate and short-term solutions rather than long-term or more global solutions. When applied to the challenges Nollen faced on the day of the offense, Newring testified, it resulted in a series of bad decisions that led to the only option Nollen could see: Mary Jo's death.

*(iii) Family and Community Environment*

In relation to Nollen's family and community environment, Newring testified:

> [Nollen] grew up in a home where the mother and father liked to go out and drink, come home, and it was described more often that the mother would initiate a verbal fight, the father would return with a physical aggressive move, and that [Nollen] would sometimes try and break it up and get involved.
>
> [Nollen] was beaten up by his dad, [Nollen] was involved in fights with his mom and dad, his older sister was involved in fights with mom and dad, [Nollen] and his older sister were left to raise themselves and their younger sister. This all suggests as a young man [Nollen] was tasked with psychological social development burdens that he was not equipped to address.

. . . .

> Those are the things that stood out about [Nollen's] early childhood social history, the large amount of family conflict, the modeling of substance abuse, and that family members spoke of [Nollen's] yearning to escape the house and yearning for some healthy guidance.

Newring noted that Nollen was "almost desperate to get the approval of others." Because Nollen came from a poor family and was picked on by peers at school, "the only peer group [Nollen] could find [was] these over-malcontent and delinquents, and that's where he was able to find a harbor in the storm." Newring testified that "[p]leasing this group led to increased substance abuse, just as was modeled at home, increasing in rule-breaking behavior because that's what was modeled by this peer group, and these activities are consistent with what we know about peer pressure and peer influences in late adolescence in males."

As for peer pressure, Newring testified that since the time of the research that informed the Supreme Court ruling in *Miller*, followup studies have shown that "it's not just direct peer influence, but the perception of peer influence."[9] Newring explained, "[I]t's not just my peers told me I need to drink, but I hold the belief that my peers expect me to drink." Newring related this to Nollen and his codefendant, Smith, opining that neither of them had a plan with respect to Mary Jo, but that both went along with what they thought was expected of them.

*(iv) Ability to Appreciate Risks and Evaluate Consequences*

Newring testified that although juveniles may be able to identify risks and consequences, they may be unable to balance risks and rewards the same way a fully formed adult would. As to Nollen's ability to appreciate risks and consequences, Newring reported:

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[9] See *Miller v. Alabama, supra* note 1.

> [Nollen]'s plan was poorly-conceived, and he clearly demonstrated an inability to assess the risk and likely outcomes of his actions; each decision point led him to cho[o]se the next immediate solution that was availed to him. After he was committed to the robbery, each poor decision further compounded his error, leaving him with no (at the time) readily perceptible alternative.

*(v) Intellectual Capacity*

As for Nollen's intellectual capacity, Newring testified that Nollen's intellectual deficits at the time of the crime impacted his ability to generate solutions and articulate his needs. Newring noted a relative deficit in Nollen's verbal intelligence, which he attributed to Nollen's adverse childhood experiences.

At the resentencing hearing, Newring was confronted with the statement made by the competency evaluator in 1983 that had Nollen been 18, the evaluator would seriously consider a diagnosis of antisocial personality disorder. Newring testified that back in 1983, it was believed that when a subject's performance score exceeded his or her verbal score by a certain number (as Nollen's did by 11), such a differential was indicative of individuals who act out frustrations, such as sociopaths and juvenile delinquents. Newring explained current research shows that poor verbal scores can instead be linked to adverse childhood experience. He explained that children enduring trauma must focus more on day-to-day survival and adapting to stress rather than building the neuroconnections that allow verbal skills to be strengthened. Newring testified that Nollen's scores were consistent with those of a person who had a history of childhood abuse, neglect, and trauma.

*(vi) Risk Assessment*

Newring testified that Nollen is "low risk" for future acts of violence, is less likely than the average male in the community to have psychopathy, and suffers from no major health disorder. Newring noted that the clinical violent

offender review team at DCS recommended no further treatment for Nollen.

Newring also testified that Nollen was "low risk" for recidivism in terms of a sex offense. This assessment was based on Nollen's scores from two different instruments. However, Newring admitted that Nollen was at a higher risk of recidivism compared to men in the general population. He explained that this was because Nollen had been adjudicated and that after 10 years, Nollen's assessed risk for reoffense will be equal to the community level. Newring also noted that although the inpatient sex offender program's clinical review team is "very conservative and tend[s] to overrecommend treatment," in Nollen's case, the team recommended no further treatment.

On cross-examination, Newring was asked if he recalled seeing a report from 1988 that indicated Nollen had rape fantasies about prison staff. Newring responded that he recalled "discussions of sexual fantasies involving staff, and typically at the time staff would have referred to that as rape fantasies because it couldn't be a consensual act." Newring testified that he and Nollen had discussed Nollen's romantic fantasies and that none of the fantasies were exploitive, aberrant, or unusual. Additionally, after conducting an assessment to identify atypical or disordered sexual behavior and paraphilic interests, Newring reported that Nollen's scores were generally within normal limits.

*(vii) Newring's Conclusion*

In his report, Newring concluded:

> [T]he acts that led to . . . Nollen's conviction are rooted in his history of adverse childhood experience, emotional avoidance, substance abuse, poor school achievement, and seeking the approval of antisocial peers. His actions were the result of impulsive adolescent-decision-making, in which he failed to consider the negative outcomes, and compounded each reckless decision with an even worse decision, ultimately resulting in the death of his victim. . . . Nollen has appreciated a benefit from his

> incarceration. The undersigned can find no barriers to . . . Nollen's positive reintegration to society, should . . . Nollen be afforded such an opportunity.

### 3. Disposition

Before announcing Nollen's sentence, the district court stated that it considered the mitigating factors set forth in § 28-105.02, Nollen's presentence report, and the evidence adduced by the State and by Nollen. The court then stated:

> I thought long and hard about this and the difficulty I have is the premeditation that took place over a several-hour period.
>
> And I understand your argument, . . . but there were thoughts of this several hours earlier as they were in the basement of the donut shop and it causes me great concern in this case.
>
> Premeditation means a design formed to do something before it's done. Certainly there was a plan to burglarize, that was the day before. Then there was an initial discussion between the two of you in the basement where you were talking about having sexual intercourse with her, and there were comments made that if you did that she would have to be killed to keep her quiet. . . .
>
> . . . .
>
> The evidence, which primarily came from statements made by you, is clear that over a several-hour period you had numerous opportunities to avoid the final decision to murder [Mary Jo].
>
> In determining what sentence ought to be imposed upon the defendant, this Court has considered the nature and circumstances of the crime, the history and character and condition of the defendant, including the defendant's age, mentality, education, experience, and social and cultural background, all as back on January 11th, 1983, the date of the original offense.
>
> The Court also considered the lack of a previous criminal record of you. I considered the motivation for the

offense, as well as the nature of the offense and the violence involved in the commission of the crime.

. . . .

The Court finds that imprisonment is necessary because the offender is in need of correctional treatment that can be provided most effectively by a commitment to a correctional facility, and a lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for the law.

The Court recognizes and acknowledges the statements that you make today. The Court also recognizes and acknowledges the efforts that you've made to improve yourself over the last 33 years of incarceration.

I'm also acknowledging and recognizing that you were 17 years old at the time of the murder and I also recognize and acknowledge the mitigating qualities of youth and your troubled family life as testified to by . . . Newring, which includes the frontal — prefrontal cortex development of youth, and I recognize all of that and the science that goes with that. I recognize those as mitigating factors.

As an aggravating factor however, . . . the manner in which [Mary Jo] was abducted, abused, and terrorized over a significant period of time prior to her death and your utter disregard at that time for her life and the manner of her death shows a depravity and callousness which even to this day is chilling to contemplate.

The court then sentenced Nollen to 90 years' to life imprisonment. Nollen appeals this sentence.

After Nollen filed his brief on appeal, he also filed a motion requesting that this court either remand the cause or allow for supplemental briefing. The basis for Nollen's request was that both parties had argued their positions under the assumption that the current good time law would apply and that Nollen would be parole eligible at age 62. However, DCS has apparently recalculated Nollen's parole eligibility according to the 1983 good time law, which would make Nollen parole eligible

at age 78. In his motion, Nollen argued that this age difference for parole eligibility may affect our decision as to the constitutionality of his sentence and that the parties should be allowed an opportunity to argue which good time law should apply. We overruled Nollen's request for a remand, but sustained the motion for supplemental briefing.

## III. ASSIGNMENTS OF ERROR

Nollen assigns, reordered and restated, that the district court erred in imposing a sentence that (1) constitutes a "de facto life sentence" in violation of the 8th and 14th Amendments to the U.S. Constitution and of article I, §§ 9 and 15, of the Nebraska Constitution and (2) is unconstitutionally disproportionate to Nollen's offense in light of his age, age-related characteristics, and proven reform. Nollen also assigns that (3) the district court denied him due process by imposing his sentence without demonstrating "[m]eaningful [c]onsideration to [h]is [a]ge or [a]ge-[r]elated [c]haracteristics."[10]

## IV. STANDARD OF REVIEW

[1,2] Whether a sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment presents a question of law.[11] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.[12]

## V. ANALYSIS

All three of Nollen's assignments of error relate to his sentence. Nollen tells us that in order to decide the constitutionality of his sentence, we must first determine his parole eligibility date, i.e., whether the current good time law or the 1983 good time law applies.

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[10] Brief for appellant at 25.

[11] See *State v. Mantich*, 287 Neb. 320, 842 N.W.2d 716 (2014).

[12] *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009); *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008).

1. Good Time Law

[3,4] We note that this same issue concerning good time law presented itself in *State v. Smith*.[13] In *Smith*, we cited *State v. Schrein*[14] for the proposition that the good time law to be applied to the defendant's sentence is the law in effect at the time the defendant's sentence becomes final. A defendant's sentence becomes final on the date that the appellate court enters its mandate concerning the defendant's appeal, if there is indeed an appeal.[15] If no appeal is taken from the judgment, that judgment becomes final.[16] In *Smith*, we concluded that the sentence the defendant received in 1983 could not become final in 1983 because it was unconstitutional and void, and therefore constituted "no sentence."[17] Accordingly, we concluded that the defendant's new, valid sentence would become final on the date we issued the mandate concerning his appeal and that therefore, the current good time law applied to his sentence.

[5] Although *Smith* was decided within the framework of a habeas corpus proceeding, its principle applies to this postconviction action because Nollen's sentence is also unconstitutional and void.[18] In *Montgomery v. Louisiana*,[19] the U.S. Supreme Court held that a sentence imposed in violation of a substantive constitutional rule is not merely erroneous, but void. This was the case with Nollen's original sentence, which was imposed pursuant to a statute later found to be unconstitutional as applied to Nollen.[20] Although Nollen's

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[13] *State v. Smith, supra* note 5.

[14] *State v. Schrein*, 247 Neb. 256, 526 N.W.2d 420 (1995).

[15] See *id*.

[16] See *id.*

[17] *State v. Smith, supra* note 5, 295 Neb. at 974, 892 N.W.2d at 63.

[18] See *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016).

[19] *Id.*

[20] See *Miller v. Alabama, supra* note 1.

original sentence is void under the circumstances in this case, we note that the result may be different where a sentence is imposed pursuant to a *procedural* error later found to be unconstitutional. Then, such sentence is not automatically invalidated.[21]

The State does not address the impact of Nollen's sentence's being void, but, rather, contends that Nollen's sentence became final in 1983 and that the issue is controlled by *Duff v. Clarke*.[22] We disagree with the State.

*Duff* involved a defendant who was originally sentenced in 1988 to 12 to 20 years' imprisonment for first degree sexual assault of a child. While he was serving his sentence, the Convicted Sex Offender Act[23] was enacted, as well as a new good time law. In 1992, he elected to be resentenced pursuant to § 29-2934(4) (Cum. Supp. 1994) of that act. Upon reviewing an updated presentence investigation, the district court ordered the defendant to continue serving the remainder of his original sentence. He filed a motion for declaratory judgment seeking a determination that the new good time law applied to his "new" sentence. On appeal, we affirmed the district court's determination that the 1988 good time law applied to his sentence. We held that the good time law applicable at the time an offender starts serving his sentence controls good time computation regardless of whether the offender is resentenced pursuant to the Convicted Sex Offender Act.

The facts in *Duff* are clearly distinguishable from the facts presented here. Therein, the original sentence was not unconstitutional, nor was it void. Instead, the defendant merely elected to be resentenced pursuant to the Convicted Sex Offender Act. This election in 1992 did not change the finality of the sentence imposed in 1988. On the other hand, herein, Nollen's original sentence, imposed in 1983, is void

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[21] *Montgomery v. Louisiana, supra* note 18.

[22] *Duff v. Clarke*, 247 Neb. 345, 526 N.W.2d 664 (1995).

[23] See Neb. Rev. Stat. §§ 29-2922 to 29-2936 (Reissue 2016).

and unconstitutional.[24] As we explained in *Smith*, a void sentence is no sentence.[25] Because Nollen's 1983 sentence is "no sentence," it cannot be said that his sentence became final in 1983. Instead, his sentence will become final on the date that this court enters its mandate concerning this appeal.[26] As such, the current good time law applies to Nollen's sentence and he will be parole eligible at age 62.

### 2. Nollen's Sentence

[6,7] Before proceeding to Nollen's arguments about his sentence, we first set forth the law on juvenile sentencing. In *Graham*, the U.S. Supreme Court held that it is unconstitutional for a state to impose a sentence of life imprisonment without parole on a juvenile convicted of a nonhomicide offense.[27] The *Graham* Court explained that the Constitution requires that those juvenile offenders be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[28]

[8] Two years later, in *Miller*, the Court declined to extend that categorical bar of no life-without-parole sentences to juveniles convicted of homicide.[29] Although the possibility of a life-without-parole sentence for a juvenile was not foreclosed, the Court said that a sentencer must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[30] The Court had explained that a lifetime in prison is

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[24] See, *Montgomery v. Louisiana, supra* note 18; *Miller v. Alabama, supra* note 1.

[25] See *State v. Smith, supra* note 5.

[26] See, *id.*; *State v. Schrein, supra* note 14.

[27] *Graham v. Florida, supra* note 2.

[28] *Id.*, 560 U.S. at 75.

[29] *Miller v. Alabama, supra* note 1. See *State v. Mantich*, 295 Neb. 407, 888 N.W.2d 376 (2016).

[30] *Miller v. Alabama, supra* note 1, 567 U.S. at 480.

a disproportionate sentence for all but the rarest of children, those whose crimes reflect "'"irreparable corruption."'"[31]

In response to *Miller*, the Legislature amended Nebraska's sentencing laws for juveniles convicted of first degree murder.[32] Rather than imposing a mandatory sentence of life imprisonment, the sentencing scheme now provides that juveniles convicted of first degree murder are to be sentenced to a "maximum sentence of not greater than life imprisonment and a minimum sentence of not less than forty years' imprisonment."[33] In determining the sentence, the sentencing judge must "consider mitigating factors which led to the commission of the offense."[34] Section 28-105.02(2) sets forth a nonexhaustive list of mitigating factors for the court to consider.

(a) Application of *Graham* and *Miller*

Nollen first argues that his sentence is unconstitutional because it does not allow him parole eligibility until age 62 and therefore denies him a "meaningful opportunity to obtain release" under *Graham*.[35] Although we have recently held that such a sentence *does* provide a meaningful opportunity for release,[36] we note that the Constitution does not require that Nollen be afforded such an opportunity.

[9] Nollen further argues that he is entitled to the "meaningful opportunity" requirement because felony murder is a nonhomicide offense. However, we recently decided *State v. Mantich*,[37] wherein we held that felony murder is a homicide

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[31] *Montgomery v. Louisiana, supra* note 18, 136 S. Ct. at 726.

[32] *State v. Garza*, 295 Neb. 434, 888 N.W.2d 526 (2016). See, also, § 28-105.02.

[33] § 28-105.02(1).

[34] § 28-105.02(2).

[35] *Graham v. Florida, supra* note 2, 560 U.S. at 75.

[36] See *State v. Smith, supra* note 5.

[37] *State v. Mantich, supra* note 29.

offense for purposes of Eighth Amendment sentencing analysis. Accordingly, Nollen's sentence is governed by *Miller*.

Under *Miller*, as stated above, a juvenile offender convicted of a homicide offense may be sentenced to life imprisonment without parole so long as the sentencer considered specific, individualized factors before handing down that sentence.[38] Here, Nollen was sentenced not to life imprisonment without parole, but to imprisonment for a term of years that allows for parole eligibility. Furthermore, the district court considered the traditional sentencing factors, along with the mitigating factors set forth in § 28-105.02(2). We conclude that Nollen's sentence does not violate *Miller* and that therefore, Nollen's first assignment of error is without merit.

(b) Proportionality

[10] Nollen next assigns that his sentence was disproportionate in light of his age and age-related characteristics. We disagree. The Eighth Amendment does not require strict proportionality between crime and sentence, but, rather, forbids only extreme sentences that are "grossly disproportionate" to the crime.[39] In this case, Nollen abducted, raped, and terrorized Mary Jo over a significant period of time prior to her death. The evidence suggests that she was conscious with her arms tied behind her back as the car sank into the ice-cold Missouri River. On these facts, Nollen's sentence was not disproportionate, and his second assignment of error is without merit.

(c) Procedural Safeguards

Finally, Nollen assigns that he was denied due process because the sentencing court failed to "[d]emonstrate [m]eaningful [c]onsideration to [h]is [a]ge or [a]ge-[r]elated [c]haracteristics"[40] and failed to use adequate procedural

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[38] *Miller v. Alabama, supra* note 1. See, also, *State v. Mantich, supra* note 11.

[39] *Ewing v. California*, 538 U.S. 11, 23, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003). See, also, *State v. Mantich, supra* note 29.

[40] Brief for appellant at 25.

safeguards when sentencing him. We discuss each of these assertions separately and find both to be without merit.

First, we disagree that the sentencing court failed to demonstrate meaningful consideration of mitigating factors, such as Nollen's age-related characteristics. Conversely, before it announced Nollen's sentence, the district court stated:

> The Court recognizes and acknowledges the statements that you make today. The Court also recognizes and acknowledges the efforts that you've made to improve yourself over the last 33 years of incarceration.
>
> I'm also acknowledging and recognizing that you were 17 years old at the time of the murder and I also recognize and acknowledge the mitigating qualities of youth and your troubled family life . . . .

As an aggravating factor, however, the district court recalled the manner in which Nollen terrorized Mary Jo prior to her death. The district court found that Nollen's "utter disregard at that time for her life and the manner of her death shows a depravity and callousness which even to this day is chilling to contemplate."

[11] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life.[41] We have reviewed the record and reject Nollen's claim that the district court did not adequately consider his age and age-related characteristics when sentencing him.

We also disagree that the district court failed to use adequate procedural safeguards when sentencing Nollen. Just as the defendant did in the recent case *Mantich*,[42] Nollen asks this court "to establish more precise procedural safeguards to ensure that sentences imposed on juveniles do not exceed

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[41] *State v. Garza, supra* note 32; *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002).

[42] *State v. Mantich, supra* note 29.

constitutional limitations and to facilitate meaningful review by this Court."[43] Specifically, Nollen asks that we "require trial courts to make findings regarding whether a juvenile killed or intended to kill, whether his offense reflects irreparable corruption or transient immaturity, or whether some other penological interest requires a sentence akin to life without parole."[44] After considering almost the same argument in *Mantich*, this court declined to adopt any new procedural safeguards after concluding that our current sentencing procedures for juveniles who have committed homicide offenses is consistent with *Miller* and the Eighth Amendment as it is currently interpreted by the U.S. Supreme Court.[45] We reach the same conclusion here, and we find that Nollen's argument is without merit.

## VI. CONCLUSION

The sentence of the district court is affirmed.

Affirmed.

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[43] Brief for appellant at 30.

[44] *Id.* at 31.

[45] *State v. Mantich, supra* note 29. See *Miller v. Alabama, supra* note 1.




**Nebraska Supreme Court**

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

-- Nebraska Reporter of Decisions

# Lacy J. Donald, appellee, v. Alex S. Donald, appellant.

892 N.W.2d 100

Filed March 17, 2017. No. S-16-547.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.
2. **Evidence: Appeal and Error.** When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Child Custody.** Joint physical custody must be reserved for those cases where, in the judgment of the trial court, the parents are of such maturity that the arrangement will not operate to allow the child to manipulate the parents or confuse the child's sense of direction, and will provide a stable atmosphere for the child to adjust, rather than perpetuating turmoil or custodial wars.
4. ____. Numerous parenting times do not constitute joint physical custody.
5. ____. The paramount consideration in determining child custody is the best interests of the children.
6. **Child Support: Rules of the Supreme Court: Presumptions.** The Nebraska Child Support Guidelines are to be applied as a rebuttable presumption and offer flexibility and guidance rather than a stringent formula.
7. **Divorce: Jurisdiction: Armed Forces.** Federal law precludes a state court, in a dissolution proceeding, from exercising subject matter jurisdiction over Department of Veterans Affairs disability benefits.

8. **Divorce: Property Division: Armed Forces: Pensions: Waiver.** Pursuant to federal law, a state court cannot include the amount of military retirement pay that a veteran waives in order to receive disability benefits as divisible marital property.

Appeal from the District Court for Lancaster County: Steven D. Burns, Judge. Affirmed as modified.

Sean M. Reagan and A. Bree Robbins, of Reagan, Melton & Delaney, L.L.P., for appellant.

Tara L. Gardner and Joel Bacon, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellee.

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

Cassel, J.

## I. INTRODUCTION

Alex S. Donald appeals from a decree dissolving his marriage to Lacy J. Donald. He presents two issues regarding child custody and support, urging that his additional daytime parenting time during Lacy's working hours required a joint physical custody classification and use of the joint custody child support worksheet. As we will explain, the relevant statutes and guidelines dictate otherwise. He presents a third issue regarding classification of his lump-sum disability payment from military service as marital property. Because federal law prevents a state court from doing so, we modify the decree to exclude the payment's proceeds. As so modified, we affirm the decree.

## II. BACKGROUND

### 1. Overview

Approximately 2 years 1 month after Alex and Lacy were married, Lacy filed a complaint for dissolution. There were two minor children born to the parties. At the time of trial, both children were under 4 years of age.

After a 2-day trial, the court awarded legal and physical custody of the children to Lacy, subject to Alex's parenting time, ordered Alex to pay child support, and divided the marital estate. During the marriage, Alex received a lump-sum disability benefit payment from the Department of Veterans Affairs (VA). In dividing the property, the court classified this payment as part of the marital estate and ordered that its proceeds be divided equally.

Because Alex's appeal contests only the award of custody, the child support order, and the classification of the lump-sum disability benefit payment as marital property, we summarize only the facts that are relevant to those issues.

## 2. Child Custody

### (a) Parties' Contentions Below

Both parties testified that prior to their separation, Lacy worked outside of the home while Alex cared for the children during the workday. Alex was injured serving in the military and throughout the marriage was unable to work. By the time of trial, the parties had not reached an agreement regarding the custody arrangement and instead both offered different parenting plans.

Lacy proposed that she receive joint legal custody and primary physical custody of the minor children. Alex proposed joint legal and physical custody.

### (b) District Court's Parenting Plan

The district court did not adopt either party's proposed parenting plan; instead, it incorporated one of its own creation into the decree. The court's plan provided that Alex would have parenting time on alternating weekends—beginning Friday at 5:15 p.m. and ending Sunday at 8:15 a.m.—and 5 weeks of summer parenting time. After the children began attending school, the alternating weekend parenting time would be adjusted to begin on Thursday at the conclusion of school and end on Monday morning at the commencement of school.

The court also found that "[t]here [was] no reason why the daytime parenting time arrangement that occurred before the separation should not continue." Thus, before the children began school, and later during summertime school vacations, Alex would have parenting time every weekday from 7:45 a.m. until 5:15 p.m. Throughout each school year after the children began to attend, Alex's weekday parenting time would begin at the conclusion of school instead of 7:45 a.m.

The parenting plan allocated Alex's parenting time. Alex will have approximately 80 parenting-time overnights a year before the children begin attending school. After that, Alex will have approximately 120 parenting-time overnights a year.

### 3. Child Support

Child support was largely calculated based upon the amount of parenting time allocated between the parties. Because the children would both be in school within 3 years of entry of the decree, the court found that Alex's parenting time would soon "reduce significantly" with the loss of the weekday parenting hours. Therefore, the district court elected to calculate child support based on the parenting-time allocation after the children were in school. The court recognized Alex's additional daytime parenting time prior to the time the children were in school by implementing a downward deviation from the guidelines.

The court calculated child support using a sole custody worksheet and determined Alex's share of child support to be $855 per month. But the court also attached a child support deviation worksheet showing a downward deviation of $200 per month for the time period beginning May 1, 2016, through August 31, 2019. The court did not specifically explain how it calculated the downward deviation but did note that the eldest child would be starting school within 1 year.

### 4. VA Disability Benefit Payment

The parties disputed whether a lump-sum disability benefit payment was marital property subject to division. The lump-sum

payment was for past-due disability benefits after Alex retroactively received an increase in monthly compensation.

(a) Monthly Disability Benefit Payments

Alex received a service-connected injury while deployed and serving in the U.S. Marine Corps in 2008. The VA initially assessed his injury and associated major depressive disorder at 70 percent disability. This assessment entitled him to receive monthly disability benefit payments at a scheduled rate set by the VA.

(b) VA Reevaluation

In November 2015, after the parties had separated, the VA reevaluated Alex's disability. The VA determined that Alex was entitled to "individual unemployability" status because he was "unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities." This meant that although his disability was assessed as a 70-percent disability, the VA would compensate him at the 100-percent disability rate due to his individual unemployability.

The VA made the determination of individual unemployability retroactive to April 2013 and issued a lump-sum payment, totaling $41,906.47, for the disability benefits he should have received at this increased rate. After receiving the lump-sum payment, Alex deposited $30,000 of the payment into a health savings account and the remainder into a checking account.

(c) District Court's Disposition

No evidence or testimony was offered to establish whether Alex was also entitled to retirement benefits or whether the disability benefit payments included or otherwise waived retirement benefits. Nonetheless, the court concluded that the entire lump-sum payment was marital property. After including the lump sum in the marital estate, the court ordered Alex to pay an equalization payment to Lacy, totaling $37,000.

## III. ASSIGNMENTS OF ERROR

Alex assigns that the district court erred in (1) not awarding the parties joint physical and legal custody of the parties' minor children, "taking into consideration the significant amount of parenting time awarded"; (2) not deviating further in the child support calculation; and (3) including Alex's lump-sum disability benefit payment from the VA in the marital estate and dividing the payment equally between the parties.

## IV. STANDARD OF REVIEW

[1] In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.[1]

[2] When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[2]

## V. ANALYSIS

### 1. Child Custody

#### (a) Generally

Alex assigns that the district court erred by not awarding the parties joint physical and legal custody of their minor children, "taking into consideration the significant amount of parenting time awarded to [him]." Although he submits that his parenting plan should have been adopted, he focuses most of his argument on the proper characterization of the custody awarded.

Before turning to his primary arguments, we recall that a statute requires a court, in determining custody and parenting

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[1] *Mamot v. Mamot*, 283 Neb. 659, 813 N.W.2d 440 (2012).

[2] *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006).

arrangements, to consider certain factors relevant to the best interests of the minor child.[3] And we have summarized additional factors that a court may consider in making a child custody determination.[4] We see nothing in the district court's decree to suggest that the court disregarded any appropriate factor.

[3] To the extent that Alex argues for an alternating-week joint physical custody arrangement, we find no abuse of discretion by the district court. Joint physical custody must be reserved for those cases where, in the judgment of the trial court, the parents are of such maturity that the arrangement will not operate to allow the child to manipulate the parents or confuse the child's sense of direction, and will provide a stable atmosphere for the child to adjust, rather than perpetuating turmoil or custodial wars.[5] In this regard, the district court's implicit assessment of witness credibility is particularly important. We now address Alex's primary arguments.

(b) Physical Custody

Alex's assignment of error and argument as it relates to joint physical custody is primarily one of definition. He contends that the significant amount of parenting time awarded warranted a characterization of joint physical custody.

[4] Nebraska's Parenting Act[6] defines joint physical custody as "mutual authority and responsibility of the parents regarding the child's place of residence and the exertion of continuous blocks of parenting time by both parents over the child for significant periods of time."[7] While Alex does have liberal parenting time under the decree with all the

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[3] See, Neb. Rev. Stat. § 43-2923 (Reissue 2016); *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015).

[4] See *Schrag v. Spear, supra* note 3.

[5] *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007).

[6] Neb. Rev. Stat. §§ 43-2920 to 43-2943 (Reissue 2016).

[7] § 43-2922(12).

weekday parenting hours, he does not exercise "continuous blocks of parenting time" for "significant periods of time." And numerous parenting times do not constitute "joint physical custody."[8]

Furthermore, Alex does not challenge the fact that Lacy has the sole authority on the children's place of residence, since they primarily reside with her. Because the parenting plan as ordered does not fit the statutory definition of joint physical custody, the district court did not err in its characterization of the physical custody award. We therefore affirm the physical custody award.

(c) Legal Custody

Alex's argument does not meaningfully distinguish between joint physical and joint legal custody. However, joint legal custody is separate and distinct from joint physical custody; it is "mutual authority and responsibility of the parents for making mutual fundamental decisions regarding the child's welfare, including choices regarding education and health."[9] Therefore, we address it separately.

[5] The paramount consideration in determining child custody is the best interests of the children.[10] At trial, Lacy testified that she has been chiefly responsible for finding and hiring babysitters, enrolling and registering the eldest child in preschool, and arranging for and taking the children to their medical appointments.

Lacy also testified that since the parties' separation, she has had problems working with Alex on dividing and sharing the children's expenses—including the eldest child's preschool registration. On the other hand, Alex testified that he believed

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[8] See *Heesacker v. Heesacker*, 262 Neb. 179, 629 N.W.2d 558 (2001).

[9] § 43-2922(11).

[10] See, generally, Neb. Rev. Stat. § 42-364(3) (Reissue 2016); *Kamal v. Imroz*, 277 Neb. 116, 759 N.W.2d 914 (2009); *Maska v. Maska*, 274 Neb. 629, 742 N.W.2d 492 (2007).

he and Lacy could set aside personal differences to communicate and put the children's best interests first.

Upon our de novo review, we find no abuse of discretion in the district court's determination that it was in the best interests of the children for Lacy to have legal custody. Lacy was primarily responsible for making the big decisions concerning the children prior to the parties' separation. And, during the proceeding's pendency, she was the primary decisionmaker regarding the eldest child's education. We give weight to the fact that the district court heard and observed the witnesses and accepted Lacy's account of the parenting disagreements over Alex's. We affirm the award of legal custody to Lacy.

### 2. Child Support

Alex's argument concerning child support is closely related to his argument concerning child custody. He argues that he was awarded de facto joint custody. And, he contends that the district court should have calculated child support using a joint custody worksheet based on the number of parenting-time hours he was awarded.

The child support guidelines provide a rebuttable presumption that support shall be calculated using a joint custody worksheet when "a specific provision for joint physical custody is ordered and each party's parenting time exceeds 142 days per year."[11] But, no specific provision of joint custody was ordered. Nonetheless, Alex argues that the district court should have deviated from the guidelines and used the joint custody worksheet because his parenting-time hours exceed 142 days per year.

Notably, Alex calculates his days of parenting time by converting the number of parenting-time hours he has with the children into equivalent days. After adding his 35 days of summer parenting time, Alex estimates that he has approximately

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[11] Neb. Ct. R. § 4-212 (rev. 2011).

180 total days of parenting time per year before the children attend school.

[6] While the Nebraska Child Support Guidelines are to be applied as a rebuttable presumption and offer flexibility and guidance rather than a stringent formula,[12] we do not believe that the guidelines can be construed so as to allow for Alex's requested deviation. Our guidelines specifically provide that "a 'day' shall be generally defined as including an overnight period."[13] Alex does not dispute that under this definition, his parenting time falls far short of the threshold for a joint physical custody calculation.

In effect, the district court treated Alex's extra daytime parenting time as an alternative to third-party childcare. This was economically beneficial to both parties. In recognition of Alex's contribution to this economic benefit, the court provided a downward deviation from the child support guidelines. And the court sufficiently explained its deviation. Because we find no abuse of discretion in the deviation ordered, we affirm that part of the decree as well.

### 3. VA Disability Benefit Payment

Finally, Alex assigns that the district court erred by including a lump-sum VA disability benefit payment in the marital estate. We agree.

[7,8] The evidence presented at trial clearly established that the lump-sum payment was for retroactive service-connected disability benefits. And federal law precludes a state court, in a dissolution proceeding, from exercising subject matter jurisdiction over VA disability benefits.[14] In the same way, a state court cannot include the amount of military retirement pay

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[12] See, Neb. Rev. Stat. § 42-364.16 (Reissue 2016); *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006).

[13] § 4-212.

[14] See, *Ryan v. Ryan*, 257 Neb. 682, 600 N.W.2d 739 (1999); *Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997).

that a veteran waives in order to receive such benefits as divisible marital property.[15] It is therefore an abuse of discretion to divide service-connected disability benefits, or any amount of waived military retirement pay, as part of the marital estate in a dissolution proceeding.

Lacy argues that it is possible the lump-sum payment included nondisability retirement benefits that were not waived. She further argues that Alex did not produce evidence establishing that the lump-sum payment was solely disability compensation. We disagree.

Alex presented evidence at trial and established that the lump-sum payment received from the VA was purely disability compensation. The lump-sum payment simply included the difference between the disability rate of compensation Alex had previously received and the new retroactive rate. Therefore, the evidence persuades us that the payment should not have been included in the marital estate.

After excluding the health savings account and the balance of the bank account representing the remainder of the lump-sum payment from the marital estate, we find that a recalculation of the equalization payment is also in order. Accordingly, we modify the decree to exclude the lump-sum payment and reduce the equalization payment ordered to $15,968.77.

## VI. CONCLUSION

The parenting plan as ordered did not fit the statutory definition of joint physical custody. Therefore, the district court did not err in its characterization of the physical custody award. We also conclude that the child support guidelines do not allow for a "day" to be construed as including any nonconsecutive 24 hours when determining whether to use the joint custody worksheet in support calculations. The district court was correct to use the sole custody worksheet in calculating

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[15] See *id.* See, also, 10 U.S.C. § 1408(a)(4)(B) and (c)(1) (2012); *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675 (1989).

child support and did not abuse its discretion in ordering a deviation for the first 3 years.

Evidence presented at trial established that the lump-sum payment Alex received was purely for service-connected disability compensation. Because federal law precludes state courts, in proceedings to dissolve a marriage, from exercising jurisdiction over such disability compensation, we modify the divorce decree to exclude the lump-sum payment from the marital estate. We also reduce the ordered equalization payment to $15,968.77. As so modified, the decree of the district court is affirmed.

Affirmed as modified.

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

# State of Nebraska, appellee, v. Jaquez B. Clifton, appellant.

892 N.W.2d 112

Filed March 24, 2017. No. S-15-1167.

1. **Motions to Suppress: Confessions: Constitutional Law: 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. **Juries: Discrimination: Prosecuting Attorneys: Appeal and Error.** An appellate court reviews de novo the facial validity of an attorney's race-neutral explanation for using a peremptory challenge as a question of law. It reviews for clear error a trial court's factual determination regarding whether a prosecutor's race-neutral explanation is persuasive and whether the prosecutor's use of a peremptory challenge was purposefully discriminatory.
3. **Motions for Mistrial: Appeal and Error.** An appellate court will not disturb a trial court's decision whether to grant a motion for mistrial unless the court has abused its discretion.
4. **Juries: Prosecuting Attorneys.** A prosecutor is ordinarily entitled to exercise permitted peremptory challenges for any reason at all, if that reason is related to his or her view concerning the outcome of the case.
5. **Juries: Discrimination: Prosecuting Attorneys: Proof.** Determining whether a prosecutor impermissibly struck a prospective juror based on race is a three-step process. In this three-step process, the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

6. **Juries: Discrimination: Prosecuting Attorneys.** Whether a prosecutor's reasons for using a peremptory challenge are race neutral is a question of law.
7. ____: ____: ____. In determining whether a prosecutor's explanation for using a peremptory challenge is race neutral, a court is not required to reject the explanation because it is not persuasive, or even plausible; it is sufficient if the reason is not inherently discriminatory.
8. ____: ____: ____. A prosecutor's intuitive assumptions, inarticulable factors, or even hunches can be proper bases for rejecting a potential juror, so long as the reasons are not based on impermissible group bias.
9. **Confessions: Miranda Rights: Police Officers and Sheriffs.** Before the police are under a duty to cease an interrogation, the suspect's invocation of the right to cut off questioning must be unambiguous, unequivocal, or clear.
10. ____: ____: ____. To invoke the right to cut off questioning, the suspect must articulate his or her desire with sufficient clarity such that a reasonable police officer under the circumstances would understand the statement as an invocation of the *Miranda* right to remain silent.
11. **Confessions.** A suspect need not utter a talismanic phrase to invoke his or her right to silence.
12. **Trial: Evidence: Due Process.** The purpose of the rule in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure the disclosure of evidence of such significance that, if suppressed, would deprive the defendant of a fair trial.

Appeal from the District Court for Douglas County: Gregory M. Schatz, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, Cindy A. Tate, and Mikki C. Jerabek, for appellant.

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

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

Wright, J.

## I. NATURE OF CASE

Jaquez B. Clifton appeals his convictions for first degree murder and use of a firearm to commit a felony in relation to

the death of Frank Sanders on July 20, 2014. Clifton asserts that the prosecution impermissibly struck prospective jurors on the basis of race and that he should be accorded a new trial under *Batson v. Kentucky*.[1] He further asserts that his statements to law enforcement should have been suppressed as obtained in violation of *Miranda v. Arizona*,[2] because the *Miranda* warning was not given until after the interrogation had begun and because he asserted his right to cut off questioning by saying, "I can't." Lastly, Clifton asserts that the court should have granted a mistrial. He claims the court allowed witness testimony concerning events that the witness had not revealed in prior statements to the police and which were allegedly revealed to the prosecution before trial, but had not been disclosed to the defense as required by *Brady v. Maryland*.[3]

## II. BACKGROUND

### 1. Voir Dire and Clifton's *Batson* Challenge

At the close of jury selection, defense counsel raised a *Batson* challenge. Although the race or heritage of the venire was not stipulated or otherwise formally put into evidence, defense counsel pointed out during argument before the district court that three of the four African-American jurors in the venire pool were struck by the State's peremptory challenges: prospective jurors Nos. 8, 13, and 14. The prosecution proffered nondiscriminatory reasons for the strikes.

#### (a) Juror No. 13

Juror No. 13 was the prosecution's third strike. The prosecutor explained that he did not believe juror No. 13 could be "ultimately independent" and disregard her past experience

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

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

[3] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

with drug addiction and alcoholism, including drug transactions that were similar to those that occurred as part of the charges against Clifton.

During voir dire, juror No. 13 stated that she worked full time both as a program specialist with the elderly and as a cook. In her work at an adult daycare, she worked with people with mental health issues. She taught them qualitative living skills. Her second job was a cook for a homeless shelter and the "Hero program." In the late 1980's, she took a class in business law, with the thought of pursuing a career as a legal secretary. She found that legal coursework was not for her. Juror No. 13 was recovering from 25 years of alcoholism and 23 years of crack addiction. She had been sober for 6 years and agreed that many crimes are "fueled by the addiction."

(b) Juror No. 8

Juror No. 8 was the State's seventh strike. The prosecution was concerned about her experience with the juvenile court and as a therapist who might have sympathy for young offenders like Clifton. The prosecutor noted that juror No. 8 would be aware of the possible penalties at issue in the trial and might resist the punishment demanded by statute, believing that Clifton should be reformed instead.

Juror No. 8 was a mental health therapist, and in that capacity, she was in juvenile court "quite often." She worked with the county attorney's office and the public defender's office in her advocacy of the juveniles or their families. She was subpoenaed "quite often," and she often has to call police officers when she has an unruly or noncompliant child.

Juror No. 8 was friends with two other members of the venire, jurors Nos. 3 and 14. Juror No. 3 ultimately was on the jury panel. With regard to juror No. 3, juror No. 8 said that they "disagree all the time." She knew one of the potential witnesses, whom she described as a friend of her ex-husband and a former coworker.

(c) Juror No. 14

Juror No. 14 was the prosecution's last strike. The prosecutor explained that he preferred the two other remaining jurors in the venire to juror No. 14, because juror No. 14 did not appear to be forthcoming in volunteering information. Based on a comparison of the answers of juror No. 14 to the answers of the other two remaining jurors, and the fact that the other two remaining jurors appeared younger, the prosecutor had the impression that "if [the other two remaining jurors] were to hear the votes of other people, they wouldn't raise a big ruckus or problem and they would kind of go along to get along." Juror No. 14 worked in sales and was originally from Chicago, Illinois.

Defense counsel generally asserted that Caucasian jurors that were selected had "answers [that] were no more damaging than . . . any of the other potential jurors that were in the pool."

(d) *Batson* Challenge Denied

The district court found that Clifton had made a prima facie showing that the prosecutor had exercised peremptory challenges on the basis of race, but found that Clifton had failed to sustain his burden to show that the State's proffered reasons for striking the jurors were a pretext for racial discrimination. Accordingly, the court denied the challenge.

2. Clifton's Statements and Motion to Suppress

Before trial, Clifton moved to suppress all of his statements to law enforcement. Clifton was questioned in custody for approximately 2½ hours. Det. Ryan Davis began the questioning with introductions. At this point, Clifton had not been given *Miranda* warnings.

Clifton spelled his name and gave his address and telephone number. Davis and Clifton discussed Clifton's job status and education. Davis asked Clifton if he knew why he was being questioned. Clifton stated that he did not. Davis explained

that he was doing some followup regarding an incident that occurred on "Sunday," giving the general location of Sanders' residence. Davis asked Clifton if he had any idea what he was talking about. Clifton said he did not, and stated that his mother had passed away some 3 weeks prior and that he was on probation. Further discussion ensued about Clifton's probation status and his mother's passing away. When Clifton mentioned he had a son "on the way," Davis inquired about the due date.

Davis proceeded to question Clifton in more detail about his education. When Clifton explained that he did not finish 12th grade because he was "running from different places" and was in the foster care system, Davis asked Clifton further questions about that history. During this time, Clifton did not make any statements regarding the night of July 20, 2014.

After about 5 minutes, Davis read Clifton his *Miranda* rights. After reading Clifton his *Miranda* rights, Davis began asking Clifton questions directly related to the events of July 20, 2014. At first, Clifton denied having left his house that evening. After further questioning, Clifton acknowledged that he was at the address in question on the night in question, but denied pulling the trigger. Clifton said "[s]ome dude . . . wanted to buy some weed"; Clifton claimed he did not know the names of the people he was with and had never seen them before.

Davis asked Clifton to walk him through what happened that night—to tell Clifton's side of the story. Clifton responded that he wanted to talk to his son. Davis stated that he could not facilitate that "right at that second" and continued, "we've come to a point where you've admitted being there, and so I would think you would want to go the one step further and explain what happened so I don't have to listen to everybody else's version of it. Doesn't that make sense?"

Clifton responded, "It do, but I can't tell you." Davis asked why, and Clifton said, "I can't, I just can't." Davis asked, "Did you guys go there to rob him?" Clifton said he did not. Clifton

continued to answer a few more questions about the night in question, and then admitted that "[t]hey" went to Sanders' residence to rob him.

When Davis asked Clifton to tell him who "they" were, Clifton said, "I can't because I don't want anybody telling on me." Davis stated that it was Clifton's future and that it was his opportunity to walk him through this. Clifton responded, "I can't." Davis responded, "Yes, you can." Davis encouraged Clifton to at least tell him who he was with on the night of the shooting. Clifton exclaimed, "Ugh," and when asked if he had wanted "that man to die," Clifton said, "I didn't want that man to die."

Davis explained there was no reason for Clifton to cover for anybody. Clifton stated that while at Sanders' residence, he was told to hold the door open. Clifton said he was holding the front door while another person went to a back room to buy marijuana. He then heard a gunshot and "ran all the way back home."

Clifton continued to refuse to name the other parties. He stated that he was "ready to go, man. I wanna go talk to my kids." When Davis stated that he understood and that they were almost done, Clifton responded, "I ain't got nothing to say, man. I got nothing else to say." After some back and forth, Davis' continued attempts to get Clifton to reveal who was with him the night of the murder, Clifton said he was "ready to leave now" and "I wanna be done." When Davis pressed Clifton again to tell him who was with him, Clifton said he could not talk anymore and stated, "I'm done talking about it. We did enough talking."

The court found through the statements, beginning with "I ain't got nothing to say, man. I got nothing else to say," Clifton had invoked his right to remain silent. It found that any statements following these invocations were inadmissible.

At trial, the jury heard Clifton's admission that he had gone to Sanders' house with two other unknown individuals on the night in question. The jury heard Clifton's statements that he

was holding the door when he heard a gunshot and he "didn't want that man to die."

### 3. Other Evidence at Trial

In addition to Clifton's statements to law enforcement made before the point in which the court found he had invoked his right to cut off questioning, the prosecution presented the testimony of Rico Larry; Absalom Scott; Jacklyn Harris, Sanders' live-in girlfriend; neighbors; law enforcement; and forensic experts.

#### (a) Jacklyn Harris

Harris lived with Sanders on the main floor of a house which was converted to four separate apartments. She testified that she had hosted a barbeque the afternoon and into the evening of July 20, 2014. Around 10:30 p.m., all the guests had left, and about 11 p.m., she was in the kitchen when Scott knocked on a screen door. She recognized Scott through the glass on the screen door as one of Sanders' regular customers and yelled to Sanders that Scott was there to see him.

Scott and "another guy" entered and walked past her to a back bedroom where Sanders was located. A few seconds later, she heard a gunshot. Immediately thereafter, Scott and another man came running past her and out the front door. Harris testified that Sanders then staggered into the kitchen, where he quickly bled to death. Harris could not find the cell phone she shared with Sanders. She went to her neighbor's apartment for help.

#### (b) Sanders' Neighbors' Testimony

Sanders' upstairs neighbor testified that he heard running and looked out his window and saw two men fleeing between two houses. Soon thereafter, Harris knocked on his door, saying that Sanders had been shot and asking to use the telephone. Sanders' downstairs neighbor described that late on July 20, 2014, he heard a scuffling noise, then a momentary quiet, followed by a "boom."

(c) Absalom Scott

Scott testified that he, Larry, and Clifton went to Sanders' residence on the night of July 20, 2014. Scott stated he and Sanders bought and sold, or traded, drugs to one another. Scott provided crack cocaine, and Sanders provided marijuana. Usually Scott would "just show up," normally accompanied by Larry, and the transactions usually took place in the kitchen or the living room. The transactions did not normally take place in the back bedroom, which was accessed through the kitchen.

On the night of July 20, 2014, Scott and Larry took Clifton to Sanders' residence because Clifton wanted to buy some marijuana. According to Scott, at some point in the evening prior to going to Sanders' house, Clifton had stated that he wanted to rob somebody. Scott testified that he thought Clifton was just "[t]alking crazy" and that he "didn't pay no mind to it." Scott knew that the police were watching Sanders' house, because Scott had participated in several "controlled buys" for the police around that time. As a result, they parked in the alley. Scott testified that Harris opened the door of her residence after they knocked and that they all entered.

Sanders was lying on the couch. Harris went to the kitchen. Scott said that he and Larry sat on the couch with Sanders, while Clifton stood by the front door. Scott informed Sanders that Clifton wished to purchase a pound of marijuana, and upon Sanders' request, Clifton pulled out his purchase money and counted it in front of Sanders. Scott saw Clifton count out approximately $2,500.

Sanders went to the back room, and about 15 seconds later, Scott saw Clifton follow him. Ten seconds after that, Sanders called to Scott to "'[c]ome here.'" Scott got as far as the hallway to the back room, where he found Clifton pointing a gun at Sanders. Scott observed Sanders standing with his hands at his sides, and he heard Sanders ask Clifton, "'What are you doing?'" Scott testified that it did not appear that Sanders had a weapon. Approximately 3 seconds after entering the hallway,

Clifton shot Sanders. Scott saw Sanders fall forward on top of Clifton. Scott said he took off running. Larry and Clifton followed shortly thereafter, and the three drove away.

Scott testified that while they were driving away, Clifton told them that Sanders had reached for Clifton's gun. Scott said that Clifton also threatened him that if he told anyone about the shooting, Clifton would kill Scott and Scott's girlfriend.

The prosecutor asked Scott if he had any contact with Clifton in the days after the shooting and before Scott's arrest. Scott stated the day following the shooting, he had a conversation with Clifton. This testimony led to defense counsel's making a *Brady* objection that will be described in more detail under the subheading entitled "Alleged *Brady* Violation." The *Brady* objection was overruled, and Scott proceeded to testify that the day after the shooting, Clifton told Scott that he and Larry had nothing to worry about because Clifton "did it."

On cross-examination, Scott admitted that on July 20, 2014, he deleted several pictures from his cell phone that depicted him holding a 9-mm semiautomatic weapon. Scott testified that, as a convicted felon, he was not supposed to possess a firearm. He claimed the weapon was not his. Scott admitted that he originally lied to law enforcement about the events in question, stating that two strangers had followed him into the house and shot Sanders while Scott was sitting on the couch.

(d) Rico Larry

Larry testified he went with Scott and Clifton to Sanders' house the evening of July 20, 2014, to buy some marijuana. He and Scott had visited Sanders many times before for the same purpose. Harris let them into Sanders' residence. Larry stated that he and Scott sat down on the couch next to Harris, while Clifton remained standing. Larry and Scott told Clifton they each wished to buy "a ten bag." Clifton said he wanted to

buy an ounce. Sanders said something about seeing new faces, referring to Clifton, and asked to see the money. Clifton pulled out "a bunch of twenties."

According to Larry, Clifton then followed Sanders to the back room, and Scott followed after Clifton. Larry testified that, soon thereafter, Clifton called out, "'"Come and get it."'" Larry started walking toward the back room. As he did so, he heard "tussling" and then a gunshot. Larry saw Sanders fall on top of Clifton and saw blood. Larry took off running with Scott behind him. Larry heard a loud noise, like Scott had "busted the door."

Larry, Scott, and Clifton entered the vehicle they had driven to Sanders' residence, and left the scene. Larry testified that Clifton told them that he did not know why Larry and Scott were scared, because Clifton was the one who "did the M." Larry explained that to do "the M" is to shoot or kill somebody. According to Larry, Clifton said that he would have shot Sanders more times, but the gun jammed. Larry testified that Clifton threatened him and Scott if they told anyone what had happened.

Larry stated that after Scott drove to a house and left the vehicle to conduct a drug transaction, Clifton "jumped into the driver's seat," and the two of them left. While Clifton was driving, he wiped a cell phone off and threw it out the window. Clifton told Larry that they "ain't gonna be able to call nobody." Larry testified that when Clifton later exited the vehicle, he thought he saw Clifton wearing a gun in his waistband.

(e) Forensic Evidence

The prosecution adduced forensic evidence that Sanders' blood was found near the rear passenger door handle of the vehicle that Larry, Scott, and Clifton drove to Sanders' residence on July 20, 2014. Sanders' autopsy revealed that Sanders was killed by a single gunshot to the chest. The prosecution presented evidence that the bullet was either a 9 mm

or a .38 caliber. A firearms examiner testified that if it was a 9 mm, a casing would have been ejected after the bullet was fired, unless the gun had jammed. The prosecution presented evidence from law enforcement that no casings were found during the search of Sanders' residence.

### 4. Alleged *Brady* Violation

During Scott's testimony, defense counsel moved to exclude any testimony about his conversation with Clifton the day after the shooting. Counsel alleged the prosecution failed to disclose before trial Scott's statements regarding this conversation. The defense claimed this was a violation of *Brady v. Maryland*.[4] Defense counsel noted that Scott had failed to mention this conversation in his deposition testimony or in his statements to police regarding any conversation with Clifton the day after the murder to the effect that Clifton told Scott that he "did it."

Defense counsel argued that the prosecutor must have known about the alleged conversation, because the prosecutor asked whether any contact was made with Clifton in the days following the shooting. Out of the presence of the jury, defense counsel was permitted to examine Scott concerning any prior mention of the conversation to the prosecution. Scott said he had met with the prosecutor three times. Defense counsel did not inquire in his questioning of Scott about what Scott might have said to the prosecution during those meetings.

Defense counsel did not enter into evidence the prior deposition testimony of Scott, or the police interviews with Scott, wherein Scott reportedly failed to mention this conversation with Clifton. Defense counsel did not ask for a continuance in light of the allegedly late disclosure.

The district court concluded that *Brady* did not apply and that defense counsel was free to cross-examine Scott about his failure to disclose this conversation in his deposition.

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[4] *Brady v. Maryland, supra* note 3.

During cross-examination before the jury, Scott testified that he could not recall if he had previously reported in his interviews with law enforcement or in his deposition that he had a conversation with Clifton the day after the shooting. But he admitted that he had mentioned it to the prosecution the week of trial.

Defense counsel's motion for mistrial based on the alleged *Brady* violation was overruled.

### 5. Verdict and Sentence

The jury found Clifton guilty of one count of first degree murder and one count of use of a firearm to commit a felony. Clifton was sentenced to life imprisonment for first degree murder and to a consecutive term of 25 to 30 years' imprisonment for use of a firearm to commit a felony. He appeals.

## III. ASSIGNMENTS OF ERROR

Clifton assigns that the district court erred by (1) failing to grant his motion to suppress his statements made to law enforcement, in violation of the constitutional safeguards afforded by *Miranda*; (2) denying Clifton's *Batson* challenge; and (3) denying Clifton's motion for mistrial that alleged a *Brady* violation.

## IV. 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 v. Arizona*, an appellate court applies a two-part standard of review.[5] 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.[6]

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

[6] *Id.*

[2] An appellate court reviews de novo the facial validity of an attorney's race-neutral explanation for using a peremptory challenge as a question of law. It reviews for clear error a trial court's factual determination regarding whether a prosecutor's race-neutral explanation is persuasive and whether the prosecutor's use of a peremptory challenge was purposefully discriminatory.[7]

[3] An appellate court will not disturb a trial court's decision whether to grant a motion for mistrial unless the court has abused its discretion.[8]

## V. ANALYSIS

### 1. *Batson* Challenge

[4] We first address whether the district court erred in overruling Clifton's *Batson* challenge to the racial makeup of the jury. A prosecutor is ordinarily entitled to exercise permitted peremptory challenges for any reason at all, if that reason is related to his or her view concerning the outcome of the case.[9] However, the U.S. Supreme Court in *Batson v. Kentucky* held that the Equal Protection Clause forbids the prosecutor to challenge jurors solely because of their race.[10]

[5] Determining whether a prosecutor impermissibly struck a prospective juror based on race is a three-step process.[11] In this three-step process, the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.[12]

First, a defendant must make a prima facie showing that the prosecutor exercised a peremptory challenge because of

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[7] *State v. Oliveira-Coutinho*, 291 Neb. 294, 865 N.W.2d 740 (2015).

[8] *State v. Gonzales*, 294 Neb. 627, 884 N.W.2d 102 (2016).

[9] *Batson v. Kentucky, supra* note 1.

[10] *Id.*

[11] *State v. Nave*, 284 Neb. 477, 821 N.W.2d 723 (2012).

[12] See *id.*

race. Second, assuming the defendant made such a showing, the prosecutor must offer a race-neutral basis for striking the juror.[13] And third, the trial court must determine whether the defendant has carried his or her burden of proving purposeful discrimination.[14]

Once the trial court has decided the ultimate question of intentional discrimination, however, the question on appeal is only whether the prosecutor's reasons were facially race-neutral and whether the trial court's final determination regarding purposeful discrimination was clearly erroneous.[15]

[6] Whether a prosecutor's reasons for using a peremptory challenge are race neutral is a question of law.[16] We conclude that the prosecutor's stated reasons for exercising his peremptory strikes were race neutral.

The prosecutor explained he struck juror No. 13 because of concerns she would be unable to set aside her past experience with drug addiction and participation in transactions similar to those surrounding the shooting. He struck juror No. 8 because her experience with juvenile court and as a therapist might give her sympathy for Clifton as a young offender. The prosecutor struck juror No. 14 because, compared to the other two remaining prospective jurors, juror No. 14 seemed the least forthcoming and was the oldest and he might be more likely to cause conflict in the deliberative process.

[7] In determining whether a prosecutor's explanation for using a peremptory challenge is race neutral, a court is not required to reject the explanation because it is not persuasive, or even plausible; it is sufficient if the reason is not inherently discriminatory.[17] Only inherently discriminatory explanations

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[13] *Id.*

[14] *Id.*

[15] See *id.*

[16] See *State v. Johnson*, 290 Neb. 862, 862 N.W.2d 757 (2015).

[17] See *id.*

are facially invalid.[18] The prosecutor's reasons were not inherently discriminatory.

We turn next to the district court's finding that these race-neutral explanations were not pretexts for discrimination. The third step of the *Batson* inquiry requires the trial court to evaluate the persuasiveness of the justification proffered by the prosecutor; it ultimately determines whether the explanation was pretext for discrimination.[19] A trial court's determination that the prosecutor's race-neutral explanation should be believed frequently involves its evaluation of a prosecutor's credibility, which requires deference to the court's findings absent exceptional circumstances.[20]

In determining whether a defendant has established purposeful discrimination in the use of a peremptory challenge, the act of striking jurors of a particular race takes on meaning only when coupled with other information, such as the racial composition of the venire, the race of others struck, or the voir dire answers of those who were struck compared to the answers of those who were not struck.[21] "'Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose.'"[22]

We find no evidence in the record of any questions or statements during voir dire indicating a discriminatory purpose. And we note that defense counsel failed to make an offer of proof of the racial composition of the venire. But even

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[18] *State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010). See, also, *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991).

[19] See, *Hernandez v. New York, supra* note 18; *State v. Thorpe, supra* note 18; *Jacox v. Pegler*, 266 Neb. 410, 665 N.W.2d 607 (2003).

[20] See *State v. Johnson, supra* note 16.

[21] *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *disapproved on other grounds, State v. Britt*, 293 Neb. 381, 881 N.W.2d 818 (2016).

[22] *Jacox v. Pegler, supra* note 19, 266 Neb. at 418, 665 N.W.2d at 614 (quoting *Batson v. Kentucky, supra* note 1).

accepting as true defense counsel's assertions as to the race of the venire, we find no reason to conclude that the district court clearly erred in finding that there was no pretext.

In considering a *Batson* challenge, we may consider whether the prosecutor's criterion has a disproportionate impact on a particular race.[23] And in determining whether there is a sufficient pattern of peremptory strikes to support an inference of discrimination, we have recognized the following factors as relevant: (1) whether members of the relevant racial or ethnic group served unchallenged on the jury and whether the striking party struck as many of the relevant racial or ethnic group from the venire as it could, (2) whether there is a substantial disparity between the percentage of a particular race or ethnicity struck and the percentage of its representation in the venire, and (3) whether there is a substantial disparity between the percentage of a particular race or ethnicity struck and the percentage of its representation on the jury.

According to Clifton's factual assertions as to the racial makeup of the venire, one African-American juror served on the jury out of four African-Americans in the venire. Thus, the prosecutor did not strike as many of the relevant racial group from the venire as he could. Indeed, Clifton does not specifically argue that he proved pretext by demonstrating the disproportionate impact of the prosecutor's criterion or a sufficient pattern of peremptory strikes to support an inference of discrimination.

Clifton instead compares the answers of the struck jurors and the nonstruck jurors during voir dire. Clifton argues that answers of the jurors who were struck (and who were African-American) were largely indistinguishable from the nonstruck jurors with respect to the proffered reasons for striking the African-American prospective jurors. If a prosecutor's proffered reason for striking an African-American panelist applies just as well to an otherwise-similar non-African-American

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[23] See *State v. Thorpe, supra* note 18.

who is permitted to serve, that is evidence to be considered in the third step of the *Batson* analysis.[24]

However, the same factors used in evaluating a juror may be given different weight depending on the number of peremptory challenges a lawyer has, and a strict comparison analysis may not properly take into account the variety of factors and considerations that may be part of a lawyer's decision to select certain jurors while challenging others that may appear to be similar.[25]

Concerning juror No. 8, Clifton points out other jurors who had experience in the criminal justice system. But, in comparison to juror No. 8, whose experience may have made her more sympathetic to relatively young defendants, the experience of the nonstruck jurors was clearly favorable to the prosecution. The jurors Clifton claims were comparable to juror No. 8 had positive experiences with law enforcement, either having taken classes in criminal justice with a view toward becoming a police officer or volunteering for law enforcement. This is distinguishable from juror No. 8's familiarity as an advocate for her therapy clients in the justice system.

As for juror No. 14, Clifton points to other jurors he believes were not forthcoming. But we find it is impossible to determine from the cold record the extent that juror No. 14's demeanor was more or less forthcoming than the two other remaining prospective jurors at the time the prosecutor used its last peremptory strike for juror No. 14.

Clifton's attack on the prosecutor's race-neutral explanations for striking prospective jurors Nos. 13 and 14 is not based on any explicit comparison to other nonstruck jurors. Instead, it is based upon his assertions that the prosecutor's reasons were illogical, speculative, ignoble, or inconsistent

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[24] See *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006), *abrogated on other grounds, State v. Thorpe, supra* note 18. See, also, *Miller-El v. Dretke*, 545 U.S. 231, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005); *State v. Starks*, 3 Neb. App. 854, 533 N.W.2d 134 (1995).

[25] *State v. Robinson, supra* note 24.

with the prospective jurors' assurances that they would be impartial. For example, Clifton asserts that allowing the prosecution to strike juror No. 14 because of his apparent "unwillingness to follow the crowd" would make a "mockery" of the voir dire process, which is aimed at finding fair and impartial jurors.[26]

[8] But the question before us is whether the district court clearly erred in finding that the prosecution's race-neutral explanations for their peremptory strikes were genuine and not pretextual. We may consider the rationality of the prosecutor's reasons in our inquiry. As the U.S. Supreme Court explained, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination."[27] However, "the ultimate inquiry for the [trial court] is not whether counsel's reason is suspect, or weak, or irrational, but whether counsel is telling the truth in his or her assertion that the challenge is not race-based."[28] A prosecutor's intuitive assumptions, inarticulable factors, or even hunches can be proper bases for rejecting a potential juror, so long as the reasons are not based on impermissible group bias.[29]

We conclude, based on our examination of the record, that the district court did not clearly err in finding the prosecutor's race-neutral explanations for striking African-American jurors were persuasive and that the use of the peremptory challenges was not purposefully discriminatory. In applying this clearly erroneous standard of review, we recognize the pivotal role that the trial court plays in evaluating *Batson* claims. The best evidence of discriminatory intent "'"often will be the demeanor of

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[26] Brief for appellant at 38.

[27] *Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) (per curiam).

[28] *U.S. v. Bentley-Smith*, 2 F.3d 1368, 1375 (5th Cir. 1993). See, also, e.g., *U.S. v. Thompson*, 735 F.3d 291 (5th Cir. 2013); *Taylor v. State*, 279 Ga. 706, 620 S.E.2d 363 (2005).

[29] See, *U.S. v. Thompson, supra* note 28; *People v. Watson*, 43 Cal. 4th 652, 182 P.3d 543, 76 Cal. Rptr. 3d 208 (2008).

the attorney who exercise[d] the challenge."'"[30] Such credibility determinations lie within the peculiar province of the trial judge and, "'"in the absence of exceptional circumstances,"'" require deference to the trial court.[31]

### 2. Motion to Suppress

We turn next to Clifton's arguments that his statements to law enforcement should have been suppressed. The court suppressed some of Clifton's statements made after the point at which the court determined Clifton had exercised his right to cut off questioning. Clifton argues that the entirety of his statement should have been deemed involuntary under *Missouri v. Seibert*.[32] Alternatively, Clifton argues that he asserted his right to cut off questioning at a point earlier than that determined by the district court.

#### (a) Warnings in Midst of Interrogation

In *Missouri v. Seibert*, the U.S. Supreme Court was confronted with a police "question-first" protocol whereby a suspect was interrogated without *Miranda* warnings until the suspect confessed, after which point, the officer would give *Miranda* warnings, ask for a waiver, and get the suspect to repeat the pre-*Miranda* confession.[33] The Court explained that the underlying assumption with the question-first tactic was that

> with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble. Upon hearing warnings only in

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[30] *State v. Nave, supra* note 11, 284 Neb. at 487, 821 N.W.2d at 732 (quoting *Snyder v. Louisiana*, 552 U.S. 472, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008)).

[31] *Id.*

[32] *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004).

[33] *Id.*, 542 U.S. at 606.

> the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again.[34]

In the plurality opinion, the Court held that such tactic effectively threatens to thwart the purpose of *Miranda* by reducing the risk that a coerced confession would be admitted.

The Court reaffirmed its holding in *Oregon v. Elstad*,[35] rejecting a blanket "'cat out of the bag'" theory to a voluntary admission obtained in the arguably innocent neglect of *Miranda* at the defendant's home before taking him to the station.[36] The Court rejected the defendant's argument that his subsequent, post-*Miranda* confession at the station house was tainted by the earlier unwarned admission. Instead, the Court found the confession admissible. The Court listed a series of facts that would bear on whether *Miranda* warnings delivered midstream of an interrogation could be effective enough to accomplish their object of presenting a genuine choice to the suspect of whether to follow up on an earlier admission: (1) the completeness and detail of the questions and answers in the first round of interrogation, (2) the overlapping content of the two statements, (3) the timing and setting of the first and the second, (4) the continuity of police personnel, and (5) the degree to which the interrogator's questions treated the second round as continuous with the first.[37]

Subsequently, in *Bobby v. Dixon*,[38] the U.S. Supreme Court addressed a situation where the police decided not to provide the defendant with *Miranda* warnings for fear that he would not speak. In the unwarned interrogation, the defendant

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[34] *Id.*, 542 U.S. at 613.

[35] *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985).

[36] *Missouri v. Seibert, supra* note 32, 542 U.S. at 615.

[37] *Id.*

[38] *Bobby v. Dixon*, 565 U.S. 23, 132 S. Ct. 26, 181 L. Ed. 2d 328 (2011).

claimed the victim had given him permission to obtain an identification card in the victim's name and endorse a check written out to the victim for the proceeds of the sale of the victim's car. The defendant denied stealing the car and denied knowing the victim's whereabouts. Approximately 4 hours later, another interrogation took place with *Miranda* warnings, after the defendant indicated he wished to talk. In this interrogation, the defendant confessed to murdering the victim and stealing his car.

The Court held that the effectiveness of the *Miranda* warning was not impaired by the sort of two-step interrogation technique condemned in *Seibert*. In addition to pointing out that the time and intervening events precluded a "continuum" of warned and unwarned interrogations, the Court reasoned that "there is no concern here that police gave [the defendant] *Miranda* warnings and then led him to repeat an earlier murder confession, *because there was no earlier confession to repeat*."[39] Nor, the Court pointed out, was there any evidence that police used the defendant's earlier admission of forgery to induce him to waive his right to silence later. The Court distinguished these facts from the facts in *Seibert*, where "the suspect's first, unwarned interrogation left 'little, if anything, of incriminating potential left unsaid,' making it 'unnatural' not to 'repeat at the second stage what had been said before.'"[40]

Thus, essential to a *Miranda* violation under *Seibert* is an inculpatory prewarning statement that somehow overlaps with statements made in the postwarning interrogation. In *State v. DeJong*,[41] we accordingly rejected the defendant's argument that her confession was involuntary because the "'cat was already out of the bag'" when the police induced

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[39] *Id.*, 565 U.S. at 31 (emphasis supplied).

[40] *Id.* (quoting *Missouri v. Seibert, supra* note 32).

[41] *State v. DeJong, supra* note 5, 287 Neb. at 889, 845 N.W.2d at 878.

admissions after she had invoked her right to cut off questioning. We reasoned that during a subsequent interrogation, she was not explicitly attempting to clarify or explain her previously voiced inadmissible statements.[42] Likewise, in *State v. Juranek*,[43] we held that the defendant's post-*Miranda* statement was voluntary despite a pre-*Miranda* admission, because we could not say that "the pre-*Miranda* interrogation left little to be said." We noted that the pre-*Miranda* questioning had not touched upon key points in the investigation, which we found distinguishable from *Seibert*, where there was a "systematic, exhaustive" pre-*Miranda* interrogation, "'little, if anything, of incriminating potential left unsaid,'"[44] and a post-*Miranda* interrogation that "'cover[ed] the same ground a second time.'"[45]

Clifton focuses on the continuum between the unwarned and warned questioning and the number of questions presented before *Miranda* warnings were given. He ignores the fact that the pre-*Miranda* questioning was not intended to induce inculpatory statements by the defendant. In the 5 minutes of pre-*Miranda* questioning at issue, the questions concerned the correct spelling of Clifton's name and other information such as his address, job status, and educational background. During this time, Davis also expressed his condolences for Clifton's recent loss of his mother and inquired about the upcoming birth of Clifton's child. "Interrogation" for purposes of *Miranda* includes "'either express questioning or its functional equivalent.'"[46] The functional equivalent of express questioning refers to "any words or actions on the part of the police

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[42] See *State v. DeJong, supra* note 5.

[43] *State v. Juranek*, 287 Neb. 846, 860, 844 N.W.2d 791, 804 (2014).

[44] *Id.* at 860, 844 N.W.2d at 803.

[45] *Id.* at 858, 844 N.W.2d at 802.

[46] *Rhode Island v. Innis*, 446 U.S. 291, 309, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

(other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[47] The only pre-*Miranda* question Davis asked that was reasonably likely to elicit an incriminating response was whether Clifton knew why he was being questioned. As in *Juranek*, there was in this pre-*Miranda* questioning much ground left to be covered.

Most importantly, Clifton also ignores the fact that he gave no incriminating statements before being given *Miranda* warnings. In no manner was Clifton repeating at the second stage what had been said before. Due to the nature of the pre-*Miranda* questioning, Clifton had revealed nothing in relation to Sanders' death during that stage of questioning.

The concerns with the two-step interrogation technique condemned in *Seibert* are simply not present under these facts. The district court did not err in denying Clifton's motion to suppress on the ground that the entirety of Clifton's statement was involuntary under *Seibert*.

(b) Cutting Off Questioning

Alternatively, Clifton argues that the district court erred in failing to determine that he asserted his right to cut off questioning at an earlier point of the interrogation, when he said, "I can't," "I can't, I just can't." Clifton argues that the court should have suppressed his statements indicating that the other people he was with on July 20, 2014, went to Sanders' residence to rob him, Clifton held the front door while the others went to the back room, and Clifton did not want Sanders to die.

The safeguards of *Miranda* "'"assure that the individual's right to choose between speech and silence remains unfettered throughout the interrogation process."'"[48] If the suspect

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[47] *Id.*, 446 U.S. at 301.

[48] *State v. DeJong, supra* note 5, 287 Neb. at 883, 845 N.W.2d at 874.

indicates that he or she wishes to remain silent or that he or she wants an attorney, the interrogation must cease.[49] The right to choose between speech and silence derives from the privilege against self-incrimination.[50]

[9,10] Before the police are under a duty to cease the interrogation, however, the suspect's invocation of the right to cut off questioning must be "'unambiguous,' 'unequivocal,' or 'clear.'"[51] This requirement of an unequivocal invocation prevents the creation of a "'third layer of prophylaxis'" which could transform the prophylactic rules of *Miranda* "'"into wholly irrational obstacles to legitimate police investigative activity."'"[52] To invoke the right to cut off questioning, the suspect must articulate his or her desire with sufficient clarity such that a reasonable police officer under the circumstances would understand the statement as an invocation of the *Miranda* right to remain silent.[53]

If the suspect's statement is not an "'unambiguous or unequivocal'" assertion of the right to remain silent, then there is nothing to "'scrupulously honor'" and the officers have no obligation to stop questioning.[54] Officers should not have to guess when a suspect has changed his or her mind and wishes the questioning to end, nor are they required to clarify ambiguous remarks.[55] They are not required to accept as conclusive

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[49] *State v. DeJong, supra* note 5.

[50] See, *Berghuis v. Thompkins*, 560 U.S. 370, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010); *Miranda v. Arizona, supra* note 2.

[51] *State v. Rogers*, 277 Neb. 37, 52, 760 N.W.2d 35, 50 (2009). See, also, e.g., *Berghuis v. Thompkins, supra* note 50.

[52] *State v. Rogers, supra* note 51, 277 Neb. at 52, 760 N.W.2d at 51.

[53] *Id.*

[54] *Id*. at 52, 760 N.W.2d at 51.

[55] See *State v. Rogers, supra* note 51. See, also, *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).

any statement or act, no matter how ambiguous, as a sign that a suspect desires to cut off questioning.[56]

[11] In considering whether a suspect has clearly invoked the right to cut off questioning, we review not only the words of the criminal defendant, but also the context of the invocation.[57] A suspect need not utter a "'talismanic phrase'" to invoke his or her right to silence.[58] Relevant facts include the words spoken by the defendant and the interrogating officer, the officer's response to the suspect's words, the speech patterns of the suspect, the content of the interrogation, the demeanor and tone of the interrogating officer, the suspect's behavior during questioning, the point at which the suspect allegedly invoked the right to remain silent, and who was present during the interrogation.[59] A court might also consider the questions that drew the statement, as well as the officer's response to the statement.[60]

We agree with the district court that a reasonable police officer would not have understood Clifton's statement that "I can't" as an invocation of the right to remain silent. Clifton indicated that it made sense to tell his side of the story, because he had already admitted being in Sanders' residence during the shooting, "but I can't tell you." When Davis asked for clarification, Clifton simply said, "I can't, I just can't." But Clifton then started answering questions about the night in question, elaborating that "[t]hey" went to Sanders' residence to rob him. When asked who "they" were, Clifton explained why he could not tell who the other parties were: "I can't because I don't want anybody telling on me."

In similar circumstances, courts have held that the statement, "I can't" is not an unambiguous invocation of the

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[56] *Id.*

[57] *Id.*

[58] *Hurd v. Terhune*, 619 F.3d 1080, 1089 (9th Cir. 2010).

[59] *State v. DeJong, supra* note 5.

[60] *Id.*

right to remain silent.[61] Rather, the suspect has thereby indicated a temporary physical or emotional incapacity, or a fear of reprisal by cohorts.[62] Such motivations will not render an unambiguous expression of a desire to remain silent ambiguous,[63] but expressions of these emotions often are something less than a clear invocation of the right not to incriminate oneself.

Such was the case here. Clifton's first ambiguous expression of "I can't" must be viewed in light of his simultaneous affirmation that it made sense to tell his side of the story. And after again saying simply "I can't," upon Davis' request for clarification, Clifton readily answered questions relating to the night in question, again indicating he was not invoking his right to cut off questioning. Clifton's last indication of "I can't" was specifically directed to his unwillingness to identify his cohorts. Thus, it did not indicate an unwillingness to answer other questions relating to the shooting; i.e., to cut off all questioning. We find no error in the district court's denial of Clifton's motion to suppress the statements made after saying, "I can't."

### 3. Alleged *Brady* Violation

Lastly, Clifton asserts that the district court should have granted his motion for mistrial based on the alleged *Brady* violation of failing to disclose Scott's recent addition to his story of the night in question, which Scott allegedly had shared with State attorneys the week before trial. At issue is Scott's testimony that the day after the shooting, Clifton told

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[61] See, *Taylor v. Riddle*, 563 F.2d 133 (4th Cir. 1977); *U.S. v. Sanchez*, 866 F. Supp. 1542 (D. Kan. 1994); *Braddy v. State*, 111 So. 3d 810 (Fla. 2012); *Williams v. State*, 290 Ga. 418, 721 S.E.2d 883 (2012); *Weaver v. State*, 288 Ga. 540, 705 S.E.2d 627 (2011); *Dowthitt v. State*, 931 S.W.2d 244 (Tex. Crim. App. 1996). Compare, *Hurd v. Terhune, supra* note 58; *State v. Diaz-Bridges*, 208 N.J. 544, 34 A.3d 748 (2012).

[62] See, generally, *id*.

[63] See, e.g., *McGraw v. Holland*, 257 F.3d 513 (6th Cir. 2001).

him he "did it." Clifton argues that earlier disclosure of this conversation would have enabled defense counsel to better prepare to cross-examine Scott. Clifton asserts that his alleged inculpatory statement to Scott was impeachment evidence, because the veracity of that statement could be questioned on the ground of its late disclosure. Clifton asserts that, as impeachment evidence, the statement was information favorable to the accused as defined by *Brady v. Maryland*[64] and *United States v. Bagley*.[65]

[12] In *Brady v. Maryland*, the U.S. Supreme Court laid down the principle that irrespective of the good or bad faith of the prosecution, its suppression of evidence favorable to an accused violates due process if the evidence is material to either guilt or punishment.[66] The purpose of the *Brady* rule is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure the disclosure of evidence of such significance that, if suppressed, would deprive the defendant of a fair trial.[67] As refined by subsequent case law, there are three components to a *Brady* violation: (1) The evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued such that there is a reasonable probability that the suppressed evidence would have produced a different verdict; i.e., the suppressed evidence must be "'material either to guilt or to punishment.'"[68]

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[64] *Brady v. Maryland, supra* note 3.

[65] *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

[66] *Brady v. Maryland, supra* note 3. See, also, *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993).

[67] See *United States v. Bagley, supra* note 65.

[68] See *Strickler v. Greene*, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) (quoting *Brady v. Maryland, supra* note 3). Accord *United States v. Bagley, supra* note 65.

As Clifton points out, the U.S. Supreme Court's decision in *United States v. Bagley* clarified that there is no distinction between impeachment evidence and exculpatory evidence. Evidence that might be used to impeach the prosecution's witnesses is "'"evidence favorable to the accused" [because] if disclosed and used effectively, it may make the difference between conviction and acquittal.'"[69]

In *Bagley*, the government had disclosed affidavits from key witnesses attesting that their statements were given without any consideration from the government, but the defendant later discovered the witnesses in question were paid for providing information and testifying against him. The Court found that the misleading affidavits affected defense counsel's ability to impeach key witnesses. Thus, the Court remanded the cause for a determination of whether there was a reasonable probability that had the inducements been disclosed to the defense, the result of the trial would have been different.

Before looking at the effect at trial of the nondisclosure, we consider the nature of the evidence itself.[70] The statement by Clifton that he "did it" was inculpatory, not exculpatory. Nor was Scott's late revelation of Clifton's inculpatory statement impeachment evidence. The impeachment here at issue is "'impeachment by omission,'" where "'"[a] former statement fails to mention a material circumstance presently testified to, which it would have been natural to mention in the prior statement . . . ."'"[71] In such circumstances, "'"the prior statement is [considered] sufficiently inconsistent" to be admitted

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[69] *State v. Lotter*, 255 Neb. 456, 487, 586 N.W.2d 591, 617 (1998), *modified on denial of rehearing* 255 Neb. 889, 587 N.W.2d 673 (1999) (quoting *United States v. Bagley, supra* note 65, and *Brady v. Maryland, supra* note 3).

[70] See *U.S. v. Gonzales*, 90 F.3d 1363 (8th Cir. 1996).

[71] *U.S. v. Useni*, 516 F.3d 634, 651 n.13 (7th Cir. 2008). See, also, e.g., Steven Lubet, *Understanding Impeachment*, 15 Am. J. Trial Advoc. 483 (1992).

to impeach the present testimony.'"[72] The impeachment evidence is Scott's deposition testimony and statements to police wherein he failed to mention the conversation that Clifton allegedly had with Scott the day after the shooting. And these prior statements were disclosed to defense counsel.

Furthermore, we have repeatedly held that where the prosecution delays disclosure of evidence, but the evidence is nonetheless disclosed during trial, *Brady* is not violated.[73] Scott's testimony was disclosed at trial, and defense counsel was given an opportunity to cross-examine Scott about whether he had previously disclosed Clifton's statement that he "did it." In the event that defense counsel believed more time was required to adequately prepare for cross-examination, a continuance could have been requested. It was not.

In sum, Scott's revelation to the prosecution that Clifton told him the day after the shooting he "did it" was not impeachment evidence. Regardless, the evidence was disclosed at trial. We conclude, therefore, that there was no *Brady* violation. The district court did not abuse its discretion in denying defense counsel's motion for mistrial.

## VI. CONCLUSION

Having found no merit to Clifton's *Batson*, *Miranda*, or *Brady* challenges, we affirm the judgment below.

Affirmed.

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[72] *U.S. v. Useni, supra* note 71, 516 F.3d at 651 n.13.

[73] See, *State v. Parnell*, 294 Neb. 551, 883 N.W.2d 652 (2016); *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004); *State v. Lotter, supra* note 69. See, also, *U.S. v. Gonzales, supra* note 70.




**Nebraska Supreme Court**

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# Last Pass Aviation, Inc., et al., appellees, v. Western Cooperative Company, appellant.

892 N.W.2d 108

Filed March 24, 2017. No. S-16-207.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
3. **Final Orders: Appeal and Error.** A party cannot move to voluntarily dismiss a case without prejudice, consent to entry of such an order, and then seek interlocutory appellate review of an adverse pretrial order.
4. **Jurisdiction: Final Orders: Appeal and Error.** When an order adjudicates fewer than all the claims of all the parties, appellate jurisdiction cannot be created by voluntarily dismissing, without prejudice, the claims on which the court has not yet ruled.

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

Steven W. Olsen and Adam A. Hoesing, of Simmons Olsen Law Firm, P.C., for appellant.

Gary J. Nedved, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., and Jon Worthman, of Worthman Law Office, for appellees.

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

Stacy, J.

This action involves the enforceability of a covenant not to compete in a contract for the sale of an aerial spraying company. The district court granted declaratory judgment in favor of the seller, finding the covenant was overly broad and unenforceable. The parties then stipulated to dismiss the remaining claims without prejudice, and the buyer appealed the declaratory judgment ruling. Because we hold the procedure used here did not create a final order and did not confer appellate jurisdiction, we dismiss the appeal.

## FACTS

In February 2011, Tony D. Peterson agreed to sell Last Pass Aviation, Inc., an aerial spraying company headquartered in Alliance, Nebraska, to Western Cooperative Company (Westco). The purchase agreement contained a covenant not to compete, which prohibited Last Pass Aviation and its principals from engaging in aerial spraying and chemical sales in the states of Nebraska, South Dakota, Wyoming, and Colorado for a period of 10 years.

In February 2014, Last Pass Aviation, Peterson, and his son Lucas J.H. Peterson (collectively Last Pass) filed this action seeking a declaratory judgment that the covenant not to compete between Last Pass and Westco was overbroad and unenforceable. Westco filed an answer and a counterclaim asking the court to enjoin Last Pass from "selling, dispersing, delivering or consigning any aerial spraying services or agricultural chemicals within the states of Nebraska, South Dakota, Wyoming or Colorado." The court issued a temporary injunction on April 28, 2014.

Subsequently, Westco filed an amended answer. The amended answer included two additional counterclaims alleging that Last Pass had breached the parties' purchase agreement and sought damages for lost profits and loss of goodwill based on the breaches.

Trial commenced on July 15, 2015, and it appears from the parties' pretrial filings that trial was held on all issues raised by the pleadings. After posttrial briefing, the court entered an order on September 28 finding the noncompete agreement was void and unenforceable because it was greater than reasonably necessary to protect the business interests of Westco both in geographical scope and duration. The September 28 order did not address Westco's counterclaims.

After the court issued the September 28, 2015, order, Last Pass filed a motion seeking damages and attorney fees related to the issuance of the temporary injunction. Last Pass relied on Neb. Rev. Stat. § 25-1079 (Reissue 2016) and *Koch v. Aupperle*[1] as authority for the motion. Before the court was able to rule on the motion, Westco filed a notice of appeal. That appeal was docketed in the Nebraska Court of Appeals as case No. A-15-972.

In November 2015, the Court of Appeals dismissed the appeal for lack of jurisdiction. That court's minute order cited Neb. Ct. R. App. P. § 2-107(A)(2) (rev. 2012) and *Malolepszy v. State*.[2] Section 2-107(A)(2) authorizes a Nebraska appellate court to summarily dismiss a case when it determines it lacks jurisdiction. *Malolepszy* held that under Neb. Rev. Stat. § 25-1315(1) (Reissue 2016), an order is final in a case involving multiple claims or parties only when there has been an explicit adjudication as to all claims and parties or the trial court has made an express determination that there is no just reason for delay of an appeal of an order disposing of less than all claims or parties.

After the cause was remanded, the parties filed a "Stipulated Motion to Dismiss Without Prejudice" in the district court. In this motion, the parties jointly requested dismissal, without

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[1] *Koch v. Aupperle*, 277 Neb. 560, 763 N.W.2d 415 (2009).

[2] *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

prejudice, of Westco's breach-of-contract counterclaims and Last Pass' motion for damages and attorney fees. The stipulated motion recited:

> [T]he Second and Third Amended Counterclaims were not addressed by the Order of this court entered on September 28, 2015. Under Neb. Rev. Stat. § 25-1315, such Order is not final and appealable because all claims were not addressed at the district court level. The Order of this court only addressed [Last Pass'] First and Second Causes of Action for declaratory relief . . . and [Westco's] First Amended Counterclaim for injunctive relief . . . . [Westco's] counterclaims will be available for refiling if desired.
>
> Similarly . . . the parties state that [Last Pass'] Motion for damages and fees need only be addressed by the Court if the Court's Order of September 28, 2015 is affirmed on appeal. [Last Pass'] motion will be available for refiling if desired after the appeal is concluded.

The district court subsequently entered an order of dismissal without prejudice that largely mirrored the language of the parties' stipulated motion. The order of dismissal was prepared by Westco's counsel and approved as to form and content by Last Pass' counsel. The order identified those claims resolved by the court's earlier order of September 28, 2015 (specifically, Last Pass' action for declaratory relief and Westco's counterclaim for injunctive relief) and identified those claims which remained unresolved (specifically, Last Pass' motion for damages and fees and Westco's second and third amended counterclaims for breach of contract). The order purported to dismiss the unresolved claims and motion "without prejudice" and specifically provided for the refiling of the motion and the counterclaims after the appeal.

Westco timely appealed from the order of dismissal without prejudice. We moved the appeal to our docket on our

own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[3]

## ASSIGNMENTS OF ERROR

Westco assigns that the district court erred in (1) finding the geographic scope and duration of the covenant not to compete unreasonable, (2) finding no evidence supported the reasonableness of the 10-year duration, (3) placing upon it the burden of proving the reasonableness of the 10-year duration, (4) issuing an advisory opinion which did not resolve all of the issues between the parties, (5) failing to equitably reform or "blue pencil" the covenant not to compete, and (6) failing to receive into evidence a purchase agreement between Westco and another Nebraska aerial spraying company.

## 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.[4]

## ANALYSIS

[2] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.[5] After reviewing the record, we conclude we lack appellate jurisdiction because Westco has not appealed from a final order.

[3] We considered a similar situation in *Smith v. Lincoln Meadows Homeowners Assn.*[6] In *Smith*, the plaintiff brought

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[3] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

[4] *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013); *In re Adoption of Amea R.*, 282 Neb. 751, 807 N.W.2d 736 (2011).

[5] *Sutton v. Killham*, 285 Neb. 1, 825 N.W.2d 188 (2013); *Carlos H. v. Lindsay M.*, 283 Neb. 1004, 815 N.W.2d 168 (2012).

[6] *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004).

a premises liability action and alleged the defendant's negligence caused her to suffer various damages, including broken bones and the onset of multiple sclerosis. The district court granted partial summary judgment in favor of the defendant on the allegation that damages included the onset of multiple sclerosis. The plaintiff then moved to dismiss her cause of action, without prejudice, so that she could appeal the grant of summary judgment. We found her appeal was not from a final order, as her voluntary dismissal was "quite clearly, an attempt to obtain interlocutory review of an order that would otherwise not be appealable."[7] We held it was clear that a party "cannot move to voluntarily dismiss a case without prejudice, consent to entry of such an order, and then seek interlocutory appellate review of an adverse pretrial order."[8]

We recently relied on *Smith* in *Addy v. Lopez*.[9] There, the plaintiff filed a wrongful death action against three defendants. After the trial court granted summary judgment in favor of one defendant, the parties entered into a joint stipulation to dismiss the claims against the remaining two defendants "without prejudice" in order to pursue an appeal of the summary judgment.[10] We held that such a procedure did not create appellate jurisdiction when there would otherwise be none because to do so would "'effectively abrogate our long-established rules governing the finality and appealability of orders, as "the policy against piecemeal litigation and review would be severely weakened."'"[11]

The same reasoning applies to the procedure used by the parties here. Westco's initial appeal was dismissed for lack of a final order. Once the matter was back before the district

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[7] *Id*. at 851, 678 N.W.2d at 729.

[8] *Id*. at 856, 678 N.W.2d at 732.

[9] *Addy v. Lopez*, 295 Neb. 635, 890 N.W.2d 490 (2017).

[10] *Id*. at 636, 890 N.W.2d at 491.

[11] *Id*. at 638, 890 N.W.2d at 493, quoting *Smith, supra* note 6.

court, the parties did not seek rulings on the remaining counterclaims or motion for damages and fees, nor did they request an order directing final judgment under § 25-1315 on fewer than all of the claims or move to dismiss the remaining claims with prejudice. Instead, the parties stipulated to a voluntary dismissal, without prejudice, of the pending counterclaims and motion for damages and fees, with the stated intent to bring those matters back before the court for ruling, depending on the outcome of the appeal. Such a procedure does not create finality and confer appellate jurisdiction.

[4] When an order adjudicates fewer than all the claims of all the parties, appellate jurisdiction cannot be created by voluntarily dismissing, without prejudice, the claims on which the court has not yet ruled.[12] We conclude the order appealed from is not a final order, and we lack jurisdiction to consider the appeal.

Appeal dismissed.

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[12] See, *Addy, supra* note 9; *Malolepszy, supra* note 2; *Smith, supra* note 6.

Nebraska Supreme Court
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# State of Nebraska, appellee, v. Tareik Q. Artis, appellant.

893 N.W.2d 421

Filed March 24, 2017. No. S-16-464.

1. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
2. **Statutes: Appeal and Error.** The interpretation of a statute is a question of law.
3. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
4. **Sentences.** When imposing a sentence, the sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the violence involved in the commission of the offense. The sentencing court is not limited to any mathematically applied set of factors.
5. ____. 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.
6. ____. It is within the discretion of the trial court to impose consecutive rather than concurrent sentences for separate crimes. This is true even when the crimes arise out of the same incident.
7. **Sentences: Appeal and Error.** While an appellate court typically reviews criminal sentences that are within statutory limits for abuse of discretion, the appellate court always reserves the right to note plain error which was not complained of at trial or on appeal.
8. **Appeal and Error: Words and Phrases.** Plain error is error of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

9. **Sentences.** A determinate sentence is imposed when the defendant is sentenced to a single term of years.
10. ____. With a determinate sentence, the court does not provide a minimum term; the minimum term is considered to be the minimum term provided by law.
11. ____. When imposing an indeterminate sentence, a sentencing court ordinarily articulates either a minimum term and maximum term or a range of time for which a defendant is to be incarcerated.
12. ____. In Nebraska, the fact that the minimum term and maximum term of a sentence are the same does not affect the sentence's status as an indeterminate sentence.

Appeal from the District Court for Lancaster County: Lori A. Maret, Judge. Affirmed.

Robert Wm. Chapin, Jr., for appellant.

Douglas J. Peterson, Attorney General, and Sarah E. Marfisi for appellee.

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

Kelch, J.

## I. NATURE OF CASE

Tareik Q. Artis was sentenced to not less than 2 years nor more than 2 years of imprisonment for possession of a controlled substance, a Class IV felony, and to 15 to 20 years' imprisonment for possession of a stolen firearm, a Class IIA felony. These sentences were ordered to be served consecutively. From these sentences, Artis appeals, alleging that they are excessive and that they should have been imposed to run concurrently.

While Artis' appeal was pending, a legislative bill[1] was enacted, which, among other things, amended Neb. Rev. Stat. § 29-2204.02 (Reissue 2016) to provide that "the court shall impose an indeterminate sentence" for Class IV felonies

[1] 2016 Neb. Laws, L.B. 1094 (effective Apr. 20, 2016).

imposed consecutively or concurrently with a sentence for a Class IIA felony "in accordance with the process set forth in section 29-2204."

In light of the amendment to § 29-2204.02, this court must determine whether Artis' sentence of not less than 2 years nor more than 2 years of imprisonment constitutes plain error.

## II. FACTS

### 1. Background

On September 22, 2015, Artis was wanted for fleeing to avoid a traffic citation. In pursuit of Artis, a Lincoln police officer was patrolling by a residence that Artis was known to frequent. While the officer checked the residence, he observed a person driving away in a vehicle. As the vehicle passed the officer, the officer smelled marijuana and initiated a traffic stop. Artis was a passenger in the back seat of the vehicle.

The occupants were removed from the vehicle one at a time, with Artis being the last person to exit. Artis fled on foot, and a chase ensued. According to Artis' statement in the presentencing report, Artis had a gun and knew the officer had seen it. Artis then ran for a few blocks before he was surrounded by law enforcement. Artis kept running after officers told him to stop. At the time, Artis had the gun in his hand. Officers shot at Artis four times, hitting him three times.

Prior to Artis' being transported to the hospital, articles of his clothing were removed by medical personnel and left at the scene. Found near his clothing was a white plastic cylinder containing 4.9 grams of cocaine. Also recovered at the scene was a .45-caliber semiautomatic pistol with a fully loaded magazine containing seven rounds, as well as two additional magazines, each fully loaded with seven rounds. A firearm "trace" revealed that the firearm had been stolen.

### 2. Charges and Plea Agreement

Artis was originally charged with three counts of possession of controlled substances. Count I was for cocaine, and counts II and III were for oxycodone and alprazolam. Artis

was also charged with possession of a stolen firearm. Pursuant to a plea agreement, Artis pled no contest to one count of possession of a controlled substance (cocaine) and to possession of a stolen firearm. This was done in exchange for the State's dismissing the other two charges.

On April 11, 2016, Artis was sentenced to consecutive sentences of not less than 2 years nor more than 2 years of imprisonment for possession of a controlled substance and 15 to 20 years' imprisonment for possession of a stolen firearm. From these sentences, Artis timely appealed.

On August 4, 2016, the State filed a motion for summary affirmance, which the Nebraska Court of Appeals sustained on September 6. On that same date, the State filed a motion to withdraw its motion for summary affirmance and subsequently filed a motion for rehearing. The basis for these motions was the State's belief that there may have been plain error in Artis' sentence for possession of a controlled substance. In response, the Court of Appeals vacated its prior order and sustained the State's motion for rehearing. Because the claim raised by the State was thought to be an issue of first impression, we moved the case to this court's docket.[2]

## III. ASSIGNMENTS OF ERROR

Artis assigns that the district court erred (1) by imposing excessive sentences and (2) by not making his sentences concurrent.

## IV. STANDARD OF REVIEW

[1] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[3]

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[2] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

[3] *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015); *State v. Cullen*, 292 Neb. 30, 870 N.W.2d 784 (2015); *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015); *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

[2,3] The interpretation of a statute is a question of law.[4] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.[5]

## V. ANALYSIS

We first review Artis' assigned errors before considering the State's contention that Artis' sentence for his conviction of possession of a controlled substance, a Class IV felony, constitutes plain error.

### 1. Artis' Assigned Errors

Artis assigns that the trial court erred in imposing excessive sentences and erred in failing to make his sentences concurrent. We note that Artis does not argue that his sentences exceed the statutory limits, but instead claims that the sentences are excessive in light of his age and "minimal criminal history."[6] He suggests that one concession the trial judge could have made was to make Artis' sentences run concurrently rather than consecutively.

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

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[4] *In re Interest of D.I.*, 281 Neb. 917, 799 N.W.2d 664 (2011); *D & S Realty v. Markel Ins. Co.*, 280 Neb. 567, 789 N.W.2d 1 (2010).

[5] *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009); *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008).

[6] Brief for appellant at 8.

[7] *State v. Oldson*, 293 Neb. 718, 884 N.W.2d 10 (2016).

demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[8] Additionally, it is within the discretion of the trial court to impose consecutive rather than concurrent sentences for separate crimes.[9] This is true even when the crimes arise out of the same incident.[10]

When the sentencing court imposed Artis' sentences and made them consecutive, it was cognizant of Artis' young age, but was concerned about Artis' criminal history, which included two prior convictions for possession of a controlled substance and narcotics investigations dating back to 2010. The sentencing court also afforded significant weight to the potential danger caused by Artis' fleeing from police in a public location while carrying a loaded firearm and two loaded magazines. After reviewing the record, we conclude that the district court did not abuse its discretion in imposing Artis' sentences.

### 2. Plain Error

[7,8] While an appellate court typically reviews criminal sentences that are within statutory limits for abuse of discretion, the appellate court always reserves the right to note plain error which was not complained of at trial or on appeal.[11] Plain error is error of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.[12] For the purpose of determining plain error, where the law at the time of trial was settled and clearly contrary to the law at the time of appeal,

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[8] *Id.*

[9] *State v. Dixon*, *supra* note 3.

[10] See *id.*

[11] *State v. Bartholomew*, 258 Neb. 174, 602 N.W.2d 510 (1999).

[12] *State v. Scott*, 284 Neb. 703, 824 N.W.2d 668 (2012); *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011); *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010); *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003); *State v. Greer*, 257 Neb. 208, 596 N.W.2d 296 (1999).

it is enough that an error be "plain" at the time of appellate consideration.[13]

The State submits that Artis' sentence for his Class IV felony was proper at the time it was imposed. However, the State asserts that due to the enactment of L.B. 1094, which went into effect on April 20, 2016, during the pendency of Artis' appeal, Artis' sentence may now constitute "plain error."[14] After the enactment of L.B. 1094, § 29-2204.02(4) now provides, in relevant part:

> For any sentence of imprisonment for a Class III, IIIA, or IV felony for an offense committed on or after August 30, 2015, imposed consecutively or concurrently with . . . (b) a sentence of imprisonment for a Class I, IA, IB, IC, ID, II, or IIA felony, the court shall impose an indeterminate sentence within the applicable range in section 28-105 that does not include a period of post-release supervision, in accordance with the process set forth in section 29-2204.

Although not enacted at the time Artis was sentenced, the State asserts that this version of § 29-2204.02 should apply to Artis' sentence pursuant to the doctrine in *State v. Randolph*.[15] However, even if § 29-2204.02 applied to Artis' sentence, his sentence would not constitute plain error, because the sentence for his Class IV felony complies with the relevant statutes under both L.B. 1094 and its predecessor, 2015 Neb. Laws, L.B. 605.

The State claims that there are three ways in which Artis' sentence for his Class IV felony does not comply with the L.B. 1094 version of § 29-2204.02. First, the State claims that Artis' sentence for his Class IV felony is a determinate sentence, while the L.B. 1094 version of § 29-2204.02 requires

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[13] *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).

[14] Brief for appellee at 8.

[15] *State v. Randolph*, 186 Neb. 297, 183 N.W.2d 225 (1971).

that Artis receive an indeterminate sentence. Second, the State suggests the amended version of § 29-2204.02(4) requires that the minimum term of Artis' sentence for his Class IV felony be less than the maximum term and that therefore, Artis' sentence does not comply. And, third, the State asserts that postrelease supervision could be imputed to Artis under the L.B. 605 version of the statutory scheme, which would be noncompliant with the L.B. 1094 version. We address each of these arguments in turn.

(a) Artis' Sentence Is Indeterminate

[9-12] The State has mischaracterized Artis' sentence of "not less than 2 years, nor more than 2 years" as a determinate sentence. A determinate sentence is imposed when the defendant is sentenced to a single term of years, such as a sentence of 2 years' imprisonment.[16] With a determinate sentence, the court does not provide a minimum term; the minimum term is considered to be the minimum term provided by law.[17] Thus, for a Class IV felony, which has a minimum punishment of no imprisonment, the minimum term of a determinate sentence would be 0 year's imprisonment.[18] In contrast, when imposing an indeterminate sentence, a sentencing court ordinarily articulates either a minimum term and maximum term or a range of time for which a defendant is to be incarcerated.[19] In Nebraska, the fact that the minimum term and maximum term of a sentence are the same does not affect the sentence's status as an indeterminate sentence.[20] Thus, we conclude that Artis' sentence for his Class IV felony is an indeterminate

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[16] See *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999).

[17] *Id.*

[18] Neb. Rev. Stat. § 28-105 (Reissue 2016); *State v. White, supra* note 16.

[19] *Id*.

[20] See, *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006); *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

sentence in which the minimum and maximum terms are the same. Such sentence complies with L.B. 1094's requirement that the court impose an indeterminate sentence for a Class IV felony when that sentence is imposed consecutively with a Class IIA felony, and we therefore find no plain error in this regard.

(b) Term "Process" in § 29-2204.02(4)

The State also claims that the current versions of Neb. Rev. Stat. § 29-2204(1) (Reissue 2016) and § 29-2204.02(4) require that the minimum term be less than the maximum term for Artis' sentence for his Class IV felony. We disagree. Section 29-2204(1) states:

> Except when the defendant is found guilty of a Class IA felony, in imposing a sentence upon an offender for any class of felony *other than a Class III, IIIA, or IV felony,* the court shall fix the minimum and the maximum terms of the sentence to be served within the limits provided by law. The maximum term shall not be greater than the maximum limit provided by law, and:
>
> (a) The minimum term fixed by the court shall be any term of years less than the maximum term imposed by the court; or
>
> (b) The minimum term shall be the minimum limit provided by law.

(Emphasis supplied.)

Although § 29-2204(1) expressly states that it does not apply to sentences for Class IV felonies, the State argues that § 29-2204.02(4) supersedes that exclusion, because § 29-2204.02(4) is more specific than § 29-2204(1). As noted above, § 29-2204.02(4) provides that "the court shall impose an indeterminate sentence" for Class IV felonies imposed consecutively or concurrently with a sentence for a Class IIA felony "in accordance with the process set forth in section 29-2204."

The State suggests that the phrase "process set forth in section 29-2204" refers to the requirement in § 29-2204(1)(a) that the minimum term of an indeterminate sentence be less than the maximum term. However, § 29-2204.02(4) does not limit the process to only § 29-2204(1)(a), but references § 29-2204 in general. Accordingly, in following the "process set forth in section 29-2204," a sentencing court should review all subsections of § 29-2204, not just specific phrases or subsections. In reviewing § 29-2204, we note that subsection (1) specifically excludes Class IV felonies, and we are required to give effect to all parts of a statute and to avoid rejecting a word, clause, or sentence as superfluous or meaningless.[21] Accordingly, we cannot accept the State's interpretation, which would require the court to disregard part of the first sentence in § 29-2204(1). Because § 29-2204(1) excludes Class IV felonies, we conclude that §§ 29-2204 and 29-2204.02(4) do not require that Artis' sentence for his Class IV felony have a minimum term less than the maximum term.

Our interpretation is supported by the legislative history of L.B. 1094, which is the bill that added § 24-2204.02(4). During at least one floor debate and at the judicial hearing, the bill's introducers repeatedly indicated that L.B. 1094 was not meant to make any substantive changes to the sentencing scheme established by L.B. 605.[22] Instead, L.B. 1094 is a "'clean-up bill'" and was intended to eliminate some unintended effects of L.B. 605.[23] One of those unintended effects was the possibility that a defendant who was sentenced consecutively or concurrently to multiple crimes would be subject

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[21] See *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 829 N.W.2d 703 (2013).

[22] Judiciary Committee Hearing, L.B. 1094, 104th Leg., 1st Sess. 47 (Feb. 4, 2016) (remarks of legal counsel to Judiciary Committee); Floor Debate, L.B. 1094, 104th Leg., 1st Sess. 25 (Mar. 23, 2016) (remarks of Senator Les Seiler).

[23] Introducer's Statement of Intent, L.B. 1094, 104th Leg., 1st Sess. (Feb. 4, 2016).

to both parole and postrelease supervision.[24] According to the Judiciary Committee Statement, § 29.2204.02 was amended to prevent that situation and also to clarify that good time should not apply to postrelease supervision.[25] Nothing within the legislative history suggests that § 29-2204.02 was meant to change the duration of punishment for offenders being sentenced to multiple crimes simultaneously.

Moreover, § 29-2204.02(4) applies only to certain offenders who are sentenced for multiple crimes. It would not limit the minimum term of sentences for offenders who have committed only one Class III, IIIA, or IV felony. Therefore, if the term "process" referred to only § 29-2204(1)(a), then the statutory scheme would allow, for example, an offender who committed multiple crimes to receive a more beneficial sentence for his or her Class IV felony than an offender who committed only a Class IV felony. We cannot say that is what the Legislature intended. Thus, § 29-2204.02(4) clearly refers to the entire statute § 29-2204.

As we read the statutes under L.B. 1094, there is nothing that requires the minimum term of Artis' sentence for his Class IV felony to be less than the maximum term. Accordingly, Artis' sentence appears to comply with L.B. 1094 in this respect.

(c) Postrelease Supervision

The State also suggests that Artis' sentence may constitute plain error pursuant to the *Randolph* doctrine, because the version of § 29-2204.02 as amended by L.B. 1094 requires that Artis receive no period of postrelease supervision.[26] Although the district court did not order postrelease supervision, the State is concerned that under the statutory scheme in effect at the time of Artis' sentencing, a period of 9 months' postrelease supervision could be imputed to him.

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[24] Committee Statement, L.B. 1094, 104th Leg., 1st Sess. 2, 5 (Feb. 4, 2016).

[25] *Id.*

[26] See *State v. Randolph, supra* note 15.

However, even under L.B. 605, Artis is not subject to postrelease supervision. The L.B. 605 version of § 28-105(6) states, in relevant part, "Any person who is sentenced to imprisonment for a Class . . . IIA felony and sentenced concurrently or consecutively to imprisonment for a Class . . . IV felony shall not be subject to post-release supervision pursuant to subsection (1) of this section." Here, Artis was sentenced to imprisonment for a Class IIA felony and sentenced consecutively to a Class IV felony, and the district court did not impose a period of postrelease supervision. Accordingly, the sentencing order was compliant with both L.B. 605 and L.B. 1094. Therefore, we find no plain error and affirm his sentences.

## VI. CONCLUSION

For the foregoing reasons, the district court did not abuse its discretion in imposing Artis' sentences and the sentence for his Class IV felony is not plainly erroneous. We therefore affirm.

Affirmed.

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

# Michael P. Burns, appellee, v. Kerry E. Burns, appellant.

892 N.W.2d 135

Filed March 24, 2017. No. S-16-491.

1. **Motions to Vacate: Time: Appeal and Error.** The decision to vacate an order any time during the term in which the judgment is rendered is within the discretion of the court; such a decision will be reversed only if it is shown that the district court abused its discretion.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when the 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: Motions to Vacate.** Although a court's decision to vacate an order is discretionary, this discretion is not an arbitrary one. It must be exercised reasonably and depends upon the facts and circumstances in each case as shown by the record.
4. **Jurisdiction: Venue: Words and Phrases.** Jurisdiction is the inherent power or authority to decide a case; venue is the place of trial of an action—the site where the power to adjudicate is to be exercised.
5. **Statutes: Presumptions: Legislature: Intent.** In interpreting a statute, a court is guided by the presumption that the Legislature intended a sensible rather than absurd result in enacting the statute.
6. **Trial: Venue: Parties: Stipulations.** Absent statutory authority to the contrary or a written stipulation or oral stipulation on the record by all parties, trials and evidentiary hearings must be conducted in the county in which they are pending.

Appeal from the District Court for Adams County: James E. Doyle IV, Judge. Reversed and remanded with directions.

Matt Catlett, of Law Office of Matt Catlett, for appellant.

Robert M. Sullivan, of Sullivan Shoemaker, P.C., L.L.O., for appellee.

Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Kelch, J.

## NATURE OF CASE

This case requires this court to determine whether Neb. Rev. Stat. § 24-303 (Reissue 2016) authorizes a district court sitting in one county to order a party in a contempt proceeding to appear in another county to show cause for why she should not be held in contempt. We conclude it does not and therefore reverse the court's order and remand the cause.

## FACTS

As an initial matter, we note that the district court judge handling this case is the Honorable James E. Doyle IV. Although Judge Doyle is a district court judge for the 11th Judicial District, this court appointed him to serve as the district court judge for the 10th Judicial District for the limited purpose of handling Burns v. Burns, case No. CI03-248. This was done because one of the parties, Michael P. Burns, served as a county court judge for the 10th Judicial District, thus creating a conflict of interest.

Michael and Kerry E. Burns divorced in 2004. Since the divorce decree was issued, there have been several modifications and appeals.[1] This particular appeal involves a contempt proceeding between the parties, which was pending before the district court for Adams County.

On January 6, 2016, Judge Doyle, acting as the district court judge for Adams County, issued an order requiring Kerry to appear in the Dawson County District Court in Lexington, Nebraska, on February 12 and show cause why she should not be held in contempt for refusing to comply with prior orders. On January 19, an affidavit of service of process was filed in

[1] See *Burns v. Burns*, 293 Neb. 633, 879 N.W.2d 375 (2016).

the district court for Adams County, reflecting that Kerry had been personally served in Wichita, Kansas. Ultimately, Kerry did not appear for the show cause hearing, but an evidentiary hearing was nevertheless held in Dawson County.

On February 24, 2016, the district court entered an order finding Kerry in contempt and sanctioning her therefore to 10 days in jail. The order also contained a purge plan.

On March 3, 2016, Kerry moved the district court to vacate its February 24 order on the basis that the court did not have authority to hold an evidentiary hearing outside of the county in which it was sitting.

On April 14, 2016, the district court issued an order in which it found that it did have authority to hold the hearing outside of the county and therefore overruled Kerry's motion to vacate. Kerry appeals from that order.

## ASSIGNMENT OF ERROR

Kerry's sole assignment of error is that the district court erred in overruling her motion to vacate, because the January 6 and February 24, 2016, orders are void.

## STANDARD OF REVIEW

[1-3] The decision to vacate an order any time during the term in which the judgment is rendered is within the discretion of the court; such a decision will be reversed only if it is shown that the district court abused its discretion.[2] An abuse of discretion occurs when the 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] Although a court's decision to vacate an order is discretionary, this discretion is not an arbitrary one. It must be exercised reasonably and depends upon the facts and circumstances in each case as shown by the record.[4]

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[2] *Hartman v. Hartman*, 265 Neb. 515, 657 N.W.2d 646 (2003).

[3] *Id.*

[4] *Talkington v. Womens Servs.*, 256 Neb. 2, 588 N.W.2d 790 (1999).

## ANALYSIS

We first address Michael's claim that Kerry waived the issue of whether the January 6 and February 24, 2016, orders should be vacated because she did not appeal from the January 6 and February 24 orders. Kerry asserts that both of those orders are void for want of jurisdiction and that thus, she can attack them at any time in any proceeding.[5] Rather than being a jurisdictional issue, Michael contends that the court's ability to hold an evidentiary hearing outside the county in which it sits is a venue issue and therefore may be waived.

[4] However, we conclude that the issue presented is clearly one of jurisdiction. Jurisdiction is the inherent power or authority to decide a case; venue is the place of trial of an action—the site where the power to adjudicate is to be exercised.[6] Here, Kerry is not questioning whether the place of trial action was proper under Neb. Rev. Stat. § 25-403.01 (Reissue 2016); instead, she questions Judge Doyle's authority in this case to order her to appear outside Adams County and to hold an evidentiary hearing outside Adams County. Accordingly, this appeal presents a jurisdictional issue. As we shall discuss below, we find that both orders are void for want of jurisdiction and that thus, Kerry has not waived the issue by failing to appeal from those orders.

First, we examine the authority granted to a district judge in Nebraska. The powers of a district judge commence with article V of the Nebraska Constitution. Section 1 vests the judicial power of the state in "a Supreme Court, an appellate court, district courts, county courts, in and for each county, with one or more judges for each county or with one judge for two or more counties, as the Legislature shall provide," as well as "other courts inferior to the Supreme Court as may be created by law." As section 11 states, "The Legislature may

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[5] See, *In re Estate of Evertson*, 295 Neb. 301, 889 N.W.2d 73 (2016); *Ryan v. Ryan*, 257 Neb. 682, 600 N.W.2d 739 (1999).

[6] *Blitzkie v. State*, 228 Neb. 409, 422 N.W.2d 773 (1988).

change the number of judges of the district courts and alter the boundaries of judicial districts."

Of relevance to this case, section 12 provides that "[t]he judges of the district court may hold court for each other and *shall do so when required by law or when ordered by the Supreme Court*." Here, as explained above, Judge Doyle, the district court judge for the 11th Judicial District, was ordered by this court to serve as a district court judge for the 10th Judicial District for the limited purpose of adjudicating the case of Burns v. Burns, case No. CI03-248, in the district court for Adams County, which is in the 10th Judicial District.[7] Although the order of appointment was not part of this record, this court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.[8]

Although Judge Doyle is still serving as a district judge in the 11th Judicial District due to his original appointment to the bench, his powers as district judge in each appointment were separate and distinct. Accordingly, Judge Doyle's authority to act in the case of Burns v. Burns was the same and not greater than any other judge serving Adams County.

Kerry claims that Judge Doyle acted outside his authority as a district court judge for Adams County when he ordered her to appear in Dawson County and held the contempt hearing there. Section 24-303 sets forth where the terms of the district court are to be held. It provides:

> (1) The judges of the district court shall, the last two months in each year, fix the time of holding terms of court in the counties composing their respective districts during the ensuing year, and cause the same to be published throughout the district, if the same can be done without expense. All jury terms of the district court shall be held at the county seat in the courthouse, or other place provided by the county board, but nothing herein

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[7] See Neb. Rev. Stat. § 24-301.02 (Reissue 2016).

[8] See *State v. Marshall*, 272 Neb. 924, 725 N.W.2d 834 (2007).

> contained shall preclude the district court, or a judge thereof, from rendering a judgment or other final order or from directing the entry thereof in any cause, in any county other than where such cause is pending, where the trial or hearing upon which such judgment or other final order is rendered took place in the county in which such cause is pending. Terms of court may be held at the same time in different counties in the same judicial district, by the judge of the district court thereof, if there be more than one, and upon request of the judge or judges of such court, any term in such district may be held by a judge of the district court of any other district of the state. The Supreme Court may order the assignment of judges of the district court to other districts whenever it shall appear that their services are needed to relieve a congested calendar or to adjust judicial case loads, or on account of the disqualification, absence, disability, or death of a judge, or for other adequate cause. When necessary, a term of the district court sitting in any county may be continued into and held during the time fixed for holding such court in any other county within the district, or may be adjourned and held beyond such time.
>
> (2) All nonevidentiary hearings, and any evidentiary hearings approved by the district court and by stipulation of all parties that have filed an appearance, may be heard by the court telephonically or by videoconferencing or similar equipment at any location within the judicial district as ordered by the court and in a manner that ensures the preservation of an accurate record. Such hearings shall not include trials before a jury. Hearings conducted in this manner shall be consistent with the public's access to the courts.

As noted by the district court, § 24-303 was amended in 2008.[9] There were two changes. First, subsection (2) was added. That subsection authorizes the use of telephone,

[9] See 2008 Neb. Laws, L.B. 1014, § 1.

videoconferencing, or similar equipment under certain circumstances. However, it specifically prohibits the use of such equipment in jury trials. The second change was that the term "jury" was added between the words "All" and "terms of the district court," so that the sentence reads: "All jury terms of the district court shall be held at the county seat in the courthouse . . . ."[10]

Obviously, § 24-303(2) does not apply to this case. The contempt hearing at issue was not heard telephonically, by videoconferencing, or any other equipment.

Instead, the issue here concerns the addition of the word "jury" to § 24-303(1). Because of that addition, the district court concluded that § 24-303 no longer specifies where nonjury terms of the court are to be held. On the other hand, Kerry contends that by adding the word "jury," the Legislature did not intend for the district judge to hold an evidentiary hearing at any location.

A careful reading of the remainder of § 24-303(1), which was not amended in 2008, reveals that all nonjury trials and hearings, except those conducted pursuant to § 24-303(2), must take place in the county in which the cause is pending (hereinafter referred to as "the pending county" for ease of discussion). Section 24-303 states, in relevant part:

> [N]othing herein contained shall preclude the district court . . . from rendering a judgment . . . in *any cause*, in any county other than where such cause is pending, *where the trial or hearing upon which such judgment or other final order is rendered took place in the county in which such cause is pending*.[11]

Based on this language, § 24-303(1) permits a district court to render a judgment outside the pending county. But this can be done only when the trial or evidentiary hearing upon which that judgment is based was held in the pending county, which, in this case, was Adams County.

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[10] See *id.*

[11] § 24-303(1) (emphasis supplied).

[5,6] In interpreting a statute, a court is guided by the presumption that the Legislature intended a sensible rather than absurd result in enacting the statute.[12] If we accepted Michael's interpretation of § 24-303(1)—that nonjury trials and hearings can be held anywhere, then the statute would allow a district judge handling a case in Omaha, Nebraska, to simply decide to hold an evidentiary hearing in Scottsbluff, Nebraska. This result would present due process concerns and is clearly not what the Legislature intended. Accordingly, we hold that absent statutory authority to the contrary or a written stipulation or oral stipulation on the record by all parties, trials and evidentiary hearings must be conducted in the county in which they are pending.

We note that this holding is supported by the legislative history of § 24-303. Although the Legislature's intent in adding the term "jury" to § 24-303(1) is unclear from the language of the statute itself, legislators' testimony before the Judiciary Committee is helpful. In discussing the addition of subsection (2), legislators were adamant that under the amended statute, jury trials would *not* be conducted by video conferencing or telephone.[13] So it appears that out of an abundance of caution, in addition to stating in subsection (2) that "[s]uch hearings shall not include trials before a jury," subsection (1) was amended to emphasize that jury terms must be conducted in the county court house or other place provided by the county board, rather than by videoconferencing or otherwise. There was no discussion of allowing district courts to hold nonjury trials or evidentiary hearings outside their county of origin.

Although neither party cited Neb. Rev. Stat. § 24-734 (Reissue 2016), we mention it since at least prior to its 2013 amendment, it provided authority for judges, including

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[12] *Concrete Indus. v. Nebraska Dept. of Rev.*, 277 Neb. 897, 766 N.W.2d 103 (2009).

[13] See Judiciary Committee Hearing, L.B. 1014, 100th Leg., 2d Sess. 31, 36 (Feb. 6, 2008).

district court judges, to perform certain acts at chambers anywhere within the state. But neither the preamendment nor the current version of § 24-734 would extend to matters involving testimony of witnesses by oral examination where the parties did not consent, such as the contempt hearing at issue here. Accordingly, this statute does not provide any assistance in this instance.

Applying § 24-303, we conclude that the district court did not act in conformity with the law when it ordered Kerry to appear in Dawson County and held the contempt hearing there, because Dawson County is outside the pending county of Adams County. We have said that a district court possesses jurisdiction only so long as it is holding court in conformity with the law; and when, without excuse, it disregards the law and attempts to hold court in any other place than that prescribed by statute, its acts become coram non judice.[14] Accordingly, the January 6 and February 24, 2016, orders are void, and the district court abused its discretion in overruling Kerry's motion to vacate the February 24 order.

## CONCLUSION

For the reasons set forth above, the district court abused its discretion by overruling Kerry's motion to vacate. We hereby reverse the order overruling Kerry's motion to vacate and remand the cause with directions to grant the motion to vacate and set a new show cause hearing in Adams County.

Reversed and remanded with directions.

Heavican, C.J., not participating.

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[14] *Hanson v. Hanson*, 195 Neb. 836, 241 N.W.2d 131 (1976).

Nebraska Supreme Court
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# County of Franklin, appellant, v. Tax Equalization and Review Commission, appellee.

892 N.W.2d 142

Filed March 24, 2017. No. S-16-554.

1. **Constitutional Law: Administrative Law: Taxation.** Neb. Const. art. IV, § 28, provides that the Tax Equalization and Review Commission is empowered to review and equalize assessments of property for taxation within the state.
2. **Taxation: Property: Valuation.** Neb. Rev. Stat. § 77-5022 (Cum. Supp. 2016) provides that the Tax Equalization and Review Commission shall annually equalize the assessed value or special value of all real property as submitted by the county assessors on the abstracts of assessments and equalize the values of real property that is valued by the state.
3. ____: ____: ____. The Tax Equalization and Review Commission is required to increase or decrease the value of a class or subclass of real property in any county or taxing authority or of real property valued by the state so that all classes or subclasses of real property in all counties fall within an acceptable range.
4. **Taxation: Judgments: Appeal and Error.** Appellate courts review decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.
5. **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.

Appeal from the Tax Equalization and Review Commission. Affirmed.

Henry C. Schenker, Franklin County Attorney, for appellant.

Douglas J. Peterson, Attorney General, and L. Jay Bartel for appellee.

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

Heavican, C.J.

## I. INTRODUCTION

The Tax Equalization and Review Commission (TERC) adjusted upward by 8 percent the value of the "Land Use Grass" subclass of the agricultural and horticultural land class in Franklin County, Nebraska. Franklin County appeals. We affirm.

## II. BACKGROUND

### 1. Applicable Law

[1,2] Some background law is helpful to understand the facts presented by this appeal. Neb. Const. art. IV, § 28, provides that TERC is empowered "to review and equalize assessments of property for taxation within the state." Neb. Rev. Stat. § 77-5022 (Cum. Supp. 2016) provides that TERC "shall annually equalize the assessed value or special value of all real property as submitted by the county assessors on the abstracts of assessments and equalize the values of real property that is valued by the state."

[3] In doing so, TERC is required "to increase or decrease the value of a class or subclass of real property in any county or taxing authority or of real property valued by the state so that all classes or subclasses of real property in all counties fall within an acceptable range."[1] The acceptable range for "agricultural land and horticultural land [is] sixty-nine to seventy-five percent of actual value."[2] The median has been

[1] Neb. Rev. Stat. § 77-5023(1) (Reissue 2009).

[2] § 77-5023(2)(a).

adopted by TERC as the preferred established indicator of central tendency.[3] Median is defined by regulation as "the value of the middle item in an uneven number of items arranged or arrayed according to size; the arithmetic average of the two central items in an even number of items similarly arranged; [or] a positional average that is not affected by the size of extreme values."[4] Thus, TERC prefers that valuation data "cluster" around the median value.[5]

If TERC finds that

> the level of value of a class or subclass of real property fails to satisfy the requirements of section 77-5023, [TERC] shall issue a notice to the counties which it deems either undervalued or overvalued and shall set a date for hearing at least five days following the mailing of the notice unless notice is waived.[6]

Subsequent to such a hearing, TERC shall raise or lower the valuation of any class or subclass or real property in a county when it is necessary to achieve equalization.[7] TERC's order following such a hearing should be entered based on information provided to it at the hearing and should specify the percentage of increase or decrease and the class or subclass of real property affected.[8]

Each county's assessor and the state's Property Tax Administrator (PTA) also have certain duties relating to the valuation process. Neb. Rev. Stat. § 77-1514 (Cum. Supp. 2016) provides that the county assessor must prepare abstracts of the property assessment rolls of locally assessed property,

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[3] 442 Neb. Admin. Code, ch. 9, § 004 (2011).

[4] *Id.*, § 002.13.

[5] *Id.*, § 002.10.

[6] Neb. Rev. Stat. § 77-5026 (Reissue 2009).

[7] Neb. Rev. Stat. § 77-5027(1) (Cum. Supp. 2016).

[8] Neb. Rev. Stat. § 77-5028 (Reissue 2009).

which should show the taxable value of property in the county as determined by the county assessor. These abstracts must be filed with the PTA.

As for the PTA, § 77-5027(2) provides that on or before 19 days after each county assessor files its abstracts under § 77-1514, the PTA must prepare and deliver to TERC and to each county assessor its own annual reports and opinions. Those reports and opinions

> shall contain statistical and narrative reports informing [TERC] of the level of value and the quality of assessment of the classes and subclasses of real property within the county and a certification of the opinion of the [PTA] regarding the level of value and quality of assessment of the classes and subclasses of real property in the county.[9]

In addition, the PTA may make nonbinding recommendations for consideration by TERC.[10] In compiling this information and formulating its opinion, the PTA may employ various methods as provided by law and may use sales of comparable real property in market areas similar to the county or area in question or from another county as indicators of the level of value and the quality of the assessment in a county.[11]

### 2. Valuation Actions

Franklin County assessor Linda Dallman timely filed her abstract of assessment. After receiving that abstract, the PTA filed certain reports with TERC regarding Franklin County's assessment. In those reports, the PTA made a nonbinding recommendation that Franklin County's assessment as to agricultural land for both farmland and pastureland be increased by 8 percent. In response to this nonbinding

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[9] § 77-5027(3).

[10] § 77-5027(4).

[11] § 77-5027(5).

recommendation, TERC called for a hearing on Franklin County's valuation.

### 3. TERC Hearing

The primary issue raised in the hearing was Franklin County's valuation for grassland. Because Franklin County had relatively few sales of grassland, the use of comparable sales from other counties was necessary to determine the valuation of that subclass. Dallman and the PTA differed on what comparable sales should be used, which in turn affected the valuation of grassland.

In its valuation, the PTA used 19 sales—9 sales from within Franklin County and another 10 in comparable sales from other counties. This resulted in an overall median of 67 percent, outside the range of 69 to 75 percent set forth by § 77-5023(2)(a). In Dallman's valuation, she used 14 sales—the same 9 sales from within Franklin County and 5 comparable sales. Three of the comparable sales were used by the PTA; two were not. Dallman testified that she rejected many of the sales used by the PTA because they were more than 12 miles from Franklin County's borders and she felt that, as such, the sales were not comparable. Dallman's valuation resulted in an overall grassland median of 74.91 percent, just inside the range set forth by § 77-5023(2)(a).

Ruth Sorensen, the PTA for the State of Nebraska, testified that Dallman's decision to not use sales beyond 12 miles of Franklin County was inconsistent with the PTA's current policy, which allows the use of any comparable sale from another county so long as "the proximity to the county and the comparability to the county" is examined. Sorensen acknowledged that this policy, while adopted in January 2016, was not published until April 11, 2016. According to the record, the prior policy generally provided that sales up to 6 miles away could be utilized. But even that prior policy noted that in an instance where there were still not enough comparable sales, "[t]he

preferred method of correcting the deficiency is to supplement the sample with comparable sales from surrounding counties," without a limitation on distance.

Sorensen also testified that she felt the sales outside of 12 miles from Franklin County were comparable to the grassland in Franklin County. Sorensen noted that the assessors of Webster and Harlan Counties, Nebraska, agreed, as both used those sales in grassland valuations for their respective counties.

### 4. TERC's Order

Following the show cause hearing, TERC entered its written findings and order adjusting value. As to all areas except one, TERC found that statistical studies of the level of value and the quality of assessment were reliable and representative of the level of value and quality of assessment for the category in question. But as to the "land use grass" subclass of the agricultural and horticultural land class of real property not receiving special valuation, excluding timber subclass and improvements, TERC found that an adjustment was necessary.

For this subclass, TERC's order noted that the level of value was 66.61 percent of actual or fair market value, as shown by the reports and opinions of the PTA. The order stated that this level was not within the acceptable range of 69 to 75 percent, and must be adjusted upward by 8 percent to a 72-percent level of value. Franklin County appeals.

## III. ASSIGNMENTS OF ERROR

Franklin County assigns, renumbered, that TERC (1) erred by relying on statistics prepared by the PTA, including sales that should not have been considered comparable sales; (2) violated Neb. Const. art. VIII by failing to uniformly and proportionally equalize Franklin County valuations; (3) erred by adjusting the grassland value of property in Franklin County

upward by 8 percent; and (4) erred by denying its motion to reconsider.

## IV. STANDARD OF REVIEW

[4,5] Appellate courts review decisions rendered by TERC for errors appearing on the record.[12] 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.[13]

## V. ANALYSIS

### 1. Use of PTA Statistics

Franklin County first assigns as error TERC's reliance on the statistics prepared by the PTA.

#### (a) Reliance on PTA Values Rather Than County Values

Franklin County first argues that TERC relied solely on the values provided by the PTA and not the values certified by Franklin County and that the Franklin County values and underlying sales files were not made available to TERC.

Franklin County is misconstruing the applicable statutes. As Franklin County argues, TERC is required by § 77-5022 to "annually equalize the assessed value or special value of all real property as submitted by the county assessors on the abstracts of assessments." But contrary to Franklin County's contention, TERC is not required to use only the abstract provided by the county to equalize that value.

The PTA is statutorily required, under § 77-5027, to provide to TERC the very information it provided to TERC in

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[12] Neb. Rev. Stat. § 77-5019(5) (Cum. Supp. 2016). See *JQH La Vista Conf. Ctr. v. Sarpy Cty. Bd. of Equal.*, 285 Neb. 120, 825 N.W.2d 447 (2013).

[13] *JQH La Vista Conf. Ctr. v. Sarpy Cty. Bd. of Equal., supra* note 12.

this case. That section also authorizes the PTA to make nonbinding recommendations regarding valuation to TERC. And TERC is to use all information provided at its hearing to make its determination.

Information was provided to TERC by both the PTA and Franklin County. The record shows that TERC considered all the information and concluded that an upward increase of 8 percent on grassland was warranted. TERC did not err in considering the PTA's figures.

(b) Presumption of Correctness

Franklin County also argues that its figures were entitled to a presumption of correctness under 350 Neb. Admin. Code, ch. 12, § 003.04 (2009). Franklin County is correct insofar as this regulation requires that its figures, as entered into the state sales record by an assessor, are presumed to be correct.

But it is not the figures entered by Franklin County that were challenged. Those figures were used by both Franklin County and the PTA in determining the appropriate valuation. It is the comparable sales outside of Franklin County that are at issue. That regulation is simply not relevant in this case.

(c) Comparable Sales Standard

Finally, Franklin County argues that TERC should not have accepted the PTA's comparable sales from counties further than 12 miles from Franklin County because of the recent change in policy. This contention is also without merit.

The PTA acknowledges that a different policy generally providing for use of comparable sales no more than 6 miles from a county's border was previously in place. The PTA further acknowledges that a new policy—that the PTA could use any comparable sale so long as "the proximity to the county and the comparability to the county"—was effective beginning in January 2016, but was not published on its website until April 11, 2016, just prior to the show cause hearing in this case.

But this standard is not a rule or statute, and is not explicitly applicable to county assessors. Rather, it is a policy directed at the PTA. This is consistent with the statutory obligation on the part of the PTA to determine the level of value and quality of assessment in all counties.[14]

Moreover, Franklin County suggests that the prior policy was a fixed 6-mile rule. In fact, the prior standard was flexible in allowing the use of sales outside of 6 miles. This is evidenced by Dallman's testimony that she utilized sales up to 12 miles from Franklin County's border. This argument, and in turn Franklin County's first assignment of error, is without merit.

### 2. Lack of Proportionality

In its second assignment of error, Franklin County contends that TERC violated Neb. Const. art. VIII by failing to uniformly and proportionally value grasslands in the state. This assertion is not supported by evidence in the record. Franklin County refers us to several figures suggesting a difference in grassland valuation between the counties, but offers no explanation beyond a list of those numbers. As TERC notes, there are any number of reasons explaining why a particular valuation is what it is, and without context to a value, a list of numbers indicates nothing.

There is no merit to Franklin County's second assignment of error.

### 3. Remaining Assignments of Error

Franklin County also assigns that TERC erred in the upward adjustment of its level of value. We review decisions rendered by TERC for errors appearing on the record,[15] and consider whether the decision conforms to the law, is supported

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[14] See § 77-5027.

[15] § 77-5019(5). See *JQH La Vista Conf. Ctr. v. Sarpy Cty. Bd. of Equal.*, *supra* note 12.

by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[16]

We have concluded that TERC did not err in utilizing the PTA's statistics. TERC's decision conformed to the law. There was evidence in the record supporting TERC's adjustment, and its decision was not arbitrary, capricious, or unreasonable. As such, we cannot find error in TERC's upward adjustment. Nor did TERC err in denying Franklin County's motion to reconsider.

## VI. CONCLUSION

TERC's order adjusting the Franklin County grassland value upward by 8 percent is affirmed.

Affirmed.

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[16] See *JQH La Vista Conf. Ctr. v. Sarpy Cty. Bd. of Equal.*, *supra* note 12.

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

# State of Nebraska, appellee, v. Jesus A. Chacon, appellant.

894 N.W.2d 238

Filed March 31, 2017. Nos. S-16-419, S-16-425.

1. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
2. **Sentences.** When imposing a sentence, the sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the violence involved in the commission of the offense. The sentencing court is not limited to any mathematically applied set of factors.
3. ____. 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.
4. **Appeal and Error.** An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal.
5. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
6. ____: ____. 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 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.

8. **Statutes: Legislature: Intent.** In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
9. ____: ____: ____. Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
10. **Criminal Law: Statutes: Legislature: Sentences.** Generally, when the Legislature amends a criminal statute by mitigating the punishment after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature specifically provided otherwise.
11. **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.

Appeals from the District Court for Hall County: John P. Icenogle, Judge. Judgment in No. S-16-419 affirmed. Judgment in No. S-16-425 affirmed in part and in part vacated, and cause remanded with directions.

Matthew A. Works, Deputy Hall County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Sarah E. Marfisi for appellee.

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

Kelch, J.

## INTRODUCTION

In these consolidated appeals, Jesus A. Chacon challenges his sentences for his convictions of two counts of possession of a controlled substance and one count of driving under the influence. In both cases, Chacon assigns that his sentences

were excessive. We affirm Chacon's sentence for possession of a controlled substance in case No. S-16-419 and his sentence for driving under the influence in case No. S-16-425. However, based on our analysis of 2015 Neb. Laws, L.B. 605, and 2016 Neb. Laws, L.B. 1094, we vacate Chacon's sentence for possession of a controlled substance in case No. S-16-425 and remand the cause for resentencing in accordance with this opinion.

## BACKGROUND

In case No. S-16-419, the State brought criminal charges against Chacon as a result of events that occurred on July 16, 2015. The State's information charged that on July 16, Chacon (1) criminally impersonated another person and (2) possessed a controlled substance, methamphetamine.

Case No. S-16-425 arises from events that occurred on December 28, 2015. The State's information alleged that on that date, Chacon unlawfully (l) possessed a controlled substance, methamphetamine; (2) tampered with physical evidence; (3) operated a motor vehicle while under the influence, second offense; and (4) operated a motor vehicle during a period of revocation, second offense.

On January 29, 2016, pursuant to a plea agreement encompassing both cases Nos. S-16-419 and S-16-425, and a third case not at issue on this appeal, Chacon pled no contest to the two Class IV felony charges of possession of a controlled substance and the single Class W misdemeanor charge of driving under the influence, second offense. In return for Chacon's pleas, the State agreed to dismiss all other charges and to recommend concurrent sentences for all convictions resulting from the two cases now on appeal.

According to the factual basis provided by the State, on July 16, 2015, law enforcement officers in Hall County, Nebraska, made contact with Chacon at a residence regarding loud music. When officers arrived, Chacon was at his vehicle. Chacon initially identified himself with a false name, but after a search

of the false name returned warrants and prompted officers to place Chacon under arrest, he admitted that his name was "Jesus Chacon" and that the initial name he had given was inaccurate. An officer observed a baggie in the front seat of Chacon's vehicle containing a white crystal-like substance which the officer believed to be methamphetamine. A search of Chacon's correct name showed multiple warrants, and he was arrested and transported to Hall County jail. Subsequent testing of the crystal-like substance returned a positive result for methamphetamine, weighing 2.3 grams.

On December 28, 2015, officers in Hall County observed a vehicle fail to yield and then execute two turns without signaling. Officers initiated a traffic stop and made contact with Chacon, who was driving the vehicle. A license check revealed that Chacon's license was suspended. Officers observed that Chacon had bloodshot eyes and "rancid" breath; and Chacon was grinding his teeth and had rigid muscle tone, indicative of a person under the influence of a stimulant drug. Officers further observed a plastic baggie between the front passenger door and the passenger seat.

Chacon performed poorly on field sobriety tests. A preliminary breath test showed no alcohol content in his breath. Officers arrested Chacon and transported him to Hall County jail, where he was determined to be under the influence of a drug. A search of Chacon's vehicle revealed methamphetamine. Officers also searched Chacon's person and discovered a coin-sized Ziploc bag containing methamphetamine in his pocket.

The district court accepted Chacon's pleas of no contest to possession of a controlled substance in cases Nos. S-16-419 and S-16-425 and his plea of no contest to driving under the influence in case No. S-16-425. Regarding enhancement, the parties stipulated that the driving under the influence offense was a second offense and that Chacon had previously been convicted of driving under the influence in Dawson County, Nebraska, on June 19, 2014. The district court enhanced the

penalty to driving under the influence, second offense, and then found Chacon guilty of all three charges. The district court ordered a presentence investigation and scheduled sentencing for March 30, 2016.

Chacon was 45 years old at the time of the presentence investigation. He had graduated from high school and had worked in the construction and meatpacking industries, but had been unemployed since 2014. According to the presentence investigation, Chacon was divorced, with one child, age 16, residing with her mother in Arizona. Chacon reported that his closest companions served as positive supporters in his life and did not have issues with substance abuse or prior arrests.

The presentence investigation revealed that Chacon has a long criminal history beginning in 1992, with charges filed in at least 18 prior incidents. Chacon's criminal history includes three convictions related to theft, three previous convictions for driving under the influence, and four previous convictions for driving under suspension and/or revocation or without an operator's license. Further, at the time of the presentence investigation, Chacon had an open charge for second degree assault, a Class IV felony offense, in Dawson County. The presentence investigation noted that although the criminal impersonation charge was dismissed in this case pursuant to the plea deal, Chacon's record shows several aliases.

Chacon had previously been sentenced to probation at least four times, but he reoffended during at least three of those terms, in 1992 and 2015. Chacon was court-ordered to complete a drug assessment in 2014 but did not attend that appointment. The presentence investigation rated him as an overall high risk for recidivism, with high risk in the categories of criminal history and procriminal attitude, and very high risk in the category of drug and/or alcohol abuse.

The presentence investigation also described significant mental health issues. Chacon experienced suicidal ideation

in 2007 when his marriage ended and again in 2014 when his girlfriend ended their relationship. During these periods, Chacon used cocaine or methamphetamine "to cope." The presentence investigation reflects that Chacon had been hospitalized and committed due to his mental health issues, but he refused to engage in the treatment process and did not connect his mental health issues with his drug use. At the time of the presentence investigation, Chacon was taking antidepressant medication. Chacon reported that he would participate in any recommended treatment for substance abuse. The presentence investigation anticipated that Chacon's inability to speak English could hinder his recovery.

On March 30, 2016, the district court conducted a sentencing hearing for both cases. The record demonstrates that in imposing its sentences, the district court heard evidence regarding Chacon's history and character, as well as the nature and circumstances of each crime. The district court found that a sentence of probation would be unsuitable for protecting the public, because Chacon had a history of failed probationary sentences and would be best served by a treatment program facilitated by a correctional institution.

In case No. S-16-419, the case arising from the July 16, 2015, possession offense, the district court sentenced Chacon to a period of incarceration with the Department of Correctional Services for 20 months to 5 years.

In case No. S-16-425, the case arising from the December 28, 2015, offenses, the district court sentenced Chacon to 2 years' imprisonment with 12 months of postrelease supervision for possession of a controlled substance. For driving under the influence, the district court sentenced Chacon to 6 months' incarceration, fined him $500, and suspended his driving privileges for 18 months. Chacon was given credit for 135 days of time served against his sentences in case No. S-16-425.

The district court sentenced Chacon concurrently on all three convictions.

Chacon now appeals his sentences in cases Nos. S-16-419 and S-16-425. We granted the State's motion to consolidate the appeals.

## ASSIGNMENT OF ERROR

In both cases, Chacon assigns that the district court imposed excessive sentences.

## ANALYSIS

### Possession of Controlled Substance in Case No. S-16-419: No Abuse of Discretion

In case No. S-16-419, Chacon assigns and argues that the district court imposed an excessive sentence for possession of a controlled substance. However, he concedes, and we agree, that his sentence on that charge falls within the statutory limits. The criminal activity underlying case No. S-16-419 occurred in July 2015. As a result, Chacon pled no contest to possession of a controlled substance, a Class IV felony, in violation of Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 2014). For acts committed prior to August 30, 2015, a Class IV felony is punishable by up to 5 years' imprisonment, a $10,000 fine, or both. See Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2014) and § 28-105(7) (Supp. 2015). See, also, *State v. Aguallo*, 294 Neb. 177, 881 N.W.2d 918 (2016) (changes made to penalties for Class IV felonies by L.B. 605 do not apply to any offense committed prior to August 30, 2015). Accordingly, Chacon's sentence of 20 months' to 5 years' incarceration falls within the statutory limits.

[1-3] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Oldson*, 293 Neb. 718, 884 N.W.2d 10 (2016). When imposing a sentence, the sentencing judge

should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the violence involved in the commission of the offense. *Id.* The sentencing court is not limited to any mathematically applied set of factors. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.*

The record demonstrates that the district court sufficiently considered Chacon's background and the aforementioned factors in imposing Chacon's sentence in case No. S-16-419. At the sentencing hearing, the district court noted that a sentence of probation would not adequately protect the public in light of Chacon's past history of failing to comply with probation and his need for inpatient substance abuse treatment. Further, the district court ordered Chacon's presentence investigation, which reveals a criminal history spanning decades and details a failure to succeed on probation or take advantage of treatment opportunities.

Given these considerations, the district court properly exercised its discretion in imposing Chacon's sentence for possession of a controlled substance in case No. S-16-419. See *State v. Oldson, supra*.

### Possession of Controlled Substance in Case No. S-16-425: Plain Error

Chacon assigns and argues that the district court imposed an excessive sentence for possession of a controlled substance in case No. S-16-425. He acknowledges that the sentence imposed was within the statutory limits in effect at that time, but he asserts that the district court nonetheless abused its discretion because, under the factors to be considered in

sentencing, the circumstances support a lesser penalty. As we explain below, we agree that the district court acted within the statutory limits in effect at the time when it sentenced Chacon to 2 years' imprisonment with 12 months of postrelease supervision for possession of a controlled substance in case No. S-16-425. However, considering again, as we did above, Chacon's criminal history, failed attempts at probation, and past resistance to treatment, we find that the district court did not abuse its discretion in sentencing him on this conviction. See *State v. Oldson, supra*.

[4] However, an appellate court always reserves the right to note plain error which was not complained of at trial or on appeal. *State v. Samayoa*, 292 Neb. 334, 873 N.W.2d 449 (2015). With respect to Chacon's felony sentence in case No. S-16-425, the State opines that plain error has occurred due to the doctrine enunciated in *State v. Randolph*, 186 Neb. 297, 183 N.W.2d 225 (1971), and the interplay between L.B. 605 and L.B. 1094, the latter of which took effect after Chacon's sentence. We agree.

[5-9] We begin by recounting the principles that govern our analysis. Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination. *State v. Draper*, 289 Neb. 777, 857 N.W.2d 334 (2015); *State v. Smith*, 286 Neb. 77, 834 N.W.2d 799 (2013). 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. Raatz*, 294 Neb. 852, 885 N.W.2d 38 (2016). 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. *Id*. In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Id*. Components of a series or collection

of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible. *Id*.

L.B. 605 became effective on August 30, 2015, prior to sentencing in the instant case and prior to the events that led the State to charge Chacon with possession of a controlled substance in case No. S-16-425. L.B. 605 amended Neb. Rev. Stat. § 29-2260(5) (Supp. 2015), which provided:

> For all sentences of imprisonment for Class III, IIIA, or IV felonies, other than those imposed consecutively or concurrently with a sentence to imprisonment for a Class I, IA, IB, IC, ID, II, or IIA felony, the court shall impose *a determinate sentence* within the applicable range in section 28-105, including a period of postrelease supervision.

(Emphasis supplied.) Therefore, at the time Chacon was sentenced, Nebraska law required prison sentences for Class IV felonies, except for those sentenced concurrently or consecutively with higher class felonies, to be determinate with a period of postrelease supervision. See § 29-2260(5). On March 30, 2016, the district court sentenced Chacon concurrently for two Class IV felonies and a Class W misdemeanor. Thus, Chacon was not sentenced for a Class IV felony that was imposed consecutively or concurrently with a higher class felony. As of the date of Chacon's sentencing for the Class IV felony in case No. S-16-425, § 28-105(1) and (7) (Supp. 2015) authorized a maximum penalty of 2 years' imprisonment with 12 months' postrelease supervision, a $10,000 fine, or both. Accordingly, the district court's determinate sentence of 2 years' imprisonment with a 12-month period of postrelease supervision fell within the statutory limits and followed the proper procedure for Class IV felonies as outlined in § 29-2260(5) at the time of sentencing.

However, on April 20, 2016, after sentencing, but while this matter was pending on appeal, L.B. 1094 took effect.

L.B. 1094 struck subsection (5) from § 29-2260 and added Neb. Rev. Stat. § 29-2204.02(4) (Reissue 2016), which provides:

> For any sentence of imprisonment for a Class III, IIIA, or IV felony for an offense committed on or after August 30, 2015, imposed consecutively or concurrently with *(a) a sentence for a Class III, IIIA, or IV felony for an offense committed prior to August 30, 2015*, or (b) a sentence of imprisonment for a Class I, IA, IB, IC, ID, II, or IIA felony, *the court shall impose an indeterminate sentence* within the applicable range in section 28-105 *that does not include a period of post-release supervision*, in accordance with the process set forth in section 29-2204.

(Emphasis supplied.) Had Chacon been sentenced pursuant to L.B. 1094, he would have received an indeterminate sentence without postrelease supervision for possession of a controlled substance in case No. S-16-425. This penalty, without postrelease supervision, would have been more favorable to Chacon than the sentence he received under the statute in effect at the time of sentencing.

[10] Under the *Randolph* doctrine, generally, when the Legislature amends a criminal statute by mitigating the punishment after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature specifically provided otherwise. See *State v. Randolph*, 186 Neb. 297, 183 N.W.2d 225 (1971). But, the *Randolph* doctrine does not apply if the Legislature created a "new crime" rather than merely changing the penalty for an existing crime. See *State v. Duncan*, 291 Neb. 1003, 870 N.W.2d 422 (2015).

Chacon's sentence for possession of a controlled substance in case No. S-16-425 fits the criteria contemplated by the *Randolph* doctrine. We have already explained that the application of L.B. 1094 would mitigate Chacon's sentence, which is not yet final, given that this direct appeal is still

pending. See *State v. Duncan, supra* (sentence on appeal is not final judgment until entry of final mandate). Furthermore, L.B. 1094's sentencing changes to Class IV felonies do not constitute a "new crime," and the Legislature did not specifically provide that the changes wrought by L.B. 1094 ought not apply retroactively to Class IV felonies that predate it. Indeed, Neb. Rev. Stat. § 83-1,135.02 (Cum. Supp. 2016) provides that L.B. 1094's amendments to § 29-2204.02 "apply to all committed offenders under sentence, on parole, or on probation on or after April 20, 2016." Chacon was a committed offender under sentence as of April 20, 2016, L.B. 1094's effective date.

Although L.B. 1094 was not in effect at the time of sentencing, the plain language of the statute and the *Randolph* doctrine compel us to apply it to Chacon's sentence for possession of a controlled substance in case No. S-16-425. As a matter of plain error, therefore, we conclude that Chacon is entitled to retroactive relief under L.B. 1094. Consequently, we vacate Chacon's sentence for possession of a controlled substance in case No. S-16-425 and remand the cause for resentencing consistent with § 29-2204.02(4) and the standard set forth in *State v. Artis, ante* p. 172, 893 N.W.2d 421 (2017), wherein we recently explained L.B. 1094's practical impact on sentencing for Class IV felonies pursuant to § 29-2404.02(4).

### Driving Under Influence in S-16-425: Not Assigned and Argued

[11] In case No. S-16-425, Chacon was sentenced for both possession of a controlled substance and driving under the influence. Chacon's brief in case No. S-16-425 assigns that "[t]he sentence imposed in this case was excessive." However, Chacon's brief argues only that his sentence for possession of a controlled substance was excessive. 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. *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014). Accordingly, we do not consider the propriety of Chacon's sentence for driving under the influence in case No. S-16-425.

## CONCLUSION

In case No. S-16-419, we find that the district court did not abuse its discretion in sentencing Chacon for possession of a controlled substance, and we affirm. In case No. S-16-425, we also affirm Chacon's sentence for driving under the influence. However, in light of our application of the *Randolph* doctrine to L.B. 1094, we vacate Chacon's sentence for possession of a controlled substance in case No. S-16-425 and remand the cause for resentencing in accordance with this opinion.

Judgment in No. S-16-419 affirmed.
Judgment in No. S-16-425 affirmed in part and in part vacated, and cause remanded with directions.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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# John Zapata, an individual and as an assignee, appellant, v. Donald McHugh, an individual, et al., appellees.

893 N.W.2d 720

Filed March 31, 2017. No. S-16-511.

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. **Corporations: Attorney and Client.** Business entities existing separate from their owners are not their own proper persons who may appear in court without the representation of an attorney.
3. **Attorney and Client.** Persons not licensed to practice law in Nebraska are prohibited from prosecuting an action or filing papers in the courts of this state on behalf of another.
4. ____. Abstractions cannot appear pro se.
5. ____. A layperson's lack of professional skills and ethical obligations imposes undue burdens on opposing parties and the courts.
6. ____. The rule that a layperson cannot appear in court in a representative capacity cannot be circumvented by subterfuge.
7. **Corporations: Assignments: Attorney and Client.** An assignment of a distinct business entity's cause of action to an assignee who then brings such suit requires that the assignee must be represented by counsel and cannot bring such action pro se.
8. ____: ____: ____. To permit a distinct business entity to maintain litigation through the device of an assignment would destroy the salutary principle that a corporation cannot act in legal matters or maintain litigation without the benefit of an attorney.
9. ____: ____: ____. When an assignee brings suit in his or her own name, the assignee is still bound by the business entity's limitation that any legal action arising out of its interests must be represented by counsel.

10. **Actions: Pleadings: Parties.** The character in which one is a party to a suit, and the capacity in which a party sues, is determined from the allegations of the pleadings and not from the caption alone.

Appeal from the District Court for Lancaster County: Steven D. Burns, Judge. Affirmed.

John Zapata, pro se.

No appearance for appellees.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Kelch, and Funke, JJ.

Wright, J.

## NATURE OF CASE

The plaintiff, as both an individual and an assignee, filed an action pro se to recover for wrongs allegedly committed against the assignor, a limited liability corporation (LLC). The district court dismissed the action on the grounds that the plaintiff engaged in the unauthorized practice of law and that the pleadings, accordingly, were a nullity. The district court reasoned that an LLC is an entity incapable of self-representation and that the policy reasons requiring representation by an attorney of such entity's interests cannot be circumvented through the assignment of the business entity's cause of action to a layperson. The plaintiff appeals.

## BACKGROUND

This action was brought pro se by John Zapata. The first pleading in the record is a "Mandatory Disclosure" filed under the caption, "John Zapata, an individual and as an Assignee, Plaintiff, v. Donald McHugh, an individual, et. al., Defendant." The complaint is not in the record, but documents attached to the mandatory disclosure purported to describe $11,100 in lost rent and $21,973.41 in repair costs owed by Lincoln Metal Recycling and Donald McHugh in relation to an address on Saunders Avenue in Lincoln, Nebraska.

At the pretrial conference on April 21, 2016, the court asked the parties to submit a joint pretrial conference order identifying the factual and legal issues to be tried. The court gave the parties 10 days to complete the order. The court, sua sponte, raised the issue whether Zapata could bring an action pro se based upon assignments from corporations on claims those organizations may have. The court gave the parties time to brief the issue.

The parties subsequently submitted a consolidated joint pretrial conference order, which stated that it superseded all prior pleadings in the case. The order stated that the claim was based on the fact that McHugh Metal Brokerage, LLC, vacated premises leased to it by Zapata's assignor, Coljo Investments, LLC (Coljo), the owner of the premises. The pretrial order stated that Zapata was "an individual and an assignee" who filed his complaint pursuant to Neb. Rev. Stat. § 25-302 (Reissue 2016). Zapata alleged that he paid consideration to Coljo in order to collect the alleged debt owed by the defendants.

The parties presented as legal issues whether there was a valid assignment to Zapata, whether Zapata was a real party in interest and had standing to bring the action, and whether the court had jurisdiction over the parties and the subject matter of the action.

As to the underlying merits, the parties stated that the legal issues were whether McHugh Metal Brokerage was liable to Zapata or Coljo arising out of the lease agreement, the nature and extent of any unpaid rentals, and the measure of damages for the reasonable cost for repairs to Coljo's premises.

On May 19, 2016, the district court dismissed the action. The court considered the defendants to have moved for dismissal in the joint pretrial conference order. The court concluded that even if the assignment of any right of action by Coljo to Zapata was effective, Zapata could not proceed pro se with the action on the assigned claims. The court explained that the right to represent oneself pro se, as set forth in Neb.

Rev. Stat. § 7-101 (Reissue 2012), does not extend to the representation of any other person or entity. The court cited to several cases setting forth the general propositions that corporate entities cannot be represented pro se and that this rule cannot be circumvented through an assignment of the corporate claims to a pro se plaintiff.[1]

The court also cited to an unpublished case in Indiana involving Zapata himself, who brought the action as Zapata, doing business as Zapata Collection Services, "'an Individual and as Assignee.'"[2] In that case, the appellate court affirmed the dismissal of Zapata's action. The court held that there was no bona fide assignment, because Zapata and the corporate assignor were inextricably linked; therefore, the alleged assignor of the claim for damages was the real party in interest and, as a corporate entity, was required to be represented by counsel.[3]

While the district court noted that in this case, Zapata did not list Coljo as a party, it found that such fact was not decisive, stating: "[Zapata] may not escape the fact that what he is attempting to litigate is not his claim. It is the claim of another which has merely been assigned to him. This is true even if [Zapata] is the one who will receive the entirety of any recovery."

As for Zapata's claim that he had a right to proceed pro se under Neb. Rev. Stat. § 25-304 (Reissue 2016), the district court stated that while Zapata had a right to bring an assigned

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[1] See, *Palazzo v. Gulf Oil Corp.*, 764 F.2d 1381 (11th Cir. 1985); *Jones v. Niagara Frontier Transp. Authority*, 722 F.2d 20 (2d Cir. 1983); *Bischoff v. Waldorf*, 660 F. Supp. 2d 815 (E.D. Mich. 2009); *In re Thomas*, 387 B.R. 808 (D. Colo. 2008); *People v. Adams*, 243 P.3d 256 (Colo. 2010).

[2] *Zapata v. Ball State University*, No. 18A04-1310-CC-534, 2014 WL 3547028 at *1 (Ind. App. July 18, 2014) (unpublished opinion listed in table at 16 N.E.3d 491 (2014)).

[3] *Id.*

action in his own name, this did not excuse the requirement that an attorney is required when the action derives from a wrong to a corporation. The court concluded that permitting the present action to go forward would unlawfully circumvent § 7-101. The court found the proceedings were a nullity. Zapata appeals.

Zapata has brought similar pro se actions in Nebraska. In *Zapata v. QBE Ins. Co.*,[4] the Nebraska Court of Appeals, in an unpublished opinion, affirmed the dismissal of an action brought by Zapata after being assigned a corporation's claims. The Court of Appeals reasoned in relevant part that although Zapata may have identified himself as both an individual and assignee, his claims were for damages to the corporation. Citing to *Steinhausen v. HomeServices of Neb.*,[5] the Court of Appeals concluded that Zapata could not prosecute any claim on behalf of the corporation, because he was not a licensed attorney.

## ASSIGNMENTS OF ERROR

Zapata assigns as error, summarized and restated, that the district court erred in dismissing his complaint as an individual and as an assignee.

## 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.[6]

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[4] *Zapata v. QBE Ins. Co.*, No. A-15-126, 2015 WL 9487813 (Neb. App. Dec. 29, 2015) (selected for posting to court website).

[5] *Steinhausen v. HomeServices of Neb.*, 289 Neb. 927, 857 N.W.2d 816 (2015).

[6] *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 694 N.W.2d 625 (2005).

## ANALYSIS

### Layperson Cannot Represent LLC

Zapata does not dispute the general rule that a layperson cannot represent a corporation or other distinct business entity existing legally separate from its owner—including an LLC.[7] The rule that such entities may litigate only through a duly licensed attorney is "venerable and widespread."[8] This rule prohibits even presidents, major stockholders, and sole owners from appearing pro se in relation to causes of action involving the entity's status as a business.[9]

[2] It is well settled that such business entities are artificial persons who cannot appear in their own behalf, but must appear through an agent; thus, they are not their own proper persons who may appear in court without the representation of an attorney.[10] And "because self-representation by unskilled persons usually leads to delay, confusion and other difficulties in the judicial system, the state has no interest in extending the right of self-representation to corporations."[11]

[3] Persons not licensed to practice law in Nebraska are prohibited from prosecuting an action or filing papers in the courts of this state "on behalf of another."[12] Under § 7-101, no such "person" shall practice law in any action or proceeding "to which he is not a party." Neb. Rev. Stat. § 7-110 (Reissue 2012) expands upon the exception to the unauthorized practice of law for persons as a party, stating that plaintiffs shall have the liberty of prosecuting "in

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[7] See *Lattanzio v. COMTA*, 481 F.3d 137 (2d Cir. 2007).

[8] *Jones v. Niagara Frontier Transp. Authority, supra* note 1, 722 F.2d at 22.

[9] See, *Palazzo v. Gulf Oil Corp., supra* note 1; *Steinhausen v. HomeServices of Neb., supra* note 5.

[10] See Annot., 8 A.L.R.5th 653 (1992).

[11] *Id.* at 653.

[12] *Steinhausen v. HomeServices of Neb., supra* note 5, 289 Neb. at 934, 857 N.W.2d at 825.

their proper persons," which we have said means, "'in their own persons.'"[13]

[4] We have explained that an entity is an abstraction, not a person. "'[A]bstractions cannot appear pro se.'"[14] Distinct business entities must appear by counsel or not at all.[15]

[5] We applied this rule most recently in *Steinhausen* to affirm the dismissal of causes of action relating to an LLC's status as a business, brought pro se by the sole owner of the LLC.[16] We noted that the prohibition of the unauthorized practice of law protects citizens and litigants in the administration of justice from the mistakes of the ignorant on the one hand and the machinations of the unscrupulous on the other.[17] A layperson's lack of professional skills and ethical obligations imposes undue burdens on opposing parties and the courts.[18]

[6] We reasoned that while an LLC has the capacity to sue and be sued in its own name, the Legislature's grace in conferring the significant privilege of limited liability "'"carries with it obligations . . . to hire a lawyer . . . to sue or defend on behalf of the entity."'"[19] This, we said, is no less true for an LLC with a single owner.[20] And we emphasized that "the rule that a layperson cannot appear in court in a representative capacity cannot be circumvented by subterfuge."[21]

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[13] *Id.* at 935, 857 N.W.2d at 825.

[14] *Id.* at 936, 857 N.W.2d at 826. See, also, *Niklaus v. Abel Construction Co.*, 164 Neb. 842, 83 N.W.2d 904 (1957).

[15] See *Ginger v. Cohn*, 426 F.2d 1385 (6th Cir. 1970).

[16] *Steinhausen v. HomeServices of Neb., supra* note 5.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 936, 857 N.W.2d at 826, quoting *Smith v. Rustic Home Builders, LLC*, 826 N.W.2d 357 (S.D. 2013). See, also, *Niklaus v. Abel Construction Co., supra* note 14.

[20] *Steinhausen v. HomeServices of Neb., supra* note 5.

[21] *Id*. at 935, 857 N.W.2d at 825.

## May Assignee of Business Entity's Right of Action Proceed With Such Action Pro Se?

We have said that the assignee of a cause of action is the proper and only party who can maintain the suit thereon.[22] But whether the assignee of a corporation's or other distinct legal entity's cause of action may maintain such action pro se is an issue of first impression for our court.

Zapata reasons that if he is the proper party to this action, he must be able to proceed pro se pursuant to §§ 7-101 and 7-110. However, the weight of authority from other jurisdictions is that an assignment does not erase the requirement that the suit arising from the entity's status as a business must be represented by a duly licensed attorney.[23]

In *Shamey v. Hickey*,[24] the court explained that although the action was brought in the name of the assignee, the assignee had essentially assumed the role of a collection agent, and the corporation was thus able to avoid the need for representation by a member of the bar through the device of selling its claim to the assignee. The court stated that it could not sanction such a convenience and remanded the cause with directions to dismiss the action.[25] The court explained that both collection agencies and individuals engage in the unauthorized practice

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[22] *Eli's, Inc. v. Lemen*, 256 Neb. 515, 591 N.W.2d 543 (1999).

[23] See, *Palazzo v. Gulf Oil Corp., supra* note 1; *Jones v. Niagara Frontier Transp. Authority, supra* note 1; *Bischoff v. Waldorf, supra* note 1; *Jones v. Dacosta*, 930 F. Supp. 223 (D. Md. 1996); *Mercu-Ray Industries, Inc. v. Bristol-Myers Company*, 392 F. Supp. 16 (S.D.N.Y. 1974); *Curtis v. U.S.*, 63 Fed. Cl. 172 (2004); *Shamey v. Hickey*, 433 A.2d 1111 (D.C. 1981); *Biggs v. Schwalge*, 341 Ill. App. 268, 93 N.E.2d 87 (1950); *Property Exchange & Sales v. Bozarth*, 778 S.W.2d 1 (Mo. App. 1989). See, also, *Roberts v. State, Dept. of Revenue*, 162 P.3d 1214 (Alaska 2007); *Heiskell v. Mozie*, 65 App. D.C. 255, 82 F.2d 861 (1936).

[24] *Shamey v. Hickey, supra* note 23.

[25] *Id.*

of law when they proceed pro se to recover on claims assigned by a corporation.[26]

Similarly, the court in *Bischoff v. Waldorf*[27] held that an action brought pro se in the name of the layperson assignee, alleging various claims relating to wrongs allegedly committed against the assignor corporation, must be dismissed. The court pointed out the "compelling policy reasons" for the rule requiring representation of distinct business entities by attorneys.[28] These included protection of the court and the public from irresponsible behavior of lay advocates. The court noted that the requirement of attorney representation in such actions also protected the various interests of a corporation's managers, workers, investors, and creditors, which interests may not be aligned with the interests of the layperson assignee making the claim.[29] In light of these important policy reasons for requiring attorney representation of claims relating to corporations, the court held that a nonlawyer may not circumvent those policy reasons through an assignment of corporate claims to an individual.[30]

In *Biggs v. Schwalge*,[31] the court affirmed the dismissal of an action brought in the name of the sole stockholder of a corporation and legal assignee of the corporation's cause of action. The record showed that the stockholder had regularly appeared pro se by virtue of his status as assignee. The stockholder attempted to convince the court of his competence in legal representation despite the fact that he was not an admitted member of the bar. The court held that the stockholder was prohibited from proceeding pro se despite the exception

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[26] *Id.*

[27] *Bischoff v. Waldorf, supra* note 1.

[28] *Id.* at 820.

[29] *Id.*

[30] See *id.*

[31] *Biggs v. Schwalge, supra* note 23.

to the prohibition of the practice of law by laypersons that allows plaintiffs and defendants to defend "in their own proper person."[32] The court noted that "[i]t is a compliment to the profession that it should have this irresistible attraction for some laymen . . . ."[33] Nevertheless, "[a]n assignment cannot be used as a subterfuge to enable plaintiff to indulge his overwhelming desire to practice law, without complying with the requirements for admission to the bar."[34]

One case reaching a different result is *Traktman v. City of New York*,[35] wherein the court held that an action by an assignee to recover damages for breach of contract with the assignor corporation did not violate a statute that prohibited a corporation from appearing pro se, despite the fact that the assignment may have been made to circumvent it. The court did not explain its reasoning. This case has been limited by subsequent case law[36] and cited by other jurisdictions as an outlier.[37]

[7,8] We agree with those cases that hold an assignment of a distinct business entity's cause of action to an assignee who then brings such suit requires that the assignee must be represented by counsel and cannot bring such action pro se. The important policy reasons supporting the rule that corporations and other related legal entities must be represented by an attorney should not be easily circumvented. To permit a distinct business entity to maintain litigation through the device

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[32] *Id.* at 271, 93 N.E.2d at 88.

[33] *Id.*

[34] *Id.*

[35] *Traktman v. City of New York*, 182 A.D.2d 814, 582 N.Y.S.2d 808 (1992). Compare *Rembrandt Personnel Group Agency v. Van-Go Transport Co., Inc.*, 162 Misc. 2d 64, 617 N.Y.S.2d 258 (1994).

[36] *Rembrandt Personnel Group Agency v. Van-Go Transport Co., Inc., supra* note 35.

[37] See, *In re Parrott Broadcasting Ltd. Partnership*, 492 B.R. 35 (D. Idaho 2013); *In re Thomas, supra* note 1.

of an assignment would destroy the salutary principle that a corporation cannot act in legal matters or maintain litigation without the benefit of an attorney.[38]

[9] An assignee stands in the shoes of the assignor and accepts it subject to all available defenses.[39] The assignment transfers to an assignee only the rights of the assignor.[40] When an assignee brings suit in his or her own name, the assignee is still bound by the business entity's limitation that any legal action arising out of its interests must be represented by counsel.

## Zapata as Individual?

[10] We find no merit to Zapata's argument that because the caption of his action is, "John Zapata, as individual and as an Assignee," he was a party to the suit as an individual who escapes the rules set forth above and who may proceed pro se. We explained in *Steinhausen* that the character in which one is a party to a suit, and the capacity in which a party sues, is determined from the allegations of the pleadings and not from the caption alone.[41] There is nothing in the pleadings indicating that Zapata has an interest in the litigation apart from those derived from his capacity as an assignee. All the allegations concern the relationship between the defendants and the assignor, Coljo.

## Zapata Engaged in Unauthorized Practice of Law

Zapata engaged in the practice of law in bringing this action, and he is a "nonlawyer," as defined by Neb. Ct. R. § 3-1002(A). By bringing the assigned claim of Coljo pro se,

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[38] *Property Exchange & Sales v. Bozarth, supra* note 23.

[39] See, *Vowers & Sons, Inc. v. Strasheim*, 248 Neb. 699, 538 N.W.2d 756 (1995); *Johnson v. Riecken*, 185 Neb. 78, 173 N.W.2d 511 (1970).

[40] *Ehlers v. Perry*, 242 Neb. 208, 494 N.W.2d 325 (1993).

[41] *Steinhausen v. HomeServices of Neb., supra* note 5.

Zapata engaged in the unauthorized practice of law. We regard the unauthorized practice of law as a serious offense and consider any unauthorized practice a nullity.[42] The district court was correct in dismissing Zapata's action.

## Timeliness of Motion

Given that Zapata's filings before the court were a nullity as a matter of law, we find no merit to Zapata's claims that the issue of his unauthorized practice of law was raised in an untimely manner and that the district court's decision was in error.

## CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

Affirmed.

Stacy, J., not participating.

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[42] *Kelly v. Saint Francis Med. Ctr.*, 295 Neb. 650, 889 N.W.2d 613 (2017).

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

# J. Daniel Estermann, appellant, v. Bill Bose et al., board members of Nebraska Cooperative Republican Platte Enhancement Project, a political subdivision of the State of Nebraska, and Nebraska Cooperative Republican Platte Enhancement Project, a political subdivision of the State of Nebraska, appellees.

892 N.W.2d 857

Filed April 7, 2017. No. S-15-1022.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Pleadings: Appeal and Error.** An appellate court reviews a district court's denial of a motion for leave to amend a complaint for an abuse of discretion. However, an appellate court reviews de novo an underlying legal conclusion that the proposed amendments would be futile.
5. **Summary Judgment.** On a motion for summary judgment, the question is not how the factual issue is to be decided but whether any real issue of material fact exists.
6. **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.

7. ____: ____. Once the moving party makes a prima facie case, the burden shifts to the party opposing the motion to produce admissible contradictory evidence showing the existence of a material issue of fact that prevents judgment as a matter of law.
8. **Constitutional Law: Eminent Domain: Taxation: Public Purpose.** A citizen's property may not be taken against his or her will, except through the sovereign powers of taxation and eminent domain, both of which must be for a public purpose.
9. **Eminent Domain: Public Purpose: Words and Phrases.** Eminent domain is the State's inherent power to take private property for a public use.
10. **Constitutional Law: Eminent Domain: Legislature: Statutes.** The State's eminent domain power resides in the Legislature and exists independently of the Nebraska Constitution. But the constitution has limited the power of eminent domain, and the Legislature can limit its use further through statutory enactments.
11. **Constitutional Law: Eminent Domain: Public Purpose.** Under Neb. Const. art. I, § 21, the State can take private property only for a public use and only if it pays just compensation.
12. **Eminent Domain: Legislature.** Only the Legislature can authorize a private or public entity to exercise the State's power of eminent domain.
13. **Pleadings.** A district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated.
14. **Pleadings: Summary Judgment: Proof.** After discovery is closed and a motion for summary judgment has been filed, the appropriate standard for assessing whether a motion to amend should be determined futile is that the proposed amendment must be not only theoretically viable but also solidly grounded in the record and supported by substantial evidence sufficient to give rise to a triable issue of fact.
15. **Legislature: Waters.** Nebraska's common law does not allow water to be transferred off overlying land. But the Legislature may provide exceptions to this common-law rule.

Appeal from the District Court for Lincoln County: Richard A. Birch, Judge. Affirmed.

Amy M. Svoboda, of Svoboda Law Office, and George G. Vinton for appellant.

Donald G. Blankenau and Vanessa A. Silke, of Blankenau, Wilmoth & Jarecke, L.L.P., for appellees.

Douglas J. Peterson, Attorney General, Justin D. Lavene, and Kathleen A. Miller, for amicus curiae Nebraska Attorney General.

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

Miller-Lerman, J.

## NATURE OF CASE

In this case, J. Daniel Estermann, the appellant, filed a complaint for injunction in the district court for Lincoln County against Bill Bose, Brad Randel, Jerry Weaver, and Terry Martin, who are board members of the Nebraska Cooperative Republican Platte Enhancement (N-CORPE) project, a political subdivision of the State of Nebraska, and N-CORPE (collectively the appellees), along with other parties who were later dismissed. Estermann filed this complaint in response to N-CORPE's separate condemnation proceedings against Estermann pending in the county court for Lincoln County, in which N-CORPE sought an easement across Estermann's real estate. Early on in this case, Estermann additionally filed an application for a temporary restraining order and a motion for temporary injunction, both of which the district court denied. The appellees subsequently filed a motion for summary judgment. After a hearing, the district court granted the appellees' motion for summary judgment and dismissed Estermann's complaint. Estermann appeals. We affirm; however, to some extent, our reasoning differs from that of the district court.

## STATEMENT OF FACTS

N-CORPE is a political subdivision of the State of Nebraska that was created under the Interlocal Cooperation Act (ICA), Neb. Rev. Stat. § 13-801 et seq. (Reissue 2012), by four natural resources districts: the Upper Republican, the Middle Republican, the Lower Republican, and the Twin Platte.

Each natural resources district (hereinafter NRD) is a political subdivision of Nebraska. The four NRD's entered into an amended agreement in December 2013, which created N-CORPE. The amended agreement states that "N-CORPE shall constitute a separate body corporate and politic of the State of Nebraska exercising public powers and acting on behalf of the Parties hereto." According to the amended agreement, the purpose of N-CORPE is to regulate and manage water to assist the State with compliance with the Republican River Compact (Compact). Nebraska, Kansas, Colorado, and the United States of America are parties to the Compact, and the Republican River Basin has been the subject of the Compact since 1943.

In *Kansas v. Nebraska*, 574 U.S. 445, 449-50, 135 S. Ct. 1042, 191 L. Ed. 2d 1 (2015), the U.S. Supreme Court described the Compact by stating:

> The Compact apportions among the three States "the virgin water supply originating in" . . . the Republican River Basin. . . . "Virgin water supply," as used in the Compact, means "the water supply within the Basin," in both the River and its tributaries, "undepleted by the activities of man." Compact Art. II. The Compact gives each State a set share of that supply—roughly, 49% to Nebraska, 40% to Kansas, and 11% to Colorado—for any "beneficial consumptive use." *Id*., Art. IV; see *id*., Art. II (defining that term to mean "that use by which the water supply of the Basin is consumed through the activities of man"). In addition, the Compact charges the chief water official of each State with responsibility to jointly administer the agreement. See *id*., Art. IX. Pursuant to that provision, the States created the Republican River Compact Administration (RRCA). The RRCA's chief task is to calculate the Basin's annual virgin water supply by measuring stream flow throughout the area, and to determine (retrospectively) whether each State's use of that water has stayed within its allocation.

In 2002, the Compact was modified via a "Final Settlement Stipulation" (FSS), which was approved by the U.S. Supreme Court in *Kansas v. Nebraska, supra*.

In furtherance of its purpose to assist the State with compliance with the compact, the amended agreement creating N-CORPE states that N-CORPE's business is to be conducted by a board and that each of the NRD's is to have a member on the board. The amended agreement provides that "N-CORPE shall have all the powers, privileges and authority exercised or capable of being exercised by each of the individual and separate Parties [NRD's] to achieve the purposes of the N-CORPE as set forth in this Agreement and as may be otherwise provided for in the [ICA]."

In the condemnation case, Lincoln County Court case No. CI 14-496, N-CORPE filed an amended petition to condemn in March 2014. N-CORPE stated in its amended petition that it was developing a "stream flow augmentation project" in Lincoln County in order to manage ground water and surface water in the Republican River Basin and to comply with the Compact. N-CORPE alleged in its amended petition that its project and petition were in response to the claim of the State of Kansas that it was not receiving its share of the Republican River water that was due to it under the Compact. N-CORPE stated in its amended petition that a portion of the water augmentation project was located over Estermann's real estate in Lincoln County and that therefore, N-CORPE was seeking a permanent "Flowage and Right-of-Way Easement" over Estermann's real estate in order to augment waterflow into Medicine Creek, which is a tributary of the Republican River.

After N-CORPE filed its amended petition to condemn, on April 1, 2014, Estermann filed the complaint in this case seeking an injunction against the appellees and Jeffrey Bain, Kent Florom, and Michael Nozicka. The latter three defendants were appraisers appointed by the county court for Lincoln County; they were subsequently dismissed as parties and are not parties to this appeal.

Estermann alleged in his complaint that as a result of N-CORPE's water augmentation project his real estate has flooded, causing increasing and irreparable damage to his land and crops, and that the floodwaters are creating new creek channels and are threatening to lower the water table under his fields. Estermann alleged that N-CORPE does not have the power of eminent domain, because "the [L]egislature has not delegated such powers to interlocal agencies under the [ICA]" and because the NRD's do not have the authority to delegate to N-CORPE any eminent domain powers they may hold. Estermann further alleged in his complaint that (1) the condemnation is not for a public use; (2) the amount of real estate being condemned is excessive in duration and area; (3) means other than an eminent domain action are available to the parties; (4) N-CORPE failed to obtain approvals and permits from certain agencies, including the Lincoln County Board of Commissioners, the Middle Republican NRD, the Twin Platte NRD, and the Nebraska Department of Natural Resources (DNR); (5) N-CORPE failed to obtain approval of the water augmentation project from Kansas; and (6) N-CORPE is prohibited under Nebraska's common law from transferring ground water off overlying land, and N-CORPE does not fall under any of the statutory exceptions to the common law. Therefore, Estermann requested that N-CORPE be enjoined from proceeding with the condemnation proceedings in case No. CI 14-496 and that N-CORPE be enjoined from discharging water into Medicine Creek.

On the day Estermann filed his complaint for injunction, Estermann also filed an application in which he sought a temporary restraining order enjoining N-CORPE from proceeding with the eminent domain action and enjoining N-CORPE from discharging water into Medicine Creek. Two days later, on April 3, 2014, the district court filed an order in which it denied Estermann's application for a temporary restraining order. In denying the application, the district court stated that "the failure to grant a temporary restraining order will not

impair [Estermann's] ability to proceed on his Complaint for an Injunction."

On April 16, 2014, Estermann filed a motion for temporary injunction that would enjoin N-CORPE from discharging water into Medicine Creek. Estermann alleged that the discharge of water into Medicine Creek during the pendency of the action would produce great irreparable injury to him. Estermann further alleged that N-CORPE does not have the power of eminent domain and therefore is not entitled to condemn an easement over his real estate. Estermann also alleged that he did not have an adequate remedy at law.

On April 30, 2014, the office of the Attorney General filed a motion for leave to file an amicus brief, in which it stated that it sought to offer guidance regarding an opinion that was issued by the Attorney General and its impact on the court's interpretation of § 13-804 of the ICA, which generally deals with public agencies exercising joint power. See Att'y Gen. Op. No. 03026 (Dec. 5, 2003). The district court granted the motion.

On May 15, 2014, the district court filed an order in which it denied Estermann's motion for temporary injunction. In the May 15 order, the district court determined that Estermann did not establish that he had a clear right to the relief he sought or that he would suffer a great or irreparable injury during the pendency of the litigation. The district court stated that Estermann's main argument in support of his request for a temporary injunction was that the NRD's that created N-CORPE cannot authorize N-CORPE to exercise the power of eminent domain. The district court rejected this argument.

In its order, the court noted that N-CORPE was created by the four NRD's pursuant to the ICA. The court recognized that pursuant to Neb. Rev. Stat. § 2-3234 (Reissue 2012), each of the NRD's has the power of eminent domain. Relying on § 13-804 of the ICA, the court further recognized that the NRD's can authorize N-CORPE to exercise any of their powers or authority, including the power of eminent domain. Section 13-804(1) provides:

> Any power or powers, privileges, or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state and jointly with any public agency of any other state or of the United States to the extent that laws of such other state or of the United States permit such joint exercise or enjoyment. Any agency of state government when acting jointly with any public agency may exercise and enjoy all of the powers, privileges, and authority conferred by the [ICA] upon a public agency.

The district court noted in its May 15, 2014, order that although the evidence showed that Estermann would sustain damages from the water augmentation project, the evidence did not support a conclusion that he would "suffer a great or irreparable injury" before his complaint could be heard. Accordingly, the district court denied Estermann's motion for temporary injunction.

On June 5, 2015, the appellees filed a motion for summary judgment. On July 17, Estermann filed a motion for leave to file an amended complaint, in which he proposed to add a claim that the acts of N-CORPE were improper because N-CORPE had not obtained approval from the Republican River Compact Administration (RRCA) for the water augmentation project.

On October 2, 2015, the district court filed an order regarding the appellees' motion for summary judgment and Estermann's motion for leave to file an amended complaint. The district court first denied Estermann's motion for leave to file an amended complaint, stating that "any issues raised in the Amended Complaint can be dealt with under the original complaint. As such, the amendment is futile and the Motion for Leave to Amend Complaint is therefore overruled."

The district court observed that Estermann disagreed with the policies that led to N-CORPE's petitioning to condemn and acquire an easement across his property. The district court

stated that "[t]hose public policy decisions are constitutionally entrusted to other branches of government."

The district court next rejected Estermann's argument that the condemnation does not meet a public purpose. The district court stated that "complying with Nebraska's obligation . . . under an interstate compact is certainly a public purpose." The court stated that the burden placed on Estermann by the condemnation does not eliminate the public purpose of the condemnation.

The district court further stated in its October 2, 2015, order that in its previous order filed May 15, 2014, the court had concluded that the NRD's had properly authorized N-CORPE to exercise the power of eminent domain. The district court stated that it believed that decision was correct and concluded that it "again holds that each of the four [NRD's] that formed N-CORPE has the power of eminent domain [and] that such authority . . . was properly exercised by N-CORPE."

The district court then rejected Estermann's argument that even if N-CORPE had the authority to condemn the easement, it did not have the authority to transport water across his property within the easement area. With respect to Estermann's contention that the common law prohibits N-CORPE from transferring ground water off the property on which it was pumped, the district court recognized that we stated in *In re Referral of Lower Platte South NRD*, 261 Neb. 90, 94, 621 N.W.2d 299, 303 (2001), that "Nebraska's common law does not allow water to be transferred off overlying land." The district court stated, however, that we went on to state that "'[t]he Legislature has the power to determine public policy with regard to ground water and . . . it may be transferred from the overlying land only with the consent of and to the extent prescribed by the public through its elected representatives.'" *Id.*, quoting *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614 (1981), *reversed on other grounds* 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982). The district court concluded that by enacting statutes "relating to" NRD's,

the Legislature modified the common law and removed any common-law prohibition against N-CORPE's transfer of water off the overlying property.

With respect to Estermann's argument that N-CORPE does not have the necessary permits from the DNR to operate the water augmentation project, the district court determined that even though Estermann had standing to challenge the taking of the easement, he did not have standing to challenge whether N-CORPE has the permits needed to use the easement. The district court further stated that even if Estermann had standing, he was not in the appropriate forum to raise that issue.

Based upon the foregoing, the district court determined that there were no material issues of fact in dispute, and it determined that the appellees were entitled to judgment as a matter of law. The district court granted the appellees' motion for summary judgment and dismissed Estermann's complaint with prejudice.

Estermann appeals.

## ASSIGNMENTS OF ERROR

Estermann claims, restated, that the district court erred when it (1) determined that N-CORPE has authority to exercise the power of eminent domain, (2) failed to determine that certain permits and approvals had to be obtained and set forth in writing before N-CORPE could proceed in eminent domain, (3) determined that Estermann did not have standing to challenge whether N-CORPE lacked required permits and authority, (4) determined that Estermann was not in the appropriate forum to contest N-CORPE's lack of certain permits and approvals, (5) failed to determine that the county court did not have jurisdiction over N-CORPE's amended petition to condemn, (6) denied Estermann's motion for leave to amend his complaint for injunction, (7) determined that Nebraska common law does not prohibit N-CORPE from removing ground water from overlying land, and (8) failed to find there were

material issues of fact as to whether N-CORPE's condemnation action was for a public use.

## STANDARDS OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Bixenmann v. Dickinson Land Surveyors*, 294 Neb. 407, 882 N.W.2d 910 (2016), *modified on denial of rehearing* 295 Neb. 40, 886 N.W.2d 277. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id*.

[3] 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. *Hargesheimer v. Gale*, 294 Neb. 123, 881 N.W.2d 589 (2016).

[4] We review a district court's denial of a motion for leave to amend a complaint for an abuse of discretion. See *Bailey v. First Nat. Bank of Chadron*, 16 Neb. App. 153, 741 N.W.2d 184 (2007). See, also, *Gonzalez v. Union Pacific RR. Co.*, 282 Neb. 47, 803 N.W.2d 424 (2011). However, as we explain in greater detail later in this opinion, we review de novo an underlying legal conclusion that the proposed amendments would be futile. *Bailey v. First Nat. Bank of Chadron, supra*.

## ANALYSIS

Estermann generally claims that the district court erred when it granted the appellees' motion for summary judgment. We address Estermann's specific assignments of error below. Because we find no merit to any of Estermann's assignments of error, we affirm the decision of the district court.

[5] The principles regarding summary judgment are well established. On a motion for summary judgment, the question

is not how the factual issue is to be decided but whether any real issue of material fact exists. *Cisneros v. Graham*, 294 Neb. 83, 881 N.W.2d 878 (2016). 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 such party the benefit of all reasonable inferences deducible from the evidence. *Strode v. City of Ashland*, 295 Neb. 44, 886 N.W.2d 293 (2016). Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Id*.

[6,7] 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. *Cisneros v. Graham, supra*. Once the moving party makes a prima facie case, the burden shifts to the party opposing the motion to produce admissible contradictory evidence showing the existence of a material issue of fact that prevents judgment as a matter of law. *Id*.

*N-CORPE Has the Authority to Exercise Eminent Domain.*

Estermann claims that the district court erred when it concluded that the NRD's that created N-CORPE properly authorized N-CORPE to use the power of eminent domain and that N-CORPE properly possessed authority to exercise eminent domain. Because we agree with the district court's legal conclusions, we find no merit to this assignment of error.

[8,9] As an initial matter, we first summarize the nature of eminent domain. Every citizen has the constitutional right to acquire, own, possess, and enjoy property. See Neb. Const. art. I, § 25. A citizen's property may not be taken against his or her will, except through the sovereign powers of taxation

and eminent domain, both of which must be for a public purpose. *Thompson v. Heineman*, 289 Neb. 798, 857 N.W.2d 731 (2015). See, also, *Burlington Northern Santa Fe Ry. Co. v. Chaulk*, 262 Neb. 235, 631 N.W.2d 131 (2001); *Burger v. City of Beatrice*, 181 Neb. 213, 147 N.W.2d 784 (1967). Eminent domain is the State's inherent power to take private property for a public use. *Thompson v. Heineman, supra*.

[10-12] The State's eminent domain power resides in the Legislature and exists independently of the Nebraska Constitution. *Thompson v. Heineman, supra*. But the constitution has limited the power of eminent domain, and the Legislature can limit its use further through statutory enactments. *Id*. Under Neb. Const. art. I, § 21, the State can take private property only for a public use and only if it pays just compensation. *Thompson v. Heineman, supra*. See, also, *Burlington Northern Santa Fe Ry. Co. v. Chaulk, supra*. Only the Legislature can authorize a private or public entity to exercise the State's power of eminent domain. *Id*.

Under § 2-3234, the Legislature has delegated the power of eminent domain to NRD's to carry out their authorized purposes. Section 2-3234 provides in part: "Except as provided in sections 2-3226.11 and 2-3234.02 to 2-3234.09, each district shall have the power and authority to exercise the power of eminent domain when necessary to carry out its authorized purposes within the limits of the district or outside its boundaries." Accordingly, the four NRD's that formed N-CORPE each had the power of eminent domain.

Pursuant to the ICA, the NRD's may exercise their authority and other powers alone or jointly with other local governmental units. Nebraska permits interlocal agreements pursuant to the ICA. *Kubicek v. City of Lincoln*, 265 Neb. 521, 658 N.W.2d 291 (2003). The ICA's purpose is "to permit local governmental units to make the most efficient use of their taxing authority and other powers by enabling them to cooperate with other localities on a basis of mutual advantage and thereby to provide services and facilities." See § 13-802.

Under § 13-804(2), two or more public agencies may enter into agreements with one another for joint or cooperative action under the ICA. See *City of Falls City v. Nebraska Mun. Power Pool*, 279 Neb. 238, 777 N.W.2d 327 (2010). The ICA authorizes the creation of a joint entity whose express authority is limited to executing the enumerated powers of the agencies which created it. Section 13-803(1) of the ICA provides that for purposes of the ICA, "[j]oint entity shall mean an entity created by agreement pursuant to section 13-804." As quoted earlier in this opinion, with respect to joint entities, § 13-804(1) provides:

> Any power or powers, privileges, or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state and jointly with any public agency of any other state or of the United States to the extent that laws of such other state or of the United States permit such joint exercise or enjoyment. Any agency of state government when acting jointly with any public agency may exercise and enjoy all of the powers, privileges, and authority conferred by the [ICA] upon a public agency.

Section 13-804(2) provides:

> Any two or more public agencies may enter into agreements with one another for joint or cooperative action pursuant to the [ICA]. Appropriate action by ordinance, resolution, or otherwise pursuant to law of the governing bodies of the participating public agencies shall be necessary before any such agreement may enter into force.

With respect to how the ICA is to be construed, § 13-825 provides:

> The provisions of the [ICA] shall be deemed to provide an additional, alternative, and complete method for the doing of the things authorized by the act and shall be deemed and construed to be supplemental and additional to, and not in derogation of, powers conferred

> upon political subdivisions, agencies, and others by law. Insofar as the provisions of the [ICA] are inconsistent with the provisions of any general or special law, administrative order, or regulation, the provisions of the [ICA] shall be controlling.

Estermann claims that the district court erred when it determined that N-CORPE had the authority to exercise the power of eminent domain. Estermann contends that the Legislature did not specify in the ICA or elsewhere that an interlocal agency created pursuant to the ICA could have the power of eminent domain. Estermann further asserts that

> the only way an interlocal agency could have condemnation powers is if the Nebraska Legislature had included language in the ICA to the effect that all agencies created under the ICA have eminent domain power or perhaps language to the effect that any such agency does possess eminent domain powers so long as the government agencies that created it have those powers.

Brief for appellant at 22. Estermann contends that only the Legislature is capable of delegating eminent domain power and that because the Legislature did not explicitly state that interlocal agencies, such as N-CORPE, may have eminent domain power, N-CORPE does not have the power to exercise eminent domain. We disagree.

In December 2013, the four NRD's formed N-CORPE by entering into an amended agreement pursuant to the ICA. As stated above, pursuant to § 2-3234, the NRD's that formed N-CORPE each had the power of eminent domain. Under § 13-804, local governmental units are authorized to jointly exercise their individually held authority and powers through a joint entity created under the ICA. Therefore, because the NRD's that formed N-CORPE each individually held the power of eminent domain, the NRD's were able to jointly exercise that individually held power through the mechanism of the joint entity they created, i.e., N-CORPE, and thus, N-CORPE was authorized to exercise the power of eminent domain. When the NRD's formed N-CORPE as a joint entity

under the ICA, they did not lose any of the powers, privileges, or authorities that they separately held, including the power of eminent domain. Instead, the powers, privileges, and authorities that the NRD's were capable of exercising separately could be exercised and enjoyed jointly with the other NRD's through the mechanism of their joint entity, N-CORPE. See § 13-804(1).

The foregoing description of the N-CORPE's authority to act and the simultaneous power of eminent domain retained by the NRD's is in accord with § 13-825, which provides:

> The provisions of the [ICA] shall be deemed to provide an additional, alternative, and complete method for the doing of the things authorized by the act and shall be deemed and construed to be supplemental and additional to, *and not in derogation of*, powers conferred upon political subdivisions, agencies, and others by law.

(Emphasis supplied.) Thus, under § 13-825, the formation of N-CORPE did not remove or degrade powers that the Legislature had already granted to the NRD's by statute. Rather, the formation by the NRD's of the joint entity N-CORPE under the provisions of the ICA created a method of exercising eminent domain which was "supplemental and additional to, and not in derogation of, powers" conferred on the NRD's. 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. *Stewart v. Nebraska Dept. of Rev.*, 294 Neb. 1010, 885 N.W.2d 723 (2016). Under the clear language of §§ 13-804 and 13-825, N-CORPE is authorized by the ICA to serve as the method to exercise the power of eminent domain to the extent that eminent domain had been conferred on the NRD's.

We have previously recognized that the authority and powers of governmental entities can be exercised and enjoyed jointly with other governmental entities through a joint entity created pursuant to the ICA. See *Kubicek v. City of Lincoln*, 265 Neb. 521, 658 N.W.2d 291 (2003). Although *Kubicek*

did not directly involve the issue of the exercise of the power of eminent domain, we find its description of a joint entity useful. In *Kubicek*, we noted that three governmental entities created a joint entity—referred to as the "joint administrative agency"—pursuant to an interlocal cooperation agreement for the purpose of completing a project. This court stated that "[b]efore the creation of [the joint agency], each partner had the statutory authority to implement certain aspects of the project. Together, through [the joint agency], the three partners have complete statutory authority to implement the whole project." *Kubicek v. City of Lincoln*, 265 Neb. at 523-24, 658 N.W.2d at 294. Accordingly, the joint entity was able to exercise the express powers and authorities that were held by the governmental agencies which created it. Similarly, in this case, N-CORPE may exercise the powers and authorities that were held individually by the four NRD's that created it pursuant to the ICA, namely the power of eminent domain.

For these reasons, we determine that the district court did not err when it concluded that N-CORPE had the authority to exercise the power of eminent domain. We find no merit to this assignment of error.

*N-CORPE Did Not Lack Necessary Permits or Approvals.*

Estermann claims that the district court erred when it failed to determine that N-CORPE was required to obtain permits and approvals from the DNR and the NRD's in order to implement and operate the N-CORPE project and to utilize the easement over Estermann's property. We find no merit to this assignment of error.

Neb. Rev. Stat. § 76-704 (Reissue 2009) provides: "If any condemnee shall fail to agree with the condemner with respect to the acquisition of property sought by the condemner, a petition to condemn the property may be filed by the condemner in the county court of the county where the property or some part thereof is situated." Estermann claims that N-CORPE failed to comply with Neb. Rev. Stat. § 76-704.01(7) (Reissue 2009),

which provides that if approval of another agency is required, "[a] petition filed pursuant to section 76-704, shall . . . set forth the approval in writing of such agency." Estermann asserts that N-CORPE failed to obtain such approvals as required by § 76-704.01 and set forth said approvals in its petition to condemn.

We note that the district court determined that Estermann does not have standing to challenge whether N-CORPE has the permits needed to use the easement and that even if Estermann did have standing, he was not in the appropriate forum within which to raise the issue. Assuming without deciding that Estermann had standing and was in the proper forum, as set forth below, we determine that N-CORPE was not required to obtain the permits and approvals alleged by Estermann. And in view of our resolution of the permits issue, we do not address Estermann's assignments of error to the effect that the district court erred when it determined that Estermann did not have standing to challenge N-CORPE's lack of permits and that he was not in the appropriate forum to raise the issue. See *In re Interest of Jackson E.*, 293 Neb. 84, 87, 875 N.W.2d 863, 866 (2016) ("[a]n appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it").

Estermann first asserts that that N-CORPE was required to obtain a permit from the DNR to conduct water into or along natural channels pursuant to Neb. Rev. Stat. § 46-252 (Reissue 2010). We will refer to this as a "conduct water permit." Section 46-252 generally provides that a conduct water permit allows a permit holder to utilize naturally occurring waterways to move a quantity of water from one point to another. A conduct water permit is required if an applicant wants the DNR to monitor and protect the quantity of water as it moves downstream. Section 46-252 provides in part:

> (1) Any person may conduct, either from outside the state or from sources located in the state, quantities of water over and above those already present into or along any of the natural streams or channels of this state, for

> purposes of instream beneficial uses or withdrawal of some or all of such water for out-of-stream beneficial uses, at any point without regard to any prior appropriation of water from such stream, due allowance being made for losses in transit to be determined by the [DNR]. The [DNR] shall monitor movement of the water by measurements or other means and shall be responsible for assuring that such quantities are not subsequently diverted or withdrawn by others unless they are authorized to do so by the person conducting the water.
>
> (2) Except as provided in subsections (3) and (4) of this section, before any person may conduct water into or along any of the natural streams or channels of the state, he or she shall first obtain a permit from the [DNR]. Application for the permit shall be made on forms provided by the [DNR]. Applications shall include plans and specifications detailing the intended times, amounts, and streamreach locations and such other information as required by the [DNR]. The water subject to such a permit shall be deemed appropriated for the use specified in the permit. Permitholders shall be liable for any damages resulting from the overflow of such stream or channel when water so conducted contributed to such overflow.

The exceptions set forth in subsections (3) and (4) of § 46-252 are not applicable to this case.

Although the N-CORPE project adds quantities of water to the stream, it does not require a conduct water permit, because unlike the scenarios described in § 46-252, N-CORPE is not attempting to guarantee that a certain quantity of water is used for a beneficial use or reaches a certain point downstream for a particular use. Rather, the purpose of the N-CORPE project is simply to add water to the Republican River Basin in order to offset water depletion.

We note that while some of the water eventually reaches Kansas, this does not mean that a conduct water permit is required. A conduct water permit provides protection for a

quantity of water as it travels along from one point to another. Estermann points to the fact that the State of Wyoming was granted a water conduct permit under § 46-252 to conduct water in the North Platte River from Wyoming's Pathfinder Reservoir to Nebraska's Kingsley Reservoir in order to comply with Wyoming's obligations under the Nebraska-Wyoming settlement agreement and the Platte River Recovery Implementation Program. Estermann contends that because Wyoming obtained a water conduct permit, one is required herein. We do not agree. According to the undisputed record, Wyoming sought the permit in order to protect the amount of water it was conducting in the North Platte River from the Wyoming-Nebraska State line for delivery to the Kingsley Reservoir in Nebraska. In contrast, in this case, N-CORPE is augmenting the flow of water into Medicine Creek to the Republican River Basin, but it is not attempting to guarantee the delivery of a specific quantity of water past the headwaters of Medicine Creek. Under the circumstances, N-CORPE does not need a conduct water permit pursuant to § 46-252.

Estermann also asserts that N-CORPE was required to obtain a permit from the DNR to transfer ground water pursuant to Neb. Rev. Stat. § 46-613.01 (Reissue 2010) in order to construct and operate the project. Pursuant to § 46-613.01, a ground water transfer permit requires that "[a]ny person, firm, city, village, municipal corporation, or other entity intending to withdraw ground water from any water well located in the State of Nebraska *and transport it for use in another state* shall apply to the [DNR] for a permit to do so." (Emphasis supplied.)

The purpose of the N-CORPE project is to increase the amount of water available in the Republican River Basin, but it is not the purpose of the N-CORPE project to transport water explicitly for use in Kansas. Because the N-CORPE project does not seek to transport water for use in another state, N-CORPE did not need to obtain a ground water transfer permit pursuant to § 46-613.01. Compare, *Sporhase v. Nebraska*

*ex rel. Douglas*, 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982) (concerning applicant with contiguous tracts in Nebraska and Colorado who pumped ground water from well in Nebraska to irrigate applicant's tracts in both Nebraska and Colorado); *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996) (concerning applicant with contiguous tracts in Wyoming and Nebraska who sought ground water transfer permit to irrigate farmland in Wyoming with water from well in Nebraska).

We additionally note that our resolution of the DNR permit issues is supported by the record which shows that the DNR was fully aware of the N-CORPE project. Specifically, the record shows that the director of the DNR and the predecessor acting director of the DNR determined that N-CORPE did not require a permit under either § 46-252 or § 46-613.01.

Estermann also argues that N-CORPE was required under its respective rules and regulations to obtain permits from the Middle Republican NRD and the Twin Platte NRD before operating the N-CORPE project. The Middle Republican NRD and the Twin Platte NRD are two of the four NRD's that created the joint entity, N-CORPE, for the purposes of completing the N-CORPE project. Pursuant to the amended agreement that created N-CORPE, each of the four NRD's had a member on the board with a vote regarding the construction and operation of the N-CORPE project. During the construction and operation of the N-CORPE project, neither the Middle Republican NRD nor the Twin Platte NRD required N-CORPE to obtain a permit from these individual NRD's. We determine that by voting in favor of the N-CORPE project, the Middle Republican NRD and the Twin Platte NRD have concluded that the N-CORPE project is in compliance with their rules and regulations and have waived the necessity of individual permits, if otherwise required.

Because we determine that N-CORPE was not required to obtain the permits specified by Estermann, we find no merit to this assignment of error.

*The District Court's Ruling That the County Court Had Jurisdiction Over N-CORPE's Amended Petition to Condemn Was Not Error.*

Estermann claims that the district court erred when it failed to rule that the county court for Lincoln County in case No. CI 14-496 did not have jurisdiction over N-CORPE's amended petition to condemn because N-CORPE failed to comply with § 76-704.01 by failing to obtain certain permits and approvals. Even assuming that the district court could properly entertain this issue collaterally challenging the jurisdiction of the county court in the condemnation case, given our resolution of the permits issue, this assignment of error would be unavailing.

*The District Court Did Not Err When It Denied Estermann's Motion to Amend His Complaint for Injunction.*

Estermann claims that the district court erred when it denied his motion to amend his complaint for injunction. We find no merit to this assignment of error.

We first address the proper standard of review regarding a district court's denial of a motion to amend the pleadings. We note that this court has previously stated that we review a district court's decision on a motion for leave to amend a complaint for an abuse of discretion. See *Gonzalez v. Union Pacific RR. Co.*, 282 Neb. 47, 803 N.W.2d 424 (2011). However, in *Bailey v. First Nat. Bank of Chadron*, 16 Neb. App. 153, 741 N.W.2d 184 (2007), the Nebraska Court of Appeals addressed a case that was procedurally similar to the present case, and the considerations in *Bailey* and the instant case cause us to refine our standard of review.

In *Bailey*, the court assessed whether the district court had properly denied a request to amend a complaint after a motion for summary judgment had been filed but before the district court had ruled on the motion. With their motion to amend, the plaintiffs sought to add additional theories of recovery to

the theories set forth in the initial complaint. The district court denied the motion to amend, and the plaintiffs appealed.

The Court of Appeals in *Bailey* noted that prior to *Bailey*, the Nebraska appellate courts had not discussed the standard of review for denial of a motion to amend filed under Nebraska's new rules for notice pleading, specifically, Neb. Ct. R. of Pldg. § 6-1115(a) (previously codified as Neb. Ct. R. of Pldg. in Civ. Actions 15(a) (rev. 2003)). Section 6-1115(a) provides:

> A party may amend the party's pleading once as a matter of course before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, the party may amend it within 30 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party, and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

The Court of Appeals in *Bailey* acknowledged that Nebraska's current notice pleading rules are modeled after the Federal Rules of Civil Procedure and that Nebraska courts may therefore look to federal decisions for guidance. See *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005). Similarly to Nebraska's § 6-1115(a), Fed. R. Civ. P. 15(a)(2) provides that once a responsive pleading has been filed, "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires."

[13] With respect to the denial of leave to amend under the Federal Rules of Civil Procedure, it has been stated by a federal appellate court:

> "Under the liberal amendment policy of Federal Rule of Civil Procedure 15(a), a district court's denial of leave to amend pleadings is appropriate only in those limited

> circumstances in which undue delay, bad faith on the part of the moving partly [sic], futility of the amendment, or unfair prejudice to the non-moving party can be demonstrated."

*Bailey v. First Nat. Bank of Chadron*, 16 Neb. App. at 163, 741 N.W.2d at 193, quoting *Roberson v. Hayti Police Dept.*, 241 F.3d 992 (8th Cir. 2001). We have similarly stated that "[a] district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated." *Golnick v. Callender*, 290 Neb. 395, 400, 860 N.W.2d 180, 187 (2015).

Federal courts generally review the denial of a motion to amend for an abuse of discretion. See, e.g., *In re K-tel Intern., Inc. Securities Litigation*, 300 F.3d 881 (8th Cir. 2002). This is consistent with that standard of review generally applied in review of such motions in Nebraska. See, *Golnick v. Callender, supra*; *Gonzalez v. Union Pacific RR. Co.*, 282 Neb. 47, 803 N.W.2d 424 (2011). However, in *Bailey v. First Nat. Bank of Chadron*, 16 Neb. App. 153, 741 N.W.2d 184 (2007), the Court of Appeals noted that the U.S. Court of Appeals for the Eighth Circuit reviews de novo the underlying legal conclusion of whether a proposed amendment would have been futile. The *Bailey* opinion stated:

> Federal courts generally review the denial of a motion to amend for an abuse of discretion. See, *In re K-tel Intern., Inc. Securities Litigation*, 300 F.3d 881 (8th Cir. 2002); 6 Charles Alan Wright et al., Federal Practice and Procedure § 1484 (2d ed. 1990). Federal case law from the Eighth Circuit indicates, however, that the Eighth Circuit reviews de novo the underlying legal conclusion of whether the proposed amendments to a complaint would have been futile. See, *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748 (8th Cir. 2006); *U.S. ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552 (8th Cir. 2006) (citing *U.S. ex rel. Gaurdineer & Comito, L.L.P.*

> *v. Iowa*, 269 F.3d 932 (8th Cir. 2001)), *cert. denied* 549 U.S. 881, 127 S. Ct. 189, 166 L. Ed. 2d 142. See, also, *Corsello v. Lincare, Inc.*, 428 F.3d 1008 (11th Cir. 2005) (underlying legal conclusion of whether particular amendment to complaint would have been futile is reviewed de novo); *Miller v. Calhoun County*, 408 F.3d 803 (6th Cir. 2005) (where district court draws legal conclusion that amendment would be futile, conclusion is reviewed de novo).

16 Neb. App. at 163-64, 741 N.W.2d at 193.

In *Bailey*, the Court of Appeals adopted the federal standards of review outlined above. In doing so, the Court of Appeals stated that "we review the district court's denial of the [appellants'] motion to amend under Nebraska's rule 15(a) [now codified as § 6-1115(a)] for an abuse of discretion. However, we review de novo any underlying legal conclusion that the proposed amendments would be futile." *Id*. at 164, 741 N.W.2d at 193.

Notably, since *Bailey* was decided, all the federal circuit courts have adopted the standard that an appellate court reviews de novo the underlying legal conclusion of whether the proposed amendments to a complaint would have been futile. See, e.g., *Thomas v. Chevron U.S.A., Inc.*, 832 F.3d 586 (5th Cir. 2016); *Maiden Creek Assocs. v. U.S. Dept. of Transp.*, 823 F.3d 184 (3d Cir. 2016); *Osborn v. Visa Inc.*, 797 F.3d 1057 (D.C. Cir. 2015); *Runnion v. Girl Scouts of Greater Chicago*, 786 F.3d 510 (7th Cir. 2015); *Giorgio Foods, Inc. v. U.S.*, 785 F.3d 595 (Fed. Cir. 2015); *Barnes v. Harris*, 783 F.3d 1185 (10th Cir. 2015); *U.S. ex rel. Ahumada v. NISH*, 756 F.3d 268 (4th Cir. 2014); *Mills v. U.S. Bank, NA*, 753 F.3d 47 (1st Cir. 2014); *Panther Partners v. Ikanos Communications*, 681 F.3d 114 (2d Cir. 2012); *Carvalho v. Equifax Information Services, LLC*, 629 F.3d 876 (9th Cir. 2010).

We agree with the Court of Appeals' holding in *Bailey*, and we now hold that an appellate court generally reviews the denial of a motion to amend a complaint for an abuse of discretion; however, an appellate court reviews de novo an

underlying legal conclusion that the proposed amendments would be futile.

In *Bailey v. First Nat. Bank of Chadron*, 16 Neb. App. 153, 741 N.W.2d 184 (2007), the Court of Appeals expressed the appropriate method to be used in assessing whether the proposed amendment should be denied on the basis of its futility. In *Hayes v. County of Thayer*, 21 Neb. App. 836, 842-43, 844 N.W.2d 347, 353-54 (2014), the Court of Appeals described *Bailey* as follows:

> In *Bailey, supra*, we quoted *Hatch* [*v. Department for Children, Youth & Families*, 274 F.3d 12 (1st Cir. 2001)], in which the First Circuit expressed that if leave to amend is not sought until after discovery is closed and a motion for summary judgment has been docketed, the proposed amendment must be not only theoretically viable but also solidly grounded in the record and supported by substantial evidence. We also quoted the Second Circuit's expression [in *Milanese v. Rust-Oleum Corp.*, 244 F.3d 104 (2d Cir. 2001),] that in such a situation, the proposed amendment may be considered futile when the evidence in support of the proposed new claim creates no triable issue of fact and would not survive a motion for summary judgment.

Based on its analysis of the standards set forth by the First and Second Circuits, the Court of Appeals ably concluded in *Bailey*:

> We find the explanations and rationale used and applied by the First and Second Circuits to be sound and hold that if leave to amend is sought under Nebraska's rule 15(a) before discovery is complete and before a motion for summary judgment has been filed, the question of whether such amendment would be futile is judged by reference to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) [now codified as Neb. Ct. R. of Pldg. 6-1112(b)(6)]. Leave to amend in such circumstances should be denied as futile only if the proposed amendment cannot withstand a rule 12(b)(6) motion to dismiss.

> If, however, the rule 15(a) motion is made in response to a motion for summary judgment and the parties have presented all relevant evidence in support of their positions, then the amendment should be denied as futile only when the evidence in support of the proposed amendment creates no triable issue of fact and the opposing party would be entitled to judgment as a matter of law.

16 Neb. App. at 169, 741 N.W.2d at 196-97.

[14] In *Hayes*, the Court of Appeals stated that "[b]oth the notion that 'substantial evidence' must be presented and the notion that the evidence must be such as would create a 'triable issue of fact' that could survive summary judgment are expressions of the same standard." 21 Neb. App. at 843, 844 N.W.2d at 354. In *Hayes*, the plaintiffs had filed a motion to amend the complaint after discovery had been closed and the defendant had filed a motion for summary judgment, and in fact, the district court had already sustained the defendant's motion for summary judgment and entered judgment in favor of the defendant. Based upon the reasoning set forth in *Bailey*, the Court of Appeals stated in *Hayes* that "the appropriate standard for assessing whether [the plaintiffs'] motion to amend should be determined futile is that the proposed amendment must be not only theoretically viable but also solidly grounded in the record and supported by substantial evidence sufficient to give rise to a triable issue of fact." *Id*. at 844, 844 N.W.2d at 354.

In the present case, we apply this standard set forth above to assess Estermann's claim that the district court erred when it denied his motion to amend the complaint. Estermann filed his motion to amend the complaint after discovery had been completed and after N-CORPE had filed its motion for summary judgment. In his appellate brief, Estermann states that although he alleged in his original complaint that N-CORPE failed to obtain necessary approval from Kansas, he did not allege in his original complaint that N-CORPE was required to obtain approval specifically from RRCA. Estermann sought to include the specific allegation that N-CORPE failed to

obtain approval from RRCA in his proposed amended complaint. In denying Estermann's motion for leave to amend his complaint, the district court stated that any issues raised in the proposed amended complaint could "be dealt with under the original complaint," and "[a]s such, the amendment is futile . . . ."

As stated above, Nebraska, Kansas, Colorado, and the United States of America are parties to the Compact, and the Republican River Basin has been the subject of the Compact since 1943. The Compact allocates to each of the states an agreed-upon share of the water supply within the Republican River Basin—roughly 49 percent to Nebraska, 40 percent to Kansas, and 11 percent to Colorado. Pursuant to the Compact, the States created the RRCA to calculate the Republican River Basin's annual virgin water supply and to determine whether each State's use of that water is within its allocation under the Compact. See *Kansas v. Nebraska*, 574 U.S. 445, 135 S. Ct. 1042, 191 L. Ed. 2d 1 (2015).

In 2002, the Compact was modified via the FSS, which was approved by the U.S. Supreme Court in *Kansas v. Nebraska, supra*. The Court stated that the FSS "established detailed mechanisms to promote compliance with the Compact's terms." *Id*., 574 U.S. at 451. The FSS "aim[s] to accurately measure the supply and use of the Basin's water, and to assist the States in staying within their prescribed limits." *Id*. This is done through detailed accounting procedures and the utilization of a ground water model that are set forth in the FSS.

In support of his argument, Estermann points to section III.B.1.k. of the FSS, which states that a moratorium on new wells shall not apply to:

> Wells acquired or constructed by a State for the sole purpose of offsetting stream depletions in order to comply with its Compact Allocations. Provided that, such Wells shall not cause any new net depletion to stream flow either annually or long-term. The determination of net depletions from these Wells will be computed by the RRCA Groundwater Model and included in the State's

> Computed Beneficial Consumptive Use. *Augmentation plans and related accounting procedures submitted under this Subsection III.B.1.k. shall be approved by the RRCA prior to implementation*.

(Emphasis supplied.) Estermann asserts that the N-CORPE project is such an "augmentation plan" that requires approval by the RRCA prior to the N-CORPE project's implementation. Brief for appellant at 37.

We disagree that this or any other section of the FSS requires N-CORPE to obtain the RRCA's approval prior to the construction or operation of the N-CORPE project. This section of the FSS refers to the fact that the RRCA must approve augmentation plans and related changes to the RRCA accounting procedure before a State may receive augmentation credit. The term "augmentation plan" does not refer to the actual construction or operation of the project itself, but, rather, an augmentation plan under the FSS sets forth the methods for how to calculate the augmentation credit the State wishes to receive that will be taken into account when considering whether the State has complied with its allocated percentage of use of the virgin water supply in the Republican Riven Basin under the Compact. An augmentation plan does not require that the RRCA approve the actual construction or operation of such project.

Our reading of the FSS is consistent with the record. The primary author of the N-CORPE augmentation plan explained that the DNR developed the N-CORPE augmentation plan "consistent with the straightforward methodologies of the RRCA Accounting Procedures and Reporting Requirements." He further explained that the N-CORPE augmentation plan "provides an example of the accounting method that would be used to quantify the [augmented water supply] Credit." Thus, although RRCA approval would be necessary to approve the N-CORPE augmentation plan and the related accounting procedures in order to receive an augmentation credit, the FFS does not require RRCA approval for the physical construction and operation of the N-CORPE project. Stated

another way, to the extent the State wishes to alter the amount of credit it receives for augmentation water under the FSS accounting procedures, it would need to obtain approval from the RRCA, but the RRCA's approval is not a prerequisite to N-CORPE's physically implementing the project itself or its operation. Therefore, N-CORPE was not required to obtain the approval of the RRCA before implementing the N-CORPE project.

Because we determine that N-CORPE was not required to obtain the approval of the RRCA in order to implement the augmentation plan, Estermann's proposed amendment to his complaint is not theoretically viable and it is not supported by substantial evidence sufficient to give rise to a triable issue of fact. See *Hayes v. County of Thayer*, 21 Neb. App. 836, 844 N.W.2d 347 (2014). Therefore, upon our de novo review, we determine the district court did not err when it determined that Estermann's proposed amendment was futile and denied his motion to amend his complaint. We find no merit to this assignment of error.

*District Court Did Not Err When It Determined That Common Law Does Not Prohibit N-CORPE From Removing Ground Water From Overlying Land.*

Estermann claims that the district court erred when it determined that Nebraska common law does not prohibit N-CORPE from removing ground water from the overlying land. We find no merit to this assignment of error.

As an initial matter, we clarify that Estermann does not claim that he has an interest in ground water that is being adversely impacted by the fact that N-CORPE is withdrawing ground water from a well field and releasing that water into Medicine Creek to augment the flow of the water. Compare *In re Referral of Lower Platte South NRD*, 261 Neb. 90, 621 N.W.2d 299 (2001) (concerning landowner's objection to withdrawal and transfer of ground water from his property, where ground water was being transferred away from

overlying land to neighbor's property, and landowner argued there was significant adverse effect upon him).

[15] We have previously stated that Nebraska's common law does not allow water to be transferred off overlying land. See *In re Referral of Lower Platte South NRD, supra*. However, we have made it clear that the Legislature may provide exceptions to this common-law rule. See *id*. We have stated:

> "Since the Nebraska common law of ground water permitted use of the water only on the overlying land, legislative action was necessary to allow for transfers off the overlying land, even for as pressing a need as supplying urban water users.
>
> ". . . [T]he Legislature has the power to determine public policy with regard to ground water and . . . it may be transferred from the overlying land only with the consent of and to the extent prescribed by the public through its elected representatives."

*In re Referral of Lower Platte South NRD*, 261 Neb. at 94, 621 N.W.2d at 303, quoting *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614 (1981), *reversed on other grounds* 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982).

With the general rule that the Legislature may provide exceptions to the common-law prohibition of the transfer of ground water off the overlying land in mind, we turn to the present case. In this regard, we note that Neb. Rev. Stat. § 2-3238 (Reissue 2012), provides that each NRD

> shall have the power and authority to develop, store and transport water, and to provide, contract for, and furnish water service for domestic purposes, irrigation, milling manufacturing, mining, metallurgical, and any and all other beneficial uses, and to fix the terms and rates therefor. Each district may acquire, construct, operate, and maintain dams, reservoirs, ground water storage areas, canals, conduits, pipelines, tunnels, and any and all works, facilities, improvements, and property necessary therefor. No district shall contract for delivery of water for irrigation uses within any area served by any irrigation

> district, public power and irrigation district, or reclamation district, except by consent of and written agreement with such irrigation district, public power and irrigation district, or reclamation district.

Neb. Rev. Stat. § 46-715 (Cum. Supp. 2016) provides that an NRD may create an integrated management plan in order to manage a river basin, subbasin, or reach. N-CORPE is such an integrated management plan, and one of its purposes is to augment the flow of Medicine Creek in order to manage the water level in the Republic River Basin. N-CORPE does so by withdrawing ground water from a well field in Nebraska and releasing the water into Medicine Creek to augment the flow. The Legislature has specifically authorized NRD's to utilize augmentation projects as part of an integrated management plan. See § 46-715(3)(e).

Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible. *In re Interest of Tyrone K.*, 295 Neb. 193, 887 N.W.2d 489 (2016). Reading these statutes in pari materia, we determine that NRD's have the power and authority to transport water and that they may do so by utilizing an augmentation project as part of an integrated management plan. Therefore, the district court did not err when it determined that N-CORPE is not prohibited by common law from utilizing ground water to augment the flow of Medicine Creek.

*No Issue of Material Fact Exists as to Whether N-CORPE's Condemnation Meets a Public Purpose.*

Estermann claims that the district court erred when it failed to find that there were issues of material fact regarding whether N-CORPE's condemnation action was for a public use. He contends that these issues preclude entry of summary judgment. We find no merit to this assignment of error.

It is well settled that it is essential that property taken under the power of eminent domain be for a public use and not a private one. *Burlington Northern Santa Fe Ry. Co. v. Chaulk*, 262 Neb. 235, 631 N.W.2d 131 (2001). In support of his argument that N-CORPE's easement is not for a public use, Estermann relies on *Burger v. City of Beatrice*, 181 Neb. 213, 147 N.W.2d 784 (1967). Estermann's reliance on *Burger* is misplaced.

In *Burger*, the landowners sought to enjoin a city from proceeding in eminent domain to obtain easements over their property to install wells and withdraw ground water beneath the surface of their lands. This court determined that the withdrawal of the ground water was largely for the private use of two private companies. We noted that although the benefit of the easements to the companies may furnish some employment and increase business in the area, "such a public interest does not constitute a public purpose under the power of eminent domain." *Id*. at 223, 147 N.W.2d at 791. Accordingly, this court determined that the purpose of the easements was for a private use, not a public use, and that therefore, it was not proper under eminent domain.

Estermann argues that just as in *Burger*, the easement sought by N-CORPE is for private use, not public use, because the N-CORPE project's purpose is to help private irrigators. However, at the hearing on the motion for summary judgment, the district court received evidence which described in detail how N-CORPE's project would be operated and what the purpose of the project was. The purpose was to augment flows of Medicine Creek to offset surface water depletions through the Republican River Basin in order to achieve the target flows identified in the Compact. The evidence shows that the overriding purpose of the N-CORPE project is to achieve compliance with the Compact; any use by private irrigators is incidental to this purpose. Further, the evidence indicates that the State's "[f]ailure to comply with the . . . Compact can expose the State of Nebraska to significant liability." Unlike in *Burger*, where the easements sought were for a private

use, even viewing the evidence in a light most favorable to Estermann, the purpose of the easement sought by N-CORPE is for a public use. Therefore, we determine that the district court did not err when it determined that N-CORPE's condemnation action is for a public use.

## CONCLUSION

As explained above, we determine generally that the district court did not err when it granted the appellees' motion for summary judgment. Among our determinations are the following: that N-CORPE had the authority to exercise the power of eminent domain, that N-CORPE did not need certain permits and approvals as alleged by Estermann, that the district court did not abuse its discretion when it denied Estermann's motion to amend the complaint, that N-CORPE is not prohibited by common law from removing ground water from overlying land, and that there is no material issue of fact regarding whether the condemnation is for a public use. Therefore, we affirm the decision of the district court which granted the appellees' motion for summary judgment and dismissed Estermann's complaint.

Affirmed.

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

# Greg Stewart et al., appellees, v. Dave Heineman, in his official capacity as Governor of Nebraska, et al., appellants.

892 N.W.2d 542

Filed April 7, 2017. No. S-16-018.

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. **Attorney Fees: Appeal and Error.** When attorney fees are authorized, the trial court exercises its discretion in setting the amount of the fee, which ruling an appellate court will not disturb on appeal unless the court abused its discretion.
3. **Summary Judgment.** In the summary judgment context, a fact is material only if it would affect the outcome of the case.
4. **Justiciable Issues.** A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.
5. **Courts: Justiciable Issues.** A court decides real controversies and determines rights actually controverted, and does not address or dispose of abstract questions or issues that might arise in a hypothetical or fictitious situation or setting.
6. **Justiciable Issues: Standing.** Standing is a key function in determining whether a justiciable controversy exists.
7. **Standing: Jurisdiction.** Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.
8. **Actions: Justiciable Issues: Standing.** The ripeness doctrine is rooted in the same general policies of justiciability as standing and mootness. As compared to standing, ripeness assumes that an asserted injury is

sufficient to support standing, but asks whether the injury is too contingent or remote to support present adjudication.

9. **Actions: Jurisdiction.** An appellate court uses a two-part inquiry to determine ripeness: (1) the jurisdictional question of the fitness of the issues for judicial decision and (2) the prudential question concerning the hardship to the parties of withholding court consideration.
10. **Declaratory Judgments.** The function of a declaratory judgment is to determine justiciable controversies which either are not yet ripe for adjudication by conventional forms of remedy or, for other reasons, are not conveniently amenable to the usual remedies.
11. **Equal Protection: Discrimination.** The injury in an equal protection case is the imposition of a barrier that makes it more difficult for members of one group to obtain a benefit, rather than the ultimate inability to obtain the benefit.
12. **Discrimination.** When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need only demonstrate that he or she is ready and able to perform and that a discriminatory policy prevents him or her from doing so on an equal basis.
13. **Discrimination: Standing.** For those persons who are personally subject to discriminatory treatment, stigmatizing injury caused by discrimination is a serious noneconomic injury that is sufficient to support standing.
14. **Standing.** Standing does not require exercises in futility.
15. **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.
16. **Discrimination: Declaratory Judgments: Injunction: Proof.** If a discriminatory policy is openly declared, then it is unnecessary for a plaintiff to demonstrate it is followed in order to obtain injunctive or declaratory relief.
17. **Actions: Moot Question.** A defendant cannot automatically moot a case simply by ending its unlawful conduct once sued.
18. **Actions: Moot Question: Proof.** A defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.
19. **Appeal and Error.** A court's consideration of a cause on appeal is limited to errors assigned and discussed.
20. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.

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

Douglas J. Peterson, Attorney General, James D. Smith, Ryan S. Post, and Jessica M. Forch for appellants.

Amy A. Miller, of ACLU Nebraska Foundation, Inc., Leslie Cooper, of ACLU Foundation, Inc., and Garrard R. Beeney and W. Rudolph Kleysteuber, of Sullivan & Cromwell, L.L.P., for appellees.

Robert McEwen and Sarah Helvey, of Nebraska Appleseed Center for Law in the Public Interest, for amicus curiae Nebraska Appleseed Center for Law in the Public Interest.

Daniel S. Volchok and Kevin M. Lamb, of Wilmer, Cutler, Pickering, Hale & Dorr, L.L.P., and Robert F. Bartle, of Bartle & Geier Law Firm, for amici curiae Child Welfare League of America et al.

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

Wright, J.

## I. NATURE OF CASE

The plaintiffs, three same-sex couples, sought, pursuant to 42 U.S.C. § 1983 (2012), to enjoin the defendants, Dave Heineman, the former Governor of the State of Nebraska; Kerry Winterer, in his official capacity as the chief executive officer of the Department of Health and Human Services (DHHS); and Thomas Pristow, in his official capacity as the director of the Division of Children and Family Services, from enforcing a 1995 administrative memorandum and from restricting gay and lesbian individuals and couples from being considered or selected as foster or adoptive parents. The court ordered the memorandum rescinded and stricken and enjoined the defendants and those acting in concert with them from enforcing the memorandum and/or applying a categorical ban

to gay and lesbian individuals and couples seeking to be licensed as foster care parents or to adopt a state ward. The court further ordered the defendants and those acting in concert to "refrain from adopting or applying policies, procedures, or review processes that treat gay and lesbian individuals and couples differently from similarly situated heterosexual individuals and couples when evaluating foster care or adoption applicants under the 'best interests of the child' standard set forth in DHHS' regulations." The court awarded the plaintiffs costs and attorney fees.

The defendants appeal. They do not assert that it is constitutional to discriminate on the basis of sexual orientation in the licensing or placement of state wards in foster care. Instead, the defendants argue that the plaintiffs lack standing because they have not yet applied for and been rejected in obtaining a foster care license or in having a state ward placed in their homes. Alternatively, the defendants argue that there was no case and controversy, because the memorandum that was the focus of the plaintiffs' complaint ceased to be the policy of DHHS by the time this lawsuit was filed, despite the fact that the memorandum was never rescinded and it remained on the DHHS website. Finally, the defendants claim that the plaintiffs' lawsuit became moot when the policy memorandum was removed from the DHHS website 3 weeks after the plaintiffs' motion for summary judgment was filed.

## II. BACKGROUND

### 1. Complaint

The complaint, filed on August 27, 2013, centered on an administrative memorandum (Memo 1-95) issued in 1995 by the then Department of Social Services, which subsequently became DHHS in 1996. Memo 1-95 was written by the director of the department and states in relevant part:

> It is my decision that effective immediately, it is the policy of the Department of Social Services that children will not be placed in the homes of persons who identify

> themselves as homosexuals. This policy also applies to the area of foster home licensure in that, effective immediately, no foster home license shall be issued to persons who identify themselves as homosexuals.

A similar policy was set forth in Memo 1-95 regarding unmarried heterosexual couples. An addendum to Memo 1-95 directed staff not to specifically ask about an individual's sexual orientation or marital status beyond those inquiries already included in the licensing application and home study. The stated reason for the policy was this State's intent to place children in the most "family-like setting" when out-of-home care is necessary. Though Memo 1-95 and the addendum stated that staff would be drafting a proposed program and licensing regulation to be brought before a public hearing in a more formal manner, such proceedings apparently never occurred.

The plaintiffs' complaint alleged that Memo 1-95 was still "in effect" as of April 1, 2013. It was not disputed by the defendants that Memo 1-95 had not been "rescinded or replaced."

The complaint alleged that Memo 1-95 set forth a policy prohibiting the Department of Social Services, now DHHS, from issuing foster home licenses to or placing foster children with persons who identify themselves as homosexuals or unrelated, unmarried adults living together. The plaintiffs alleged that this policy also effectively banned homosexuals from adopting children from state custody, because individuals may adopt children from state care only if they have first been licensed as foster parents.

The plaintiffs consist of three homosexual couples who alleged in the complaint that they are able and ready to apply to be foster parents and would do so but for the policy stated in Memo 1-95.

One couple, Greg Stewart and Stillman Stewart, further alleged that they were married in 2008 in California. They alleged they had contacted DHHS in October 2012 to inquire about obtaining a foster home license. Greg and Stillman

alleged they were told by a DHHS representative that they could not obtain a license because same-sex couples are barred from becoming licensed under DHHS policy.

Another couple, Todd Vesely (Todd) and Joel Busch (Joel), alleged that they "began the process of applying" to become foster parents in July 2008. They completed training, a home study, and submitted to background checks. But, in 2010, Todd Reckling, the director of DHHS' Division of Children and Family Services at that time, informed Todd and Joel that it was DHHS' policy to bar licensing unrelated adults living together. In their answer, the defendants admitted that Reckling informed this couple of Memo 1-95.

The plaintiffs generally alleged that the policy expressed in Memo 1-95 violated equal protection and due process under the state and federal Constitutions and violated 42 U.S.C. § 1983 of the Civil Rights Act. They alleged that prospective foster and adoptive parents were being subjected to differential treatment on the basis of their sexual orientation, and they asserted that sexual orientation constituted a suspect class. The plaintiffs asserted that there was no compelling interest, or even a rational basis, justifying such disparate treatment. The plaintiffs asserted that the policy found in Memo 1-95 impermissibly burdened their personal liberty and privacy rights to enter into and maintain intimate personal relationships within their own homes.

The plaintiffs asserted that they had no adequate remedy at law to redress these wrongs, which were of a continuing nature and would cause irreparable harm. They prayed for a declaration that the policy stated in Memo 1-95 is unconstitutional, void, and unenforceable, and an order enjoining the defendants from enforcing Memo 1-95.

In addition, the plaintiffs asked for an order "directing Defendants to evaluate applications of gay and lesbian individuals and couples seeking to serve as foster or adoptive parents consistently with the evaluation process applied to applicants that are not categorically excluded."

Finally, the plaintiffs asked for attorney fees and further relief as the court deemed proper.

The defendants alleged as affirmative defenses that the plaintiffs had failed to state a cause of action and that the defendants had not violated any of the plaintiffs' constitutional, civil, or statutory rights. The defendants did not affirmatively allege that Memo 1-95 was no longer in effect or enforced.

### 2. Motions Below

The defendants moved to dismiss on the grounds that on the face of the complaint, the plaintiffs lacked standing and stated no claim upon which relief could be granted. The court overruled the motion to dismiss.

On the issue of standing, the court relied upon *Gratz v. Bollinger*[1] for the proposition that the injury in fact in an equal protection case is the denial of equal treatment resulting from the imposition of a barrier, not the ultimate inability to obtain the benefit. Under *Gratz*, the plaintiffs need only show they are "'able and ready'" to apply for a benefit should the discriminatory policy that prevents them from doing so be removed.[2] The court concluded that because the plaintiffs alleged they were able and ready to apply for foster care licenses, their complaint sufficiently alleged standing.

On the issue of failure to state a claim, the court first observed that nothing in Nebraska law sets forth a policy prohibiting homosexuals or unmarried couples from fostering or adopting.[3] It then concluded that the allegations of disparate treatment were sufficient to state causes of action under equal protection and due process.

On December 11, 2014, the defendants moved for summary judgment. On January 27, 2015, the plaintiffs filed

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[1] *Gratz v. Bollinger*, 539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003).

[2] See *id.*, 539 U.S. at 262.

[3] See Neb. Rev. Stat. §§ 43-101, 43-107, and 43-109 (Reissue 2016).

a cross-motion for summary judgment. On October 16, the plaintiffs moved for attorney fees. The court's orders on these motions are the subject of the current appeal.

### 3. Evidence at Summary Judgment Hearing

In support of their motion for summary judgment, the plaintiffs submitted affidavits in which they generally confirmed the truth of their factual allegations made in the complaint. The plaintiffs expressed their desire to serve as foster parents and "be subject to the same approval process that is applied to heterosexuals and not be subject to any discriminatory approval process based on our sexual orientation." Greg and Stillman clarified they no longer live in Nebraska, but that they still wish to adopt a Nebraska child out of foster care. Numerous exhibits, including the transcripts of the depositions of several DHHS employees, were also entered into evidence.

#### (a) Todd Reckling

Reckling was the director of the Division of Children and Family Services of DHHS when Todd and Joel were communicating with DHHS about the then almost 2-year delay in making any licensing or placement decision since Todd and Joel had completed all the necessary training and background checks. A letter written in June 2010, by Reckling to Todd and Joel, was entered into evidence.

Reckling wrote to Todd and Joel that DHHS policy "allows for an exception" which would have to be made in order for either one of them to foster a child, given that they are two unmarried individuals living together. Reckling gave no indication that such an exception would be made in their case. Even if such an exception were made, Reckling explained, a child could not be placed jointly with or adopted jointly by Todd and Joel. Reckling explained that "'second parent adoptions'" were not permitted by a second person who is not married to the first and that Todd and Joel could not marry, because the

Nebraska Constitution states that only marriage between a man and a woman shall be recognized in Nebraska.

(b) Kerry Winterer

Todd and Joel were subsequently in contact with Winterer, who has been the chief executive officer of DHHS since July 2009. Winterer sent a letter to Todd and Joel's attorney in November 2011, which was also entered into evidence. By that time, Todd and Joel had waited over 3 years to foster a child. In the letter, Winterer repeatedly cited to Memo 1-95. Winterer explicitly stated that "Policy Memorandum # 1-95 is still in force."

But in his deposition taken in July 2014, Winterer deferred to Pristow, the director of the Division of Children and Family Services for DHHS at that time, regarding the precise details of the then-current policy and the reasons for it. He noted that Pristow's practice permitted placement with homosexual applicants as long as their placement was approved by Pristow in his capacity as director.

Winterer testified that he could imagine no reason for this extra layer of review and approval except to ensure there was no bias against persons who identify themselves as homosexual. However, he also noted that because the Nebraska Constitution does not recognize marriage between two persons of the same gender, homosexual couples who have married in another state would be considered as cohabitating, unrelated adults. Winterer then elaborated that there are "stability" concerns in placing children with cohabitating, unrelated adults. Winterer stated that the current regulations do not allow for both adults in a cohabitating, unmarried relationship to hold a joint license and that there can only be one license issued per address.

Winterer testified he did not believe identifying as homosexual was relevant to that person's qualification as a foster or adoptive parent, but that he could envision sexual orientation being a factor in the best interests analysis, in the event

it could cause a problem with the relationship between the biological parent and the foster parent.

Winterer stated that Memo 1-95 was "modified by practice and . . . the policy of the current director." Winterer thought that Memo 1-95 was still used in DHHS training materials. Nevertheless, he believed new employees were "informed about what the current practice is and the current process in terms of dealing with applicants." He was "assuming that [the new practice] has been communicated to [the caseworkers and supervisors in the service areas] through one means or another." He testified that there was no documentation of any new policy or practice.

With regard to the failure to formally rescind Memo 1-95, Winterer said, "I think our attitude would be it's probably unnecessary because policy evolves and is the expression of practice and policy of the director, who is in charge of making policy for the division under which this falls." He also thought it was "probably unnecessary" to rescind Memo 1-95, which "goes back 20 years and was issued by a director of a[n] agency that no longer exists." He did not specifically discuss any possible distinction between "policy" and "practice."

Finally, Winterer explained that there "may be, shall we say, some . . . implications" in formally rescinding Memo 1-95. Winterer stated that rescinding Memo 1-95 "could draw attention on the part of certain individuals in the state of Nebraska to . . . the issue of gay marriage and some other . . . sensitive issues" and that it could increase scrutiny and "complicate our going about doing our business." He elaborated that he was concerned formal rescission of Memo 1-95 could result in elected officials taking actions that would make it difficult for DHHS to place children with homosexual applicants.

(c) Thomas Pristow

In March 2012, Pristow took over Reckling's position of director of the Division of Children and Family Services for

DHHS, and remained in that position at the time his deposition was taken in September 2014. In his deposition, Pristow indicated that it was his "understanding" that the same licensing restrictions existed for single, cohabitating, unmarried, married, heterosexual, or homosexual applicants, even before he adopted any policies or procedures with regard to homosexual applicants. He was speaking in terms of a single license, however, and not the ability to obtain a joint license. An email from 2012 indicates that legal advisors before Pristow's tenure had opined that Memo 1-95 could not be enforced as to licensing, because the regulations concerning licensing are silent on the sexual orientation of the applicant.

But licensing is different than placement. While a child generally cannot be placed in a nonlicensed home, having a person licensed in a home does not mean a child will be placed there.

Sometime in the summer of 2012, Pristow verbally instructed his service area administrators and his deputy director that homosexual applicants could be considered for foster or adoptive placements. Pristow did not specifically address whether this was a change in "policy" versus a change in "practice," though most of the questions and answers referred to "policy."

Pristow's placement protocol, hereinafter referred to as the "Pristow Procedure," set forth different procedures for homosexual applicants than for heterosexual applicants. When a caseworker recommends a placement in the home of a married, heterosexual couple, that placement is effective if the caseworker's supervisor agrees with the recommendation. But, under the Pristow Procedure, as described by Pristow, if the caseworker recommends a placement in the home of a homosexual couple or individual, then the placement recommendation can only take effect after being approved by the caseworker's supervisor, the service area administrator, and, finally, Pristow himself. Other DHHS employees clarified that as to homosexual applicants under the Pristow Procedure there are actually five layers of placement review: the caseworker,

the caseworker's supervisor, the administrator, the service area administrator, and then the director (Pristow).

According to Pristow, the protocol for an unmarried heterosexual adult living with another adult—or for a married, heterosexual felon—would require only three levels of approval: the caseworker's, the caseworker's supervisor, and the service area administrator's approval to effect the placement recommendation. Other DHHS employees clarified that this would be four levels of approval, as it would include the administrator. Such applicants would not require Pristow's approval.

Pristow explained that there was no category of applicants, other than homosexuals, that required Pristow's personal approval before a caseworker's placement recommendation could be implemented. And Pristow clarified that he did not review denials of placement with homosexual applicants. He only reviewed recommendations for placement.

Pristow testified that there was no reason, with respect to child welfare, that a person who identifies as homosexual, or that unmarried persons living together, should be treated differently than heterosexual, married persons in the licensing or placement of a child in a foster or adoptive home. He said that in his 20 years of experience in children and family services, "gay and lesbian foster parents do just as good on — if not better than regular foster parents, everything being equal." Pristow agreed that there was a consensus in the scientific literature that the outcome for children was not adversely affected by being raised by homosexual persons, and he said that he had no reason to doubt that consensus.

Pristow explained that Nebraska was a conservative state with a constitutional amendment banning gay marriage. He "take[s] that into account when [he] make[s] these type[s] of placements." When asked how he takes that into account, Pristow explained, "I make it my decision and not the field's."

Pristow explained that when reviewing placement recommendations with homosexual applicants, he did not consider the sexual orientation of the recommended foster or adoptive

parent in making his decision. The applicant's sexual orientation was only relevant insofar as it was the triggering factor of the extra layer of review.

But Pristow also indicated that Nebraska's laws and the constitutional amendment regarding homosexual couples were somehow taken into account in his decisonmaking:

> I do work for the State, and I am supportive of its laws and its amendments to the constitution. And I take that in balance when I, you know, make those type[s] of decisions about placing children in gay and lesbian foster homes. . . .
>
> . . . .
>
> . . . [T]his is a conservative state, and I'm cognizant of that, and I want to make sure that I — that my process is — has foundation, and that, again, it reflects what the best interest of that child is . . . .

Pristow, however, denied that he took a "harder look" at placements with homosexual applicants. And he stated that he had no reason to doubt the competency of caseworkers and their supervisors in making best interests decisions. He explained that it is just "a process so that I can take on the responsibility of making that decision from the field so that these placements can be made in accordance with the best interests of the child."

Pristow acknowledged that, as of the time of the deposition in September 2014, Memo 1-95 was still on DHHS' website and that there was nothing in writing on the website or elsewhere disavowing the policies stated in Memo 1-95. To the contrary, it was his understanding that Memo 1-95 was included in the packet of administrative memorandums that was given to new trainees as they enter into the system.

Neither was there anything in writing, to his knowledge, reflecting the Pristow Procedure. But Pristow said that, as new trainees go out into the field, they are supposed to be told of it. Pristow was unsure exactly how thoroughly this was done. He explained:

> As the new trainee goes out to the field, either through a mentoring protocol that we have or through [his or her] new supervisor, there is — they are — they begin to learn the practice of how we do child welfare in Nebraska. And as this would come up or when it does come up, they are told of the protocol that I put — the policy that I put in place verbally.
>
> . . . .
>
> . . . I can't speak to whether [a caseworker, when approached for the first time by a homosexual applicant] would know [Memo 1-95 is no longer the current practice]. My instructions were to the service area administrators when I gave my verbal policy out, and my direction was to make sure that it was disseminated throughout the field.

Pristow agreed that there "might be some confusion" for new employees as to whether Memo 1-95 is still DHHS' policy and practice, but he believed "the field is very competent, very competent in making sure that information is disseminated and that we look out for the best interests of the child and we find the best possible placement for that child regardless of gender — or of orientation."

Pristow acknowledged that four new service area administrators had been hired or promoted into that position since the summer of 2012 and that he did not have a specific discussion with those new service area administrators regarding his verbal policy. Pristow said, "The general intent and theme of what I wanted to have happen, though, I'm sure was conveyed through the deputy and in some manner or form as we went through the years."

Pristow testified that it was within his authority to send out a notification to all staff stating that Memo 1-95 no longer represents DHHS policy. He had chosen not to do so. Pristow testified that Memo 1-95 was "still on the website and it's still in play." He explained "it hasn't been rescinded except through verbal instructions by me to my service area administrators."

There was "nothing on the website that would indicate [Memo 1-95 is] no longer policy."

Pristow agreed that a prospective applicant could look at the website and be discouraged by Memo 1-95 from applying to be a foster or adoptive parent. Pristow testified that he deliberately determined to keep Memo 1-95 on the website and in DHHS' training materials, and to have the Pristow Procedure be verbal only. Pristow could think of no instance other than Memo 1-95 wherein DHHS has had an administrative memorandum on its website setting forth a policy that is not, in actuality, DHHS' policy and practice.

(d) Other DHHS Employees

The depositions of two deputy directors at DHHS, a policy administrator, a field operations administrator, and five service area administrators were also entered into evidence for purposes of the summary judgment motions. At the time the depositions were taken, in October and November 2014, Memo 1-95 was still on the DHHS website. Tony Green, a deputy director at DHHS, testified that it is DHHS' general practice to update memorandums as needed and that, typically, a memorandum that no longer represents DHHS policy would be removed from the website. The decision to remove or keep a memorandum from the website would be made by the director and the chief executive officer.

No other employee opined with any certainty as to the standard procedure for memorandums that cease to represent DHHS' policy or procedure. However, a copy of a DHHS web page listed, under the broad category of "Archived Administrative & Policy Memos," the subcategories of "Rescinded Memos" and "Rescinded and Replaced Memos." Memo 1-95 was not listed under either of those categories. The web page set forth that it was last updated on February 6, 2015.

None of the employees deposed were aware of anything in writing on the website or elsewhere, informing staff and potential applicants that Memo 1-95 no longer represented DHHS'

policy or its practice. Neither were any of the employees aware of anything in writing contradicting Memo 1-95 by expressly stating that homosexuals were permitted to serve as foster or adoptive parents.

The employees described Memo 1-95 as still the current "policy," but stated that it did not represent the current "practice." According to these employees, Memo 1-95 had not been "rescinded" or "modified" by the director, thus it was still "in effect," or "active." They all agreed it was not followed, however. The witnesses were unaware of any other instance where DHHS practice was in conflict with an existing policy memorandum.

A field operations administrator for DHHS described the Pristow Procedure as "granting an exception on [an] existing memo." And a document was entered into evidence that had been created in August 2014 by Nathan Busch, a DHHS policy administrator, listing the "Placement Exceptions by Director" from July 2013 to August 2014. Numerous such exceptions listed the "Type of Exception" as "Same-Sex Couple."

The DHHS employees uniformly described the current practice as having five layers of approval for placement of a foster child in the home of same-sex couples or individuals who identify as homosexual. These layers consist of the original recommendation for placement by the caseworker and then approval by the caseworker's supervisor, the administrator, the service area administrator, and, finally, the director. The DHHS employees testified that felons and unmarried, unrelated adults also require extra layers of approval, but only four. Only homosexual applicants required the approval of the director.

According to Kathleen Stolz, a service area administrator, Reckling had required director approval of all placements with unmarried couples. And Stolz stated that "we no longer needed to send for approval for placement in an unmarried, unrelated home to the director unless there was a self-disclosure that they were in a same-sex relationship or were gay or lesbian." The employees believed that under the Pristow Procedure,

sexual orientation was not to be taken into account in a best interests analysis.

The employees testified that during training, new DHHS hires are no longer given a physical copy of Memo 1-95, or of any of the policy memorandums. Instead, trainees are notified of where to locate the administrative memorandums on the website. There was no indication during new employees' classroom training that Memo 1-95 is no longer to be followed.

The employees explained that the Pristow Procedure is instead discussed in the field during mentoring of new caseworkers, as well as through "word-of-mouth" within the service areas. DHHS also holds monthly meetings of service area administrators, and one or two caseworkers or supervisors from each service area attend those meetings. The Pristow Procedure is discussed at these meetings whenever there are new service area administrators.

One DHHS deputy director explained that dissemination of the Pristow Procedure is always verbal, "[b]ecause we have a current policy on the — on the issue."

A service area administrator testified that when asked about the status of Memo 1-95 by DHHS staff, she responds that it is on the website; it is "still an administrative memo, and it's still in effect." She does not explain the Pristow Procedure unless specifically asked about it.

None of the employees deposed could state with certainty that all DHHS employees were aware of the Pristow Procedure. However, none were specifically aware of any current confusion as to the Pristow Procedure within DHHS.

As to dissemination of the current practice to the approximately 40 agencies that DHHS contracts with to provide foster care services, the DHHS employees explained that there are regular meetings with such agencies. There was testimony that the Pristow Procedure was discussed in at least one of those meetings.

But, again, the employees were uncertain whether every contractor knew of the Pristow Procedure. One service area

administrator believed there was still confusion within outside contracting agencies about DHHS policy and practice as concerns placement with homosexual applicants.

The employees agreed that there is a need for more foster parents and that there are no child welfare interests served by excluding homosexual applicants or by requiring extra layers of approval for placements with homosexual licensees. The employees conceded that Memo 1-95 could deter prospective homosexual foster and adoptive parents from pursuing foster care or adoption.

According to the DHHS employees, the approval was generally described as strengthening the placement decision as being in the best interests of the children placed within homes of homosexual foster parents—in the event that a particular placement became an "issue." Busch was unsure exactly what the reason was, but believed Pristow was "referring to the fact that there is a written policy in place that he does not support the practice of."

(e) Internal Communications

Internal email correspondence from June 28, 2012, to June 4, 2013, was also offered by the plaintiffs and admitted into evidence in support of their motion for summary judgment. The emails were submitted as evidence of the lack of dissemination and clarity surrounding the Pristow Procedure and the continuing validity of Memo 1-95.

In an email dated June 29, 2012, a DHHS employee expressed that he and any contractor needed to follow Memo 1-95 until that policy is changed. And in correspondence with a contracting agency, he explained that the likelihood of placement with a same-sex couple was "small as the adults in that home would need to be the best possible placement for a specific child and [the Division of Children and Family Services] would need to take the request to make the placement all the way to Central Office and get [its] agreement."

In various other emails in the months following the announcement of the Pristow Procedure, employees appeared

to be aware of the Pristow Procedure, but asked for clarification on the details. In July 2012, Marylyn Christenson, a DHHS resource development supervisor, expressed confusion, in light of Memo 1-95, about whether homosexual applicants could be licensed. This communication took place because a contracting agency was also confused. Still, Christenson stated that she knew placement approval for a homosexual applicant would have to be from the director. She opined that "we would need to tell these [homosexual individuals interested in fostering] that [any placement will require director approval] so they know before they go to the trouble to get [licensed]."

In September 2012, a different contracting agency asked for clarification as to whether same-sex couples could foster, given that the "memo from the 90's seems to be in [e]ffect." Pristow personally responded to this email, explaining that DHHS' legal department advised that DHHS cannot deny a license to applicants who meet the regulations, which do not touch upon sexual orientation. But Pristow also explained that licensing "does not guarantee placement as the placement would need my prior approval before the placement could occur."

In October 2012, the employee of yet another contracting agency still believed that neither party of a same-sex couple could be licensed to foster. A DHHS employee told that employee that one member of the same-sex couple could be licensed, but the DHHS employee was unable to answer the agency's questions regarding what factors were involved in the placement decision for a licensed member of a same-sex couple.

In November 2012, Christenson expressed in an email her belief that Memo 1-95 was "still in force since it's on the website." Stolz responded that she thought Memo 1-95 had been removed from the website, but that she would follow up. Christenson responded that she "didn't know an Admin memo could be removed, w/out a replacement, or notice. It's been confusing to follow how they are handling that memo."

When, after discussion with Stolz, the resource developer administrator emailed Christenson that they would be going ahead with licensing one of the applicants who is in a same-sex relationship, Christenson stated that "no one has clearly explained to me how we can license a home when [Memo 1-95] is still in effect." Further emails between Christenson and other employees discussed being unwilling to license homosexual applicants, apparently despite communications from their supervisors to do so. An email to Christenson from a DHHS resource developer explained that she was "not comfortable going against policy" and that others should know that Memo 1-95 "which clarifies the policy has not been rescinded so . . . it is basically against policy [to license homosexual applicants] at this point."

In November 2012, Busch stated to the service area administrators that he had been receiving some inquiries about the status of Memo 1-95. He clarified that Memo 1-95 was "still active and has not been rescinded. An exception to [Memo 1-95] must be granted by Director Pristow."

There was testimony that up until approximately September 2014, Christenson and other staff were placing "holds" on all licensed homes where homosexuals or unmarried couples resided. When a home is on hold, no placements can be made in the home until the hold is lifted. These holds were apparently meant to "trigger the staff to know that they needed to have either service area or director approval prior to the placement to ensure that we were following current practice." After Stolz became aware of the practice of putting these homes on hold, it ceased.

(f) Answers to Interrogatories

In the defendants' answers to interrogatories, they described that it was DHHS' "policy" to allow only one license per address and to allow a joint license only for married couples.

With regard to placements of wards when the foster parent is unmarried and there are other adults living in the home, the defendants explained:

> [P]lacement of wards when the foster parent is unmarried and there are other adults living in the home if:
> - The ward is related to the foster parent by blood or adoption
> - The ward is a former foster child of the foster parent
> - The foster parent is the legal guardian of the ward, or
> - The foster parent is responsible to provide physical care to and supervision of the ward, whose placement is supervised by a developmental disability agency.
>
> If none of the above criteria are met, DHHS policy also allows for an exception if the local office believes that placement in the home would be appropriate and in the best interest of the child. *If the foster parent has identified as gay or lesbian, the Service Area Administrator would then make a request for approval to the Director of the Division of Children and Family Services. The Director would then make a decision on whether placement in the home would be appropriate and in the best interest of the child. If the placement is approved, the ward will be placed with the licensed or approved individual.*

(Emphasis supplied.) The defendants did not address whether it would recognize same-sex couples as married if they were married in another state.

In a response to an interrogatory asking how DHHS would determine an applicant's sexual orientation, the defendants relied on Memo 1-95 to point out its policy not "'to ask any specific questions about an individual's sexual orientation or marital status than is currently asked in the licensing application, home study, etc.'" The defendants stated that training instructors do not distribute any administrative memorandums during orientation training, but are "expected to review policies on their own."

### (g) Memo 1-95 Removed From Website

The defendants submitted the affidavit of Green, the acting director of the Division of Children and Family Services.

Green obtained that position on January 8, 2015. Green averred that Memo 1-95 was removed from the DHHS website on February 20, 2015, approximately 4 weeks after the defendants filed their motion for summary judgment and 3 weeks after the plaintiffs filed their cross-motion for summary judgment. Green did not state that Memo 1-95 had been rescinded. Nor did Green address whether homosexual applicants were still subject to a five-tier approval process for placement.

### 4. Arguments Made Below

At the hearing on the motions for summary judgment, the plaintiffs argued that DHHS discriminated on the basis of sexual orientation. The plaintiffs argued that it did so both by virtue of Memo 1-95 and through DHHS' five-tier Pristow Procedure. The defendants did not object to the Pristow Procedure as being outside the scope of the pleadings.

The plaintiffs pointed out that Memo 1-95 has not been rescinded and is used in new employee training; some DHHS employees and private contracting agencies continue to implement it. The plaintiffs pointed out that Memo 1-95 was removed from the website only 2 months before the summary judgment hearing and that it was still not listed on the web page for rescinded policies. The plaintiffs pointed out that the defendants have not given an official announcement that they treat heterosexual and homosexual applicants the same.

The plaintiffs asserted that the confusion about whether Memo 1-95 still applies discourages homosexual applicants. Further, such applicants were "subject to the whims of new employees coming in and out, even at the top level, as to whether they're going to apply a policy that's on the books, or whether they're going to apply their predecessor's policy, or how they're going to treat gay and lesbian applicants."

The plaintiffs argued that the Pristow Procedure is itself discriminatory, because heterosexual applicants, even felons, are subjected to fewer tiers of review than homosexual applicants. Since the extra review is only of approvals and not rejections, the extra review cannot be to protect homosexual

applicants from discrimination. The plaintiffs pointed out that the only possible change in the outcome for the applicant as a result of such review is that a homosexual applicant who was accepted in an earlier level of review is rejected "further up the chain."

In response to these arguments, the defendants acknowledged that Memo 1-95 had not been rescinded, but claimed that rescission was unnecessary. The defendants described Memo 1-95 as "nothing"; it was not DHHS' policy or procedure, was no longer on the DHHS website, and is not elsewhere "on the books." The defendants asserted that the plaintiffs' claims of confusion surrounding Memo 1-95 were speculative and, in any event, "confusion does not equal a constitutional violation."

With regard to the Pristow Procedure, the defendants did not deny that the procedure is still in place. But they argued that "equal protection does not require absolute equality" and that there was no discrimination, because the same best interests standard applied to both homosexual and heterosexual applicants. Further, the defendants argued that the extra levels of review were not directed at the homosexual applicants, but, rather, were a "mechanism for review of the employees and what they are doing within their placement determinations" in order "to prevent bias by the caseworkers."

Lastly, the defendants argued that nothing has prevented the plaintiffs from applying to be foster parents and that there was no remedy for the court to award.

### 5. District Court's Order

The court granted summary judgment in favor of the plaintiffs. The court's original order, dated August 5, 2015, was modified on September 16, following the court's consideration of the defendants' motion to alter or amend the judgment, filed August 17. Both the August 5 and the September 16 orders described the plaintiffs as making both a constitutional challenge to Memo 1-95 and to the discriminatory process of the Pristow Procedure.

The court rejected the defendants' arguments that there is no longer a case and controversy concerning Memo 1-95 because it has not represented DHHS policy or practice since 2012. The court noted that at the time the lawsuit was filed, there was confusion within DHHS surrounding Memo 1-95 insofar as most of the employees deposed believed it to still be DHHS "policy." And the court stated that although the Pristow Procedure may be the "current policy," Memo 1-95 has not been formally rescinded or replaced. The court concluded that "DHHS cannot have two conflicting policies that reflect wholly incompatible interpretations of the same regulations." It found that Memo 1-95 should be stricken in its entirety as in violation of equal protection and due process.

The court likewise found that the Pristow Procedure violated equal protection and due process. It noted that the defendants had failed to identify any legitimate government interest to justify treating homosexual individuals and couples differently from heterosexual individuals and couples. Further, the defendants had conceded that no child welfare interests are advanced by treating homosexual applicants differently from heterosexual applicants. It rejected the defendants' argument that the five-tier approval process was to prevent bias against homosexual individuals and couples, explaining that "[i]f the Defendants wanted to prevent bias against gay and lesbian couples, Defendants would review denials of placements rather than approvals of placements."

The court ordered the defendants to "refrain from adopting or applying policies, procedures, or review processes that treat gay and lesbian individuals and couples differently from similarly situated heterosexual individuals and couples when evaluating foster care or adoption applicants under the 'best interests of the child' standard set forth in DHHS' regulations."

Both orders taxed costs of the action to the defendants.

On August 7, 2015, the court granted the plaintiffs an extension of the time to file a motion for attorney fees and costs, which was ultimately filed on October 16. The motion for attorney fees and costs was filed pursuant to 42 U.S.C. § 1988

(2012). The plaintiffs' attorney filed with the district court 80 pages of affidavits and attached exhibits in support of the motion. Those documents are found in the transcript rather than in the bill of exceptions, because they were not offered as exhibits during a hearing. But a hearing was conducted in which the parties discussed the requested fees and costs. The defendants did not object to the documents supporting the requested fees on the grounds that they were not properly in evidence or otherwise unreliable. The court entered an order on December 15 awarding $28,849.25 in costs and $145,111.30 in attorney fees.

## III. ASSIGNMENTS OF ERROR

The defendants assign that the district court erred by (1) receiving hearsay evidence, (2) granting summary judgment when there were genuine issues of fact, (3) granting summary judgment and issuing an injunction when the plaintiffs did not have standing, (4) deciding a case that was moot, and (5) awarding attorney fees.

## IV. STANDARD OF REVIEW

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

[2] When attorney fees are authorized, the trial court exercises its discretion in setting the amount of the fee, which ruling an appellate court will not disturb on appeal unless the court abused its discretion.[5]

## V. ANALYSIS

The defendants do not contest the underlying merits of the district court's determination that Memo 1-95 and the Pristow

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[4] *Latzel v. Bartek*, 288 Neb. 1, 846 N.W.2d 153 (2014).

[5] *State v. Rice*, 295 Neb. 241, 888 N.W.2d 159 (2016).

Procedure violate equal protection and due process. Instead, the defendants assert there is a material issue of fact whether the plaintiffs' claims were justiciable. The defendants assert that if the action was not justiciable, the plaintiffs could not be the prevailing parties under 42 U.S.C. § 1988. The defendants also claim the award of attorney fees was an abuse of discretion because the evidence of fees was not presented to the district court in the correct manner.

### 1. Justiciability

[3] We first address whether there was a material issue of fact as to the justiciability of the plaintiffs' claims. Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[6] In the summary judgment context, a fact is material only if it would affect the outcome of the case.[7]

[4,5] A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.[8] A court decides real controversies and determines rights actually controverted, and does not address or dispose of abstract questions or issues that might arise in a hypothetical or fictitious situation or setting.[9]

#### (a) Ripeness

The defendants' principle contention is that the plaintiffs lack standing because they have not yet applied for and been denied foster care licenses and placement of state wards in their care. The defendants argue that the plaintiffs thus have

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[6] *Latzel v. Bartek, supra* note 4.

[7] *Id.*

[8] *In re Estate of Reading*, 261 Neb. 897, 626 N.W.2d 595 (2001).

[9] *US Ecology v. State*, 258 Neb. 10, 601 N.W.2d 775 (1999).

not been harmed. And they argue that if the plaintiffs are granted licenses and children are placed in their homes, then they never will be harmed. The defendants assert that the controversy presented by the plaintiffs' action is, accordingly, purely hypothetical.

[6,7] Standing is a key function in determining whether a justiciable controversy exists.[10] Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.[11]

But the defendants do not argue that the plaintiffs are asserting merely a general injury to the public. They do not argue that if the plaintiffs were to apply for licenses and be denied the ability to provide foster care, they would lack a personal stake in the outcome of the litigation. The defendants' standing argument is more accurately considered one of ripeness.

[8] The ripeness doctrine is rooted in the same general policies of justiciability as standing and mootness.[12] As compared to standing, ripeness assumes that an asserted injury is sufficient to support standing, but asks whether the injury is too contingent or remote to support present adjudication.[13] It is a time dimension of standing.[14]

[9] We use a two-part inquiry to determine ripeness: (1) the jurisdictional question of the fitness of the issues for judicial decision and (2) the prudential question concerning the hardship to the parties of withholding court consideration.[15] We follow the Eighth Circuit, which has explained that

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[10] *Hall v. Progress Pig, Inc.*, 254 Neb. 150, 575 N.W.2d 369 (1998).

[11] *City of Omaha v. City of Elkhorn*, 276 Neb. 70, 752 N.W.2d 137 (2008).

[12] 13B Charles Alan Wright et al., Federal Practice and Procedure § 3532.1 (2008).

[13] *Id.*

[14] See *id.*

[15] See *City of Omaha v. City of Elkhorn, supra* note 11.

> "[t]he 'fitness for judicial decision' inquiry goes to a court's ability to visit an issue. . . . [I]t safeguards against judicial review of hypothetical or speculative disagreements. . . .
>
> "In addition to being fit for judicial resolution, an issue must be such that delayed review will result in significant harm. 'Harm' includes both the traditional concept of actual damages—pecuniary or otherwise—and also the heightened uncertainty and resulting behavior modification that may result from delayed resolution."[16]

Declaratory and injunctive relief, which were sought here, require a justiciable controversy that is ripe for judicial determination.[17] Such actions cannot be used to obtain advisory opinions, adjudicating hypothetical or speculative situations that may never come to pass.[18]

[10] The question of ripeness is to be viewed in light of the relief sought. We have said that a "declaratory judgment is by definition forward-looking, for it provides '"preemptive justice" designed to relieve a party of uncertainty before the wrong has actually been committed or the damage suffered.'"[19] We have explained that the function of a declaratory judgment is to determine justiciable controversies which either are not yet ripe for adjudication by conventional forms of remedy or, for other reasons, are not conveniently amenable to the usual remedies.[20] The purpose of an injunction,

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[16] *Id*. at 80, 752 N.W.2d at 145-46, quoting *Nebraska Public Power Dist. v. MidAmerican Energy*, 234 F.3d 1032 (2000).

[17] See, *Ryder Truck Rental v. Rollins*, 246 Neb. 250, 518 N.W.2d 124 (1994); 43A C.J.S. *Injunctions* § 76 (2014).

[18] See, *Greater Omaha Realty Co. v. City of Omaha*, 258 Neb. 714, 605 N.W.2d 472 (2000); *Ryder Truck Rental v. Rollins, supra* note 17. See, also, *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002*, 265 Neb. 8, 654 N.W.2d 166 (2002).

[19] See, *Hauserman v. Stadler*, 251 Neb. 106, 110, 554 N.W.2d 798, 801 (1996); *Ryder Truck Rental v. Rollins, supra* note 17.

[20] See *id*. See, also, e.g., *Central City Ed. Assn. v. Merrick Cty. Sch. Dist.*, 280 Neb. 27, 783 N.W.2d 600 (2010).

similarly, is to restrain actions that have not yet been taken.[21] Injunctive relief is generally preventative, prohibitory, or protective.[22]

We reject the defendants' contention that the harm at issue in this action is too remote or speculative to be ripe for the protective, forward-looking relief sought and obtained by the plaintiffs. Fundamentally, the defendants mischaracterize the harm the plaintiffs seek to prevent.

The harm the plaintiffs wish to avoid is not just the possible, ultimate inability to foster state wards; it is the discriminatory stigma and unequal treatment that homosexual foster applicants and licensees must suffer if they wish to participate in the foster care system. The imminent injury that the court redressed was the plaintiffs' inability to be treated on equal footing with heterosexual applicants.[23]

[11] We find several U.S. Supreme Court cases instructive on this issue. The U.S. Supreme Court has specifically rejected the argument that persons claiming denial of equal treatment must demonstrate their ultimate inability to obtain a benefit in order for their claims to be justiciable.[24] As noted by the district court below, the Court has explained that the injury in an equal protection case is the imposition of a barrier that makes it more difficult for members of one group to obtain a benefit, rather than the ultimate inability to obtain the benefit.[25] This proposition directly contradicts the defendants' argument that the plaintiffs would suffer no harm unless they applied to be foster parents and were ultimately denied placement of state wards in their homes.

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[21] *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999).

[22] *Crete Ed. Assn. v. Saline Cty. Sch. Dist. No. 76-0002, supra* note 18.

[23] See *Revelis v. Napolitano*, 844 F. Supp. 2d 915 (N.D. Ill. 2012).

[24] *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993).

[25] See *id.*

[12] The U.S. Supreme Court has applied this proposition in the context of affirmative action bidding programs and school application processes, holding that a plaintiff has standing to make a claim challenging the inability to compete on an equal footing no matter whether the plaintiff would have been admitted to the school or obtained the winning bid but for that unequal treatment.[26] The Court has held that when the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need only demonstrate that he or she is ready and able to perform and that a discriminatory policy prevents him or her from doing so on an equal basis.[27]

In other cases, the Court has elaborated on the stigmatic injury that stems from discriminatory treatment. The Court has explained that the discriminatory treatment itself is a serious harm that supports standing. In *Heckler v. Mathews*,[28] for example, the Court addressed the plaintiff's claim that Social Security laws subjected him to unequal benefits on the basis of gender. The Court found standing, despite the fact that a successful action would result in the plaintiff's benefits remaining the same (while, due to the severability of the discriminatory provision, female applicants' benefits would decrease).[29]

[13] The Court stated it had "repeatedly emphasized" that

> discrimination itself, by perpetuating "archaic and stereotypic notions" or by stigmatizing members of the

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[26] See, *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. City of Jacksonville, supra* note 24; *University of California Regents v. Bakke*, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978).

[27] See *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. City of Jacksonville, supra* note 24.

[28] *Heckler v. Mathews*, 465 U.S. 728, 104 S. Ct. 1387, 79 L. Ed. 2d 646 (1984). See, also, *Barber v. Bryant*, 193 F. Supp. 3d 677 (S.D. Miss. 2016); *Campaign for Southern Equality v. Bryant*, 64 F. Supp. 3d 906 (S.D. Miss. 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014).

[29] *Heckler v. Mathews, supra* note 28.

> disfavored group as "innately inferior" and therefore as less worthy participants in the political community, . . . can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.[30]

The Court reiterated that when the right invoked is that of equal treatment, the appropriate remedy is a mandate of equal treatment.[31] Similarly, in *Allen v. Wright*,[32] the U.S. Supreme Court explained that for those persons who are personally subject to discriminatory treatment, stigmatizing injury caused by discrimination is a serious noneconomic injury that is sufficient to support standing.

As for the ripeness questions of whether this harm is too remote and whether delayed review will result in significant harm, the Court held in the bidding cases that the plaintiffs seeking to prevent future deprivation of the equal opportunity to compete need only demonstrate they will "sometime in the relatively near future" bid on a contract governed by such race-based financial incentives.[33]

[14] In a number of cases in other jurisdictions similar to the case at bar, courts have found plaintiffs to have standing in spite of the absence of any formal application under the challenged program or law.[34] This is because standing does not

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[30] *Id.*, 465 U.S. at 739-40 (citation omitted).

[31] *Heckler v. Mathews, supra* note 28.

[32] *Allen v. Wright*, 468 U.S. 737, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984), *abrogated on other grounds, Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014).

[33] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

[34] *Dragovich v. U.S. Department of the Treasury*, 764 F. Supp. 2d 1178 (N.D. Cal. 2011). See, also, *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 113 S. Ct. 2485, 125 L. Ed. 2d 38 (1993); *Teamsters v. United States*, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977); *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005); *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989); *Waters v. Ricketts*, 48 F. Supp. 3d 1271 (D. Neb. 2015).

require exercises in futility.[35] "Courts have long recognized circumstances in which a failure to apply may be overcome by facts which demonstrate the futility of such application."[36]

In *Teamsters v. United States*,[37] the U.S. Supreme Court explained that "[i]f an employer should announce his policy of discrimination by a sign reading 'Whites Only' on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs." Thus, the Court rejected the argument that those who failed to apply for the position that discriminatory practices made it difficult to obtain could not share in the "make-whole relief" that was sought in the action.[38] Rather, such plaintiffs must show that they should be treated as applicants, or "potential victim[s]," of the discrimination, by showing they were actually deterred by the discriminatory practice and would have applied but for that practice.[39]

The Court explained that a plaintiff's desire for a job need not be "translated into a formal application solely because of his unwillingness to engage in a futile gesture."[40] The nonapplicant is unwilling to subject himself or herself to the humiliation of certain rejection.[41] Such a nonapplicant is as much a victim of discrimination as the applicant.[42]

Memo 1-95 was a published statement on DHHS' official website that "heterosexuals only" need apply to be foster

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[35] *Dragovich v. U.S. Department of the Treasury, supra* note 34. See, also, e.g., *LeClerc v. Webb, supra* note 34; *Terry v. Cook, supra* note 34.

[36] *Terry v. Cook, supra* note 34, 866 F.2d at 378.

[37] *Teamsters v. United States, supra* note 34, 431 U.S. at 365. See, also, e.g., *Reno v. Catholic Social Services, Inc., supra* note 34.

[38] *Teamsters v. United States, supra* note 34, 431 U.S. at 367.

[39] *Id.*

[40] *Id.*, 431 U.S. at 366.

[41] See *Teamsters v. United States, supra* note 34.

[42] See *id.*

parents. It is legally indistinguishable from a sign reading "Whites Only" on the hiring-office door. Memo 1-95 clearly excluded same-sex couples and individuals who identified as homosexuals either from being licensed or from having state wards placed in their homes. There is no dispute that all the plaintiffs were ready and able to be foster parents, were aware of and deterred by Memo 1-95, and would have taken further steps to become foster parents but for the barrier expressed in Memo 1-95. The plaintiffs considered any further action to be futile and did not wish to subject themselves to the humiliation of rejection and the stigmatic harm of unequal treatment.

There was a barrier to equal treatment and serious noneconomic injuries that the plaintiffs would be imminently subjected to upon application to become foster parents. The plaintiffs could only ultimately foster children through an uncertain exception to the absolute ban set forth in Memo 1-95 or through a five-tier review procedure that subjected them to increased scrutiny because of their sexual orientation. In either scenario, the plaintiffs would suffer stigmatic harm stemming from systematic unequal treatment. By seeking forward-looking relief, the plaintiffs wished to avoid suffering the discrimination inherent in Memo 1-95 and the Pristow Procedure.

What is more, there is no dispute in the record that Todd and Joel actually began the process of applying by completing training, a home study, and background checks. After a significant delay in the progression of their case, they contacted the director as well as the chief executive officer of DHHS, who both either directly or indirectly confirmed the continuing force and effect of Memo 1-95. In addressing the by-then 3-year delay, Winterer relied repeatedly on Memo 1-95 and stated it was "still in force." In an action where multiple plaintiffs seek identical injunctive or declaratory relief, once the court determines that one of the plaintiffs has standing, it need

not decide the standing of the others in order to determine that the action is justiciable.[43] For if one plaintiff prevails on the merits, the same prospective relief will issue regardless of the standing of the other plaintiffs.[44] Clearly, Todd and Joel did not need to subject themselves to even more personal rebuffs in order to demonstrate their personal stake in this action and the ripeness of their claim.

We agree with the district court that the controversy raised by the plaintiffs is neither hypothetical nor speculative by virtue of the fact that the plaintiffs have not yet applied for and been denied foster care licenses and placement of state wards in their homes. And we agree with the district court that the harm at issue is appropriate for the preemptive justice that declaratory and injunctive relief provide. The plaintiffs were faced with the unavoidable inability to be treated on equal footing if they wished to pursue being foster parents, and the district court's order effected an immediate resolution of that imminent and serious harm. We find no merit to the defendants' narrow view that the action presented a hypothetical harm because the plaintiffs have not shown an ultimate inability to become foster parents.

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[43] *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006); *Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012); *New Jersey Physicians, Inc. v. President of U.S.*, 653 F.3d 234 (3d Cir. 2011); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993 (11th Cir. 2004); *Save Our Heritage, Inc. v. F.A.A.*, 269 F.3d 49 (1st Cir. 2001); *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228 (D.C. Cir. 1996); *Kelley v. Selin*, 42 F.3d 1501 (6th Cir. 1995); *Heckman v. Williamson County*, 369 S.W.3d 137 (Tex. 2012); *MacPherson v. DAS*, 340 Or. 117, 130 P.3d 308 (2006); *Cohen v. Zoning Bd. of Appeals*, 35 Mass. App. 619, 624 N.E.2d 119 (1993). See, also, e.g., Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be Part 1: Justiciability and Jurisdiction (Original and Appellate)*, 42 U.C.L.A. L. Rev. 717 (1995).

[44] *Patel v. Dept. of Licensing and Regulation*, 469 S.W.3d 69 (Tex. 2015).

(b) Mootness

[15] The defendants alternatively claim the plaintiffs lacked a justiciable claim, because Memo 1-95 no longer represented official DHHS policy or practice by the time the plaintiffs filed this action. In order to maintain an action to enforce private rights, the plaintiff must show that he or she will be benefited by the relief to be granted.[45] 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.[46] At the latest, the defendants believe that any issue concerning Memo 1-95 became moot in February 2015, when Memo 1-95 was taken off the DHHS website during the pendency of the parties' motions for summary judgment.

This list of memorandums was designed to be viewed by the public, and new DHHS employees were directed to familiarize themselves with DHHS policy by looking at the memorandums on the website. As late as November 2011, DHHS officials with the authority to declare DHHS policy and procedure represented to same-sex couples that Memo 1-95 was still in force. The continuing presence of Memo 1-95 on the DHHS website at the time this action was filed affirmed these representations.

Pristow intentionally avoided formal rescission of Memo 1-95 and, in fact, avoided creating anything in writing disavowing it or stating a policy or practice different from that articulated in Memo 1-95. The Pristow Procedure was strictly verbal, and DHHS employees were told about the Pristow Procedure only if and when they were confronted with homosexual applicants. Pristow deliberately kept Memo 1-95 on the DHHS website, and the Pristow Procedure was never

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[45] *Id.*

[46] See *Mullendore v. Nuernberger*, 230 Neb. 921, 434 N.W.2d 511 (1989).

communicated to the public. In fact, it can be surmised that the plaintiffs did not learn of the Pristow Procedure until discovery conducted during the current lawsuit.

[16] If a discriminatory policy is openly declared, then it is unnecessary for a plaintiff to demonstrate it is followed in order to obtain injunctive or declaratory relief.[47] We thus find immaterial any dispute in the record as to whether the Pristow Procedure was a policy versus a practice, whether it "replaced" Memo 1-95, or the level of confusion within DHHS and its contractors concerning DHHS' policy and practice when this action was filed. A secret change in policy or procedure cannot moot an action based on a published policy statement that has been cited by the agency as excluding the plaintiffs from eligibility.

Memo 1-95 was deliberately maintained on the website in order to give the public the impression that it represented official DHHS policy. The defendants cannot now complain that the plaintiffs believed it so, were deterred by the discriminatory exclusion set forth so clearly therein, and brought this action to challenge it.

[17,18] As for DHHS' eleventh-hour removal of Memo 1-95 from its website, it is well recognized that "a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued."[48] If voluntary cessation of that kind rendered a case moot, "a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends."[49] "'[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful

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[47] See *U.S. v. Bd. of Educ. of School D. of Philadelphia*, 911 F.2d 882 (3d Cir. 1990).

[48] *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 133 S. Ct. 721, 727, 184 L. Ed. 2d 553 (2013).

[49] *Id.*

behavior could not reasonably be expected to recur.'"[50] This standard is "stringent."[51] The defendants made no attempt to meet this standard.

Finally, we note that any argument that the plaintiffs' action is moot because the Pristow Procedure superseded Memo 1-95 ignores the fact that the Pristow Procedure itself was challenged in this action and was encompassed by the injunctive and declaratory relief granted by the district court's order. The defendants make no argument that the five-tier Pristow Procedure is no longer in effect or that the plaintiffs' action with regard to the Pristow Procedure is otherwise nonjusticiable. In their brief, the defendants make no arguments concerning the Pristow Procedure other than to assert that it superseded Memo 1-95.

[19] The defendants mentioned at oral arguments that the Pristow Procedure was not specifically alleged in the plaintiffs' complaint. Thus, they believed that if they could show that the Pristow Procedure replaced Memo 1-95, there was no action. But this court's consideration of a cause on appeal is limited to errors assigned and discussed.[52] The defendants assigned neither error below nor on appeal asserting that the Pristow Procedure was beyond the scope of the pleadings or that they lacked timely notice of the Pristow Procedure's being at issue in the case. To the contrary, the plaintiffs argued to the district court that the Pristow Procedure was unconstitutionally discriminatory, and the defendants argued that it was not.

The plaintiffs, having no apparent way of knowing about the Pristow Procedure before filing their action, alleged as the operative fact in their complaint the discriminatory exclusion articulated in Memo 1-95. The defendants raised the

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[50] *Id.* (quoting *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)).

[51] *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., supra* note 50, 528 U.S. at 189.

[52] See, Neb. Rev. Stat. § 25-1919 (Reissue 2016); *In re Estate of Balvin*, 295 Neb. 346, 888 N.W.2d 499 (2016).

Pristow Procedure in the hearing on the motions for summary judgment in the hope of mooting the plaintiffs' claim. The defendants also hoped that a discriminatory process allowing for the possibility of fostering a child was somehow constitutional even if the absolute prohibition of Memo 1-95 was not. Finally, the defendants argued that the ultimate possibility of fostering inherent to the Pristow Procedure meant that the plaintiffs could demonstrate no imminent harm—an argument that, if accepted, could have left unequal scrutiny of the Pristow Procedure immune from challenge.

At the same time that the defendants relied so heavily on the Pristow Procedure for their defense, they remained silent as to the clearly expanded scope of the operative facts at issue in the plaintiffs' action. While, in general, we caution plaintiffs to amend their pleadings when discovery reveals new operative facts, the defendants' maneuverings here are unavailing.

We will not reverse the district court's judgment on the ground that the Pristow Procedure superseded Memo 1-95. Memo 1-95 was openly declared, and DHHS chose not to inform the public that it was no longer followed. Neither did DHHS moot the plaintiffs' case through its voluntary removal of Memo 1-95 from the website following the motions for summary judgment. And, regardless of the status of Memo 1-95, the plaintiffs were the prevailing parties with regard to the discriminatory nature of the Pristow Procedure.

### 2. Attorney Fees

Beyond the defendants' arguments attacking the justiciability of the plaintiffs' underlying claims, with the ultimate goal of preventing the plaintiffs from being the prevailing parties for purposes of attorney fees, the defendants assert that there was insufficient evidence of attorney fees. The defendants make this argument solely on the ground that the evidence of attorney fees was filed with the clerk of the district court and is found only in the transcript. Evidence of attorney fees was not entered into evidence as exhibits and that evidence is not, therefore, found in the bill of exceptions.

The attorney fees in this case were awarded pursuant to 42 U.S.C. § 1988. Section 1988(b) states in relevant part that "[i]n any action or proceeding to enforce a provision of [§] 1983, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ." We have said that affidavits included in the transcript, but not received as evidence and appearing in the bill of exceptions, cannot be considered on appeal by the appellate court.[53] Such affidavits must be "preserved" for appellate review in the bill of exceptions.[54] We have explained that offering of a bill of exceptions is necessary at some point if the appellate court is to consider errors assigned by the appellant which require a review of the evidence that was received by the tribunal from which the appeal is taken.[55]

But the defendants are the appellants in this case; they wish us to consider their assignment of error that the lower court abused its discretion in awarding attorney fees. Generally, in determining whether there is merit to an appellant's claim that the lower court's judgment should be reversed, it will be presumed in the absence of a bill of exceptions that issues of fact presented by the pleadings were established by the evidence.[56]

True, where an appellant argues on appeal that the evidence is insufficient on a point for which an appellee bore the burden of proof, we will not simply presume there was evidence before the lower court, which we have no evidence of despite the filing of a bill of exceptions.[57] But we have never held

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[53] See, *State v. Dean*, 270 Neb. 972, 708 N.W.2d 640 (2006); *State v. Allen*, 159 Neb. 314, 66 N.W.2d 830 (1954).

[54] *State v. Allen, supra* note 53, 159 Neb. at 321, 66 N.W.2d at 835.

[55] See *Marcotte v. City of Omaha*, 196 Neb. 217, 241 N.W.2d 838 (1976).

[56] See, *State v. Allen, supra* note 53; *McMillan v. Diamond*, 77 Neb. 671, 110 N.W. 542 (1906).

[57] See, e.g., *Emery v. Moffett*, 269 Neb. 867, 697 N.W.2d 249 (2005).

that an appellant may successfully assert that the evidence was insufficient to support a lower court's order when the record on appeal affirmatively demonstrates that sufficient evidence was considered by the lower court, with notice to and without objection by the appellant, but that such evidence was received through filing with the clerk of the court rather than at a hearing wherein it became part of the bill of exceptions.

To the contrary, in *Zwink v. Ahlman*,[58] we expressly rejected the appellants' contention that the lower court's judgment was not sustained by the evidence because the necessary evidence was attached to the petition and placed in the transcript, but was not entered as an exhibit to be found in the bill of exceptions. We observed that the journal of the trial court showed that the evidence in question was considered and that no specific objection was raised on the ground that the evidence was not formally admitted.[59] We concluded that under such circumstances, the evidence was to be considered as if made a part of the bill of exceptions.[60]

We explained that it would be repugnant to the general rules of equity governing the underlying action to dismiss the proceeding because the evidence was "not formally introduced in evidence when the transcript shows they were duly filed and the judgment of the trial court shows [the evidence was] considered by it."[61] Furthermore, to remand the cause for retrial because the evidence was not formally introduced when the evidence was before us in the transcript and was considered by the trial court, "would appear a circuitous and useless procedure if a proper decision is possible by considering them as evidence along with the bill of exceptions at this time."[62]

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[58] *Zwink v. Ahlman*, 177 Neb. 15, 128 N.W.2d 121 (1964).

[59] See *id.*

[60] *Id.*

[61] *Id.* at 19-20, 128 N.W.2d at 124.

[62] *Id*. at 20, 128 N.W.2d at 124-25.

Similarly, in *Nimmer v. Nimmer*,[63] we affirmed an award of attorney fees despite the fact that the evidence of those fees was found only as an itemized list of services rendered, attached to the application for fees, and not in the bill of exceptions. We observed that it was clear that there was a hearing on the fees, but no bill of exceptions was created for that hearing.

And in *Chilen v. Commercial Casualty Ins. Co.*,[64] we affirmed the award of attorney fees despite the fact that the evidence of such fees, though apparently presented at the hearing, was not embodied in the bill of exceptions. The appellant was the party opposing the fees, and we found that with no bill of exceptions, the pleadings were sufficient to support the judgment awarding the fees.[65]

The defendants' only argument that there was insufficient evidence to support the lower court's award of fees is that the evidence of those fees is found in the transcript rather than in the bill of exceptions. However, the appellate record is clear that extensive evidence supporting attorney fees was filed with the clerk of the district court, examined by the district court, and addressed by both parties during the hearing on fees and costs. The defendants did not raise at this hearing any issue regarding the method by which the evidence was brought before the court. They did not raise any objection to the fees other than to assert that they were excessive. The district court clearly found the exhibits adequate and reduced the amount of its award in light of the defendants' arguments, made upon examination of the evidence found in the transcript.

These facts are clearly distinguishable from *Lomack v. Kohl-Watts*,[66] a case relied upon by the defendants. In *Lomack*, it was the appellant who assigned as error the denial of fees below.

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[63] *Nimmer v. Nimmer*, 203 Neb. 503, 279 N.W.2d 156 (1979).

[64] *Chilen v. Commercial Casualty Ins. Co.*, 135 Neb. 619, 283 N.W. 366 (1939).

[65] *Id.*

[66] *Lomack v. Kohl-Watts*, 13 Neb. App. 14, 688 N.W.2d 365 (2004).

And there was no indication in the appellate record that the evidence of attorney fees, found only in the transcript, was actually filed with the clerk of the lower court. Neither was there any evidence that the opposing party had notice of the evidence and an opportunity to object to it, or that such evidence was considered by the lower court in making its determination regarding fees.

[20] On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.[67] Upon the record before us, we cannot conclude that the district court abused its discretion in awarding costs and attorney fees to the plaintiffs.

### 3. Hearsay

We do not need to address the defendants' assignment of error relating to the admission in evidence of several newspaper articles. The defendants assert these articles were inadmissible hearsay. These articles played no role in our determination that the underlying action was justiciable.

## VI. CONCLUSION

We find no merit to the defendants' claims that the underlying action was not justiciable. Nor do we find any merit to the defendants' claims that the district court abused its discretion in awarding costs and attorney fees, simply because the evidence of those fees is found in the appellate transcript rather than in the bill of exceptions. We find no merit to the defendants' assignments of error; therefore, we affirm the judgment of the district court.

Affirmed.

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[67] *Cisneros v. Graham*, 294 Neb. 83, 881 N.W.2d 878 (2016).

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

# State of Nebraska, appellee, v. Joseph J. Buttercase, appellant.

893 N.W.2d 430

Filed April 7, 2017. No. S-16-114.

1. **Search and Seizure: Appeal and Error.** The denial of a motion for return of seized property is reviewed for an abuse of discretion.
2. **Sentences.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
3. **Judges: Recusal: Appeal and Error.** A motion requesting a judge to recuse himself or herself on the ground of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.
4. **Criminal Law: Search and Seizure: Property.** Property seized in enforcing a criminal law is said to be in custodia legis, or in the custody of the court.
5. **Trial: Search and Seizure: Evidence.** Property seized and held as evidence shall be kept so long as necessary for the purpose of being produced as evidence at trial.
6. **Courts: Jurisdiction: Search and Seizure: Property.** The court in which a criminal charge was filed has exclusive jurisdiction to determine the rights to seized property, and the property's disposition.
7. **Search and Seizure: Property.** The proper procedure to obtain the return of seized property is to apply to the court for its return.
8. **Judges: Recusal.** Under the Nebraska Revised Code of Judicial Conduct, a judge must recuse himself or herself from a case if the judge's impartiality might reasonably be questioned.
9. ____: ____. Under the Nebraska Revised Code of Judicial Conduct, such instances in which the judge's impartiality might reasonably be questioned specifically include where the judge has a personal bias or prejudice concerning a party or a party's lawyer.

10. **Judges: Recusal: Presumptions.** A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
11. **Judges: Recusal.** In evaluating a trial judge's alleged bias, the question is whether a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.
12. ____: ____. That a judge knows most of the attorneys practicing in his or her district is common, and the fact that a judge knows attorneys through professional practices and organizations does not, by itself, create the appearance of impropriety.
13. ____: ____. Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion directed to a trial judge.
14. **Judges: Recusal: Waiver.** A party is said to have waived his or her right to obtain a judge's disqualification when the alleged basis for the disqualification has been known to the party for some time, but the objection is raised well after the judge has participated in the proceedings.
15. **Judges: Recusal: Appeal and Error.** Once a case has been litigated, an appellate court will not disturb the denial of a motion to disqualify a judge and give litigants a "second bite at the apple."
16. **Judges: Recusal: Time.** The issue of judicial disqualification is timely if submitted at the earliest practicable opportunity after the disqualifying facts are discovered.

Appeal from the District Court for Gage County: Paul W. Korslund, Judge. Affirmed.

Joseph J. Buttercase, pro se.

Douglas J. Peterson, Attorney General, Melissa R. Vincent, and, on brief, George R. Love for appellee.

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

Heavican, C.J.

## INTRODUCTION

This is an appeal from the denial of Joseph J. Buttercase's motion for the return of seized property, filed within a criminal case that is currently pending on postconviction review with this court, docketed as case No. S-15-987.

Buttercase contends that he was denied his right to the return of certain personal property, in violation of Neb. Rev. Stat. § 29-818 (Reissue 2016). The district court denied the motion. Buttercase appeals. We affirm.

## BACKGROUND

Following a jury trial, Buttercase was convicted in the Gage County District Court of first degree sexual assault, first degree false imprisonment, strangulation, and third degree domestic assault. Buttercase appealed, and in case No. A-12-1167, in an unpublished memorandum opinion dated November 5, 2013, the Nebraska Court of Appeals affirmed his convictions and sentences.

On December 9, 2015, Buttercase filed a motion for return of seized property. In his motion, Buttercase requested the return of the following:

1. One black leather couch cushion;
2. One brown and white striped fitted sheet;
3. One white mattress pad;
4. One Sony Camcorder;
5. One camera tripod;
6. One pair of Flypaper blue jeans;
7. One pair of blue Fruit of the Loom underwear;
8. One "I have the Dick" black T-shirt;
9. One pair of white Nike shoes and pair of white socks;
10. One green belt;
11. One Silver Case and Blackberry cell phone[;]
12. SpeedTech 500GB External Hard Drive and cord;
12. E-Machine PC Tower and Cord, SN# GRY5A20017309;
13. SanDisk media card;
14. Lexar 128 MB media card;
15. 77 Homemade compact discs (from upstairs and living room);
16. One Brass pipe (Brand new, still in package);
17. 3-page note from T. Fulton to J. Buttercase.

On January 20, 2016, the district court held a hearing on Buttercase's motion to return property. Buttercase, acting

pro se, appeared telephonically. At the hearing, the State argued that at that time, Buttercase had a pending postconviction motion and a pending federal prosecution for child pornography and that "many of the items that he pled in his motion are subject to that case." The State further argued that "until there's a final disposition in this matter in both the federal case and the state case that's on appeal, that none of the property items should be returned." The district court denied Buttercase's motion to return property, stating at the hearing that

> at least some of the property listed here might be necessary for the federal prosecution or the other postconviction matter depending on the outcome of that, and rather than try to parse through the different items of property and determine what may or may not be needed at this time, it would be premature to release property. So I will deny the Motion for Return of Seized Property, because it may be necessary for those other matters.

## ASSIGNMENTS OF ERROR

Buttercase assigns that the district court erred in dismissing his motion for return of seized property because (1) the pending federal prosecution and postconviction proceedings do not qualify as pending trials, (2) the State was required to determine what portion of the seized evidence would be necessary for the pending proceedings and return the portion that would not be necessary, and (3) the court was biased against him.

## STANDARD OF REVIEW

[1,2] The denial of a motion for return of seized property is reviewed for an abuse of discretion.[1] An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.[2]

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[1] *State v. Agee*, 274 Neb. 445, 741 N.W.2d 161 (2007).

[2] *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998).

[3] A motion requesting a judge to recuse himself or herself on the ground of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.[3]

## ANALYSIS

Buttercase argues that the district court erred in denying his motion to return seized property under § 29-818 because (1) the "collateral or postconviction proceedings do not qualify as a criminal prosecution in which evidence is needed for any pending trial,"[4] and "court proceedings against [Buttercase] ceased in 2013 when the appellate court mandate affirming [his] convictions and sentences on direct appeal was entered by the district court"[5]; (2) at least some of the property was not needed for his pending federal prosecution or postconviction proceedings; and (3) there is evidence of judicial bias.

### Whether Pending Federal Prosecution and Postconviction Proceedings Qualify as Pending Trial

On appeal, Buttercase contends that the pending postconviction and federal prosecution are not "any pending trial" for purposes of § 29-818 and that therefore, he is entitled to the return of his property.[6] Section § 29-818 governs seized property and provides in relevant part:

> [P]roperty seized under a search warrant or validly seized without a warrant shall be safely kept by the officer seizing the same, unless otherwise directed by the judge or magistrate, and shall be so kept so long as necessary for the purpose of being produced as evidence in any trial. Property seized may not be taken from the officer having

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

[4] Reply brief for appellant at 3.

[5] Brief for appellant at 4.

[6] Reply brief for appellant at 3.

> it in custody by replevin or other writ so long as it is or may be required as evidence in any trial, nor may it be so taken in any event where a complaint has been filed in connection with which the property was or may be used as evidence, and the court in which such complaint was filed shall have exclusive jurisdiction for disposition of the property or funds and to determine rights therein, including questions respecting the title, possession, control, and disposition thereof.

[4-7] Property seized in enforcing a criminal law is said to be "in custodia legis," or in the custody of the court.[7] Property seized and held as evidence shall be kept so long as necessary for the purpose of being produced as evidence at trial.[8] The court in which a criminal charge was filed has exclusive jurisdiction to determine the rights to seized property, and the property's disposition.[9] The proper procedure to obtain the return of seized property is to apply to the court for its return.[10]

In *State v. Agee*,[11] this court found that the district court erred in denying the defendant's motion for return of property after the defendant's theft charge was dismissed, and that the State did not meet its burden of proving it had a legitimate reason to retain the property. The State claimed that the property did not belong to the defendant and that it had been stolen by him. This court found that no evidence had been adduced at trial as to whether the seized items were stolen property; rather, without evidentiary support, the district court based its ruling solely on representations made by the State that the property was stolen.[12] We noted that

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[7] *State v. Agee, supra* note 1.

[8] *Id.*

[9] *Id.* See *State v. Holmes*, 221 Neb. 629, 379 N.W.2d 765 (1986).

[10] *State v. Agee, supra* note 1. See *State v. Allen*, 159 Neb. 314, 66 N.W.2d 830 (1954).

[11] *State v. Agee, supra* note 1.

[12] *Id.*

> the general rule is well established that upon the termination of criminal proceedings, seized property, other than contraband, should be returned to the rightful owner unless the government has a continuing interest in the property. "'[I]t is fundamental to the integrity of the criminal justice process that property involved in the proceeding, against which no Government claim lies, be returned promptly to its rightful owner.'" . . . Thus, a motion for the return of property is properly denied only if the claimant is not entitled to lawful possession of the property, the property is contraband or subject to forfeiture, or the government has some other continuing interest in the property.[13]

This court further stated that the burden of proof was on the "government to show that it has a legitimate reason to retain the property."[14] And, "[t]he State must do more than assert, without evidentiary support, that the property was stolen, or is not in the State's possession."[15] Therefore, this court held that the State did not meet that burden because it failed to present evidence of "any of the other grounds that have been used to justify the government's retention of property, such as an ongoing investigation, a tax lien, an imposed fine, or an order of restitution."[16]

Also relevant is *State v. Dubray*,[17] in which the Court of Appeals applied the reasoning in *Agee* and found that once criminal proceedings against the defendant were concluded, he was presumptively entitled to the return of property seized from him. Without providing any supporting evidence, the State argued that the items belonged to the defendant's

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[13] *Id.* at 449-50, 741 N.W.2d at 166, quoting *United States v. Wright*, 610 F.2d 930 (D.C. Cir. 1979).

[14] *Id.* at 450, 741 N.W.2d at 166.

[15] *Id.* at 452, 741 N.W.2d at 167.

[16] *Id.* at 451, 741 N.W.2d at 167.

[17] *State v. Dubray*, 24 Neb. App. 67, 883 N.W.2d 399 (2016).

murder victims and that the defendant "failed to present evidence supporting his claim to the property."[18] The Court of Appeals found the State had not overcome that presumption because it did not submit any evidence "of a cognizable claim or right of possession adverse to [the defendant's]."[19]

Buttercase argues that the State does not have a continuing interest in his property because his conviction and sentence are final. Buttercase further contends that the State made no "specific showing . . . of any legitimate reason to retain said property or demonstrate any valid continuing interests in such property."[20] We disagree as to both assertions.

This court has held that a motion for the return of property is properly denied "only if the claimant is not entitled to lawful possession of the property, the property is contraband or subject to forfeiture, or the government has some other continuing interest in the property."[21] In this case, the government does not contend that Buttercase is not entitled to lawful possession of the property or that the property is contraband or subject to forfeiture. Instead, the government asserts that it has a continuing interest in the property.

In the instant case, much like in *Agee* and *Dubray*, without presenting evidence or requesting the district court to take judicial notice, the State cited the pending federal case and motion for postconviction relief currently pending in this court. The judge then asked Buttercase if there was anything further he would like to say. Buttercase did not dispute the State's assertion of his pending proceedings in state and federal court, nor did he dispute that some of the seized items may be needed for those proceedings. Rather, Buttercase responded that "at least part of it could be returned . . . if there

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[18] *Id.* at 72, 883 N.W.2d at 403.

[19] *Id.* at 73, 883 N.W.2d at 404.

[20] Brief for appellant at 5.

[21] See *State v. Agee, supra* note 1, 274 Neb. at 450, 741 N.W.2d at 166.

was no other need for it." In addition, Buttercase acknowledges in his brief the existence of both cases against him, but asserts that they "do not qualify as a criminal prosecution in which evidence is needed for any pending trial."[22] The district court found that the State showed it had a legitimate reason to retain the seized property based on "a pending appeal on [Buttercase's] post-conviction matter and a federal case that is still pending."

Under § 29-818, seized evidence "shall be so kept so long as necessary for the purpose of being produced as evidence in *any* trial." (Emphasis supplied.) When a prisoner files a motion for postconviction relief, the court must determine whether the prisoner "has the right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States."[23] If, after conducting an evidentiary hearing, the court finds such a denial or infringement, "the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence the prisoner or grant a new trial as may appear appropriate."[24] Accordingly, postconviction proceedings provide an evidentiary hearing for the court to determine whether there has been a "denial or infringement" of his or her rights, and whether the court should "grant a new trial." For these purposes, the State may have a continuing need to retain the evidence in the course of postconviction proceedings. Postconviction proceedings are the equivalent of a "trial" for purposes of § 29-818.

In addition, at the time this motion was filed, Buttercase remained subject to a pending federal criminal child pornography case. Thus, the evidence seized may have been "necessary

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[22] Reply brief for appellant at 3.

[23] Neb. Rev. Stat. § 29-3001(1) (Reissue 2016).

[24] § 29-3001(2).

for the purpose of being produced as evidence" at trial in the federal criminal proceedings.[25]

Given the fact that Buttercase does not contest the existence of the postconviction motion or the federal prosecution, the presumption in *Agee* and *Dubray* has been rebutted. Under these facts, we cannot say that the district court abused its discretion in denying Buttercase's motion to return seized property.

### Whether State Was Required to Determine Portion of Seized Evidence Required for Pending Proceedings and Return Portion Not Required

Buttercase argues, without citation to any relevant authority, that the district court must determine what property is needed for his pending federal prosecution or postconviction proceedings and return any evidence that is not needed for prosecution.

Under § 29-818, when a complaint has been filed, the State must only show that the property "may be used as evidence." Here, the district court found that there was such a possibility. The district court did not abuse its discretion in failing to parse through the property to determine what evidence would be used in the other pending proceedings and what should be returned to Buttercase.

### Buttercase's Contentions of Judge's Bias

Finally, we address Buttercase's contention that the district court denied his motion because the court was biased against him. Buttercase points to the following as evidence of this bias: (1) The court denied Buttercase's postconviction motion without granting an evidentiary hearing, (2) the court denied a new trial wherein newly discovered evidence would have made the result different, (3) the court denied Buttercase's motion

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[25] See § 29-818.

to amend his motion for postconviction relief, (4) the victim sent Buttercase's ex-wife a message on social media prior to trial stating that her attorney and the judge play golf together and that the judge likes the victim, (5) the court issued a "one-sided 'admonishment'"[26] of Buttercase in the presence of the jury, (6) the court denied Buttercase the chance to fully establish a defense based on consensual sexual conduct, and (7) the court showed "cumulative bias"[27] against Buttercase.

[8-10] Under the Nebraska Revised Code of Judicial Conduct, a judge must recuse himself or herself from a case if the judge's impartiality might reasonably be questioned.[28] Under the code, such instances in which the judge's impartiality might reasonably be questioned specifically include where "'[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer . . . .'"[29] A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.[30]

[11-13] Under the standard we have articulated for evaluating a trial judge's alleged bias, the question is whether a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.[31] That a judge knows most of the attorneys practicing in his or her district is common, and the fact that a judge knows attorneys through professional practices and organizations does not, by itself, create the appearance of impropriety.[32]

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[26] Brief for appellant at 7.

[27] *Id.*

[28] *Young v. Govier & Milone, supra* note 3.

[29] *Tierney v. Four H Land Co.*, 281 Neb. 658, 664, 798 N.W.2d 586, 591 (2011), quoting Neb. Rev. Code of Judicial Conduct § 5-302.11(A)(1).

[30] *State v. Pattno, supra* note 2.

[31] *State v. Barranco*, 278 Neb. 165, 769 N.W.2d 343 (2009).

[32] *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004).

Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion directed to a trial judge.[33]

[14-16] A party is said to have waived his or her right to obtain a judge's disqualification when the alleged basis for the disqualification has been known to the party for some time, but the objection is raised well after the judge has participated in the proceedings.[34] Once a case has been litigated, an appellate court will not disturb the denial of a motion to disqualify a judge and give litigants "'a second bite at the apple.'"[35] "[T]he issue of [judicial] disqualification is timely if submitted at the '"earliest practicable opportunity" after the disqualifying facts are discovered.'"[36]

The record contains no indication that Buttercase raised any allegation of judicial bias prior to or during the hearing on his motion for return of seized property. And each of Buttercase's allegations was known to him prior to the hearing.

As noted above, at the hearing, the State cited the pending federal case and the motion for postconviction relief currently pending in this court. The judge then asked Buttercase, "[I]s there anything further you would like to state?" Buttercase did not dispute the State's assertion of his pending proceedings in state and federal court, nor did he dispute that some of the evidence may be needed for those proceedings. After the court denied Buttercase's motion, the judge again asked, "Anything else that anybody wants to bring up at this point?" Once again, Buttercase failed to make any of his judicial bias arguments.

Despite several opportunities, Buttercase failed to raise any allegation of bias at any point during the hearing. Thus, we find that Buttercase failed to raise these issues at the earliest

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[33] *Young v. Govier & Milone, supra* note 3.

[34] *Tierney v. Four H Land Co., supra* note 29.

[35] *Id.* at 665, 798 N.W.2d at 592.

[36] *Id.*

practicable opportunity and has waived any argument regarding bias.

Even if we were to consider these allegations, we find them to be without merit. As we have previously held, the fact that the district court socialized with another member of the bar is insufficient to show bias, as is the fact that the court previously presided over other actions involving the parties and made rulings against one or another of the parties. The possibility that the judge and the State's attorney knew each other and played golf together "does not, by itself, create the appearance of impropriety."[37] Buttercase also contends that the statement in the victim's social media message that the judge "'likes'"[38] her is evidence of bias. Assuming such a message is admissible evidence, without further substantive support no reasonable person would question the judge's impartiality under an objective standard of reasonableness based on the claimed social media message.

Even considered collectively, these allegations are insufficient to show bias. We find that a reasonable person who knew the circumstances of the case would not question the judge's impartiality under an objective standard of reasonableness. Therefore, Buttercase's arguments that the district court judge was biased are without merit.

## CONCLUSION

The district court did not err in dismissing Buttercase's motion for return of seized property. Accordingly, we affirm.

Affirmed.

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[37] See *State v. Hubbard, supra* note 32, 267 Neb. at 324, 673 N.W.2d at 576.

[38] Brief for appellant at 8.

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

# State of Nebraska, appellee, v. Jack E. Harris, appellant.

893 N.W.2d 440

Filed April 7, 2017. No. S-16-283.

1. **Postconviction: Evidence: Appeal and Error.** In reviewing a trial court's factual findings following an evidentiary hearing in a postconviction case, an appellate court will uphold those findings unless they are clearly erroneous.
2. **Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
3. **Constitutional Law.** The determination of constitutional requirements presents a question of law.
4. **Effectiveness of Counsel: Appeal and Error.** When a claim of ineffective assistance of counsel presents a mixed question of law and fact, an appellate court reviews the lower court's factual findings for clear error but independently determines whether those facts show counsel's performance was deficient and prejudiced the defendant.
5. **Pretrial Procedure: Prosecuting Attorneys: Evidence.** Under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the prosecution has a duty to disclose all favorable evidence to a criminal defendant prior to trial.
6. **Evidence: Impeachment: Words and Phrases.** Favorable evidence includes both exculpatory and impeachment evidence.
7. **Prosecuting Attorneys: Evidence: Due Process.** Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
8. ____: ____: ____. The Due Process Clause requires the prosecution to disclose favorable material evidence even if a defense counsel did not request it.
9. **Prosecuting Attorneys: Evidence: Due Process: Police Officers and Sheriffs.** A prosecutor has a due process duty to learn of favorable

material evidence known to others acting on the government's behalf in a case. Thus, the State's duty to disclose favorable material evidence exists even if the evidence was known only to police investigators and not to the prosecutor.

10. **Prosecuting Attorneys: Evidence: Verdicts.** The prosecution's undisclosed evidence must be material either to guilt or to punishment, and the prosecution's suppression of favorable evidence violates a defendant's due process right to a fair trial only if the suppressed evidence is sufficiently significant to undermine confidence in the verdict.
11. **Prosecuting Attorneys: Evidence: Judgments: Words and Phrases.** For all claims of prosecutorial suppression of favorable material evidence, the evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.
12. **Trial: Evidence.** Under *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), the touchstone of a reasonable probability of a different result is not a sufficiency of the evidence test and does not require a defendant to show that an acquittal was more likely than not with the suppressed evidence. Instead, the question is whether the defendant received a fair trial without the evidence.
13. **Judgments: Evidence: Due Process.** When the State has suppressed more than one item of favorable material evidence, a court must consider, in addition to the three primary components of a due process violation contemplated by *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), whether prejudice occurred from the suppressed evidence collectively, not simply on an item-by-item basis; that is, it must assess its cumulative effect on the fact finder in the light of other evidence.
14. **Pretrial Procedure: Prosecuting Attorneys: Evidence: Words and Phrases.** Whether a prosecutor's failure to disclose evidence results in prejudice depends on whether the information sought is material to the preparation of the defense, meaning that there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony, or assisting impeachment or rebuttal.
15. **Trial: Evidence: Convictions: Presumptions.** *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), does not apply after a defendant has been convicted in a fair trial and the presumption of innocence no longer applies.
16. **Prosecuting Attorneys: Evidence.** A prosecutor has a duty to learn of favorable material evidence known to others acting on the government's behalf in a case.

Appeal from the District Court for Douglas County: William B. Zastera, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

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

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Funke, J.

## I. NATURE OF CASE

This is Jack E. Harris' appeal from the district court's order dated March 10, 2016, denying him postconviction relief following an evidentiary hearing held on June 28, 2013. The court failed to apply the correct standard to Harris' claim that the State suppressed evidence favorable to him at his 1999 murder trial. The court also failed to address Harris' claims concerning the State's plea agreement with Harris' accomplice. Accordingly, we affirm in part and in part reverse, and remand the cause for the court to resolve Harris' outstanding claims in a manner consistent with the standards set out in this opinion.

## II. BACKGROUND

### 1. Facts of Crime From Harris' Direct Appeal

In 1999, Harris was convicted of first degree murder and use of a deadly weapon to commit a felony for the 1995 death of Anthony Jones, an Omaha drug dealer. Jones was found dead in his apartment; he had been shot in the head. Harris' alleged accomplice was Howard "Homicide" Hicks, whom Harris had met that summer through Corey Bass, a mutual acquaintance.

In December 1996, Bass was murdered. Officers who were investigating Bass' murder spoke to his brother, who had been incarcerated that year with Harris and a third inmate. Bass' brother told the officers that while Harris and he were incarcerated, Harris admitted that he and someone named "Homicide" had murdered Jones. The third inmate reported that Harris had told him Jones was killed because Jones recognized Harris while Harris was robbing him.

In May 1997, officers arrested Hicks for Jones' murder. After his arrest, Hicks confessed to law enforcement that he and Harris had robbed Jones but that Harris had killed Jones.

The State first tried Harris for Jones' murder in March 1999. The court declared a mistrial because the jury deadlocked. When the State retried Harris in July 1999, the jury found him guilty of first degree murder and use of a deadly weapon to commit a felony. Hicks, Bass' brother, and the third inmate, as well as another man, Robert Paylor, testified against Harris; Paylor also claimed that Harris had told him about Harris' involvement with Jones' murder. Leland Cass, an Omaha police officer, also testified at trial. He testified that while investigating Bass' murder, he interviewed Harris, and that during the interview, Harris had identified Hicks by the nickname "Homicide."[1]

On direct appeal, we rejected Harris' claim that the State failed to disclose Cass' report about the interview with Harris. We held that the court did not abuse its discretion in concluding that Harris had failed to show that the prosecution did not provide him with Cass' report.

### 2. Interlocutory Appeal of First Amended Motion for Postconviction Relief

In 2004, we decided Harris' first postconviction appeal.[2] Harris contended that he was entitled to an evidentiary hearing

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[1] See *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002).

[2] See *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004).

on claims regarding the alleged nondisclosure of Cass' police report. As stated above, Cass testified at trial that during a 1996 police interview, Harris identified Hicks by the nickname "Homicide." Part of Harris' defense was that he did not know Hicks and that Hicks had lied when he said that he and Harris had robbed Jones together. The Cass report provided direct statements from Harris that he knew Hicks. We concluded that Harris was entitled to an evidentiary hearing on his claim that the prosecution had failed to disclose the Cass report and whether he was prejudiced by that misconduct if it occurred. Similarly, we held he was entitled to an evidentiary hearing on his claims of ineffective assistance of counsel related to the police report and remanded the matter for further proceedings. We rejected his remaining claims.

### 3. Appeal of Judgment on First Amended Motion for Postconviction Relief

On remand, Harris was granted leave to file a second amended motion for postconviction relief. In 2007, we considered Harris' appeal of the judgment on his first amended motion for postconviction relief.[3] Harris again claimed that he was prejudiced by Cass' statement that he knew Hicks by the nickname "Homicide," because this testimony forced Harris' trial counsel to abandon his defense that Harris did not know Hicks.

We stated that it was "now undisputed that although the State agreed to provide Harris with a copy of all police reports, the State failed to provide Harris with a copy of the Cass report prior to trial."[4] But we noted that Harris' trial counsel did not move to continue the trial because of the late discovery of the Cass report, and Harris did not claim that the late disclosure impeded his attorney's ability to prepare a defense. We further stated that because Harris was present at the interview,

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[3] See *State v. Harris*, 274 Neb. 40, 735 N.W.2d 774 (2007).

[4] *Id.* at 42, 735 N.W.2d at 777.

he knew the report's contents. We concluded that he was not prejudiced by Cass' statement in the light of testimony from three other witnesses who stated that Harris had admitted to the crime.

### 4. First Appeal of Second Motion for Postconviction Relief

In 2008, Harris filed a second motion for postconviction relief, a motion for a new trial, and a motion for a writ of error coram nobis.[5] All three motions primarily rested on his claim that he had discovered new evidence that Hicks testified falsely at Harris' trial and that Hicks had acted alone in the murder. Harris submitted the affidavits of Terrell McClinton and Curtis Allgood in support of the motions. McClinton stated that Hicks had confessed to him that he killed Jones. Allgood "provided details placing Hicks near the crime scene at the time of the murder and corroborated some of the information provided by McClinton."[6] Harris alleged that he was unaware of this information until McClinton contacted Harris' attorney in 2006 and that he was prevented from discovering it because of misconduct by the prosecutor and the State's witness.

The district court agreed to grant Harris an evidentiary hearing, but stated that because it had done so, it would not address his motions for a new trial and a writ of error coram nobis. Before the evidentiary hearing, however, the district court bench for Douglas County recused itself when the prosecutor at Harris' trial was appointed to the bench. In August 2009, a Sarpy County judge was appointed to hear Harris' postconviction motion. In December 2010, the court permitted Harris to file a third amended motion, which added allegations of newly discovered evidence that the prosecutor mispresented

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[5] See *State v. Harris*, 292 Neb. 186, 871 N.W.2d 762 (2015).

[6] *Id.* at 189, 871 N.W.2d at 765.

or allowed Hicks to misrepresent the nature of Hicks' plea agreement during Harris' trial.[7]

At the start of the evidentiary hearing in June 2013, the court announced that the "matter comes on for a full hearing on [Harris'] Third Amended Motion for Postconviction Relief." However, the record does not reflect that Harris filed the third amended motion for postconviction relief.

After the hearing, the district judge dismissed Harris' postconviction motion without addressing the merits on the basis that Harris had the two other pending motions for relief, i.e., his motions for a new trial and a writ of error coram nobis. The court concluded that those motions did not show that postconviction relief was the sole remedy available to Harris as required under Nebraska's postconviction statutes.[8] Harris subsequently appealed that ruling.

In December 2015, we held that when a district court is presented with simultaneous motions for postconviction relief and some other type of relief, the court must dismiss the postconviction motion without prejudice when the allegations, if true, would warrant relief through the alternative remedy that the defendant sought. But if the court determines that no other remedy is available and the postconviction motion is not procedurally barred under § 29-3003, the court must consider the motion on the merits.

We concluded that Harris' motion for a new trial was not an available remedy because the motion was time barred. We also concluded that a writ of error coram nobis was not an available remedy for Harris' claim that a witness testified falsely. Because Harris could not obtain relief through the alternative remedies he sought, we held that the court erred in dismissing his motion for postconviction relief. We reversed the court's judgment and remanded the cause for the court to consider the merits of Harris' postconviction motion. The district court's

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[7] *Harris, supra* note 5.

[8] See Neb. Rev. Stat. § 29-3003 (Reissue 2016).

ruling on the merits presents the issues now currently before this court.

### 5. Proceedings on Remand

On remand from Harris' first appeal of his latest motion for postconviction relief, the district court did not conduct a new evidentiary hearing. Instead, the court considered the evidence presented at the 2013 evidentiary hearing.

At the 2013 hearing, at Harris' request and with the State's consent, the court took judicial notice of the bill of exceptions for Harris' second trial in 1999. Nonetheless, in this appeal, the parties cite exhibit numbers referencing the bill of exceptions from Hicks' 1999 trial and quote excerpts from the trial, all of which are not part of the record before us. The only record before us is the evidence offered at the 2013 evidentiary hearing. Most of the facts that we set out below either are in the record from the 2013 postconviction hearing or come from our previous records and decisions in this case, which we judicially notice.[9]

As mentioned above, in Harris' third amended motion, he added the allegation that "the prosecutor engaged in misconduct by misrepresenting or allowing Hicks to misrepresent the nature of the plea agreement at Harris' trial."[10] Relatedly, Harris alleged that the prosecutor failed to disclose impeachment evidence regarding the State's true plea agreement with Hicks. Harris contended that contrary to the prosecutor's representations, the true plea agreement included the following terms: (1) The prosecutor would meet with Hicks' attorney and the judge and make recommendations for lenient sentencing; (2) neither the prosecutor nor Hicks' attorney would object to Harris' waiver of a presentence investigation report, which would have alerted the judge that Paylor had identified Hicks as his shooter; (3) the prosecutor would make a statement

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[9] See, e.g., *State v. Marshall*, 272 Neb. 924, 725 N.W.2d 834 (2007).

[10] *Harris, supra* note 5, 292 Neb. at 189, 871 N.W.2d at 765.

regarding Hicks' sincere remorse for his involvement in the case of Jones' homicide; (4) the prosecutor would not object to Hicks' attorney's recommendations for sentencing nor object to certain illegal credit for time served on different charges; and (5) the prosecutor would advise the court that she had spoken to Jones' family members and that they did not object to her recommendations.

However, in the court's 2016 order denying relief, the court did not address Harris' claims regarding Hicks' plea agreement. Instead, the court's order stated that Harris had filed a "second" motion for postconviction relief and addressed the claims raised in only that second motion.

The court specifically ruled upon Harris' claims that the State suppressed information in the possession of Allgood before Harris' trial and information in the possession of McClinton before Harris' trial, direct appeal, or postconviction proceedings. To address Harris' claims and the court's rulings, we must provide more factual context.

### 6. Additional Facts

In 2006, McClinton wrote Harris' postconviction attorney with information that he had obtained in prison about homicides in Omaha, including Jones' homicide. McClinton wrote that Hicks had told him about killing Jones and walking to Allgood's house afterward. McClinton refused to be transported to court for the 2013 evidentiary hearing, but the court received his 2007 affidavit into evidence.

In his affidavit, McClinton stated that for an unspecified period, he had worked for Bass, who was a major drug dealer in Douglas County. McClinton would "administer beatings" to people who owed Bass money or drugs. McClinton said that Hicks killed people for Bass and was referred to as "Homicide" because "he will leave you dead." McClinton said that in 2001, he met with Hicks in Omaha and Hicks talked about some of Hicks' crimes.

McClinton's affidavit further stated that Hicks told McClinton that despite his testimony at Harris' trial, Hicks had shot Jones. Hicks said that he had waited outside Jones' apartment door until Jones came home and then took Jones inside to rob him. Hicks said he shot Jones twice because his gun misfired. But Hicks could not find Jones' drugs and needed to walk to a telephone booth to call Bass and ask where Jones kept them. Hicks put a vase in the doorway so he could get back inside. After Bass told Hicks where to look, he returned to Jones' apartment and found the drugs. Then he walked to Allgood's house, but Allgood kicked him out because he got mud on the floor.

Finally, McClinton's affidavit stated that he "tried" to call the gang unit with this information in 2004, contacted a federal agent in 2005, and wrote the county attorney about it in June 2006.

McClinton's information led Harris' postconviction attorney to Allgood, who signed an affidavit in 2007. In that affidavit, Allgood stated that in 1995, he lived within blocks of Jones' apartment. He said that he installed hydraulic suspensions on cars, that some of his customers were people involved in gangs and illegal drugs, and that it was not unusual for these customers to "'hang out'" at his house. Allgood said that Bass, a "known street gangster" and major drug dealer, and Hicks were among the customers who would spend time at his house. He also knew Harris. He said that he would sometimes see Bass with Harris but would not see Hicks with Harris. Allgood said the following regarding August 22, 1995: It was a rainy day; Bass and another person were at Allgood's house, and Harris was not there. Around 10:30 p.m., Hicks ran into Allgood's kitchen without knocking and appeared very agitated. He was wearing dark clothes and had gloves in his back pocket. Allgood was upset because Hicks was tracking mud onto the floor. He overheard Hicks tell Bass that "'it was handled.'" Hicks and Bass talked inside for about 15 minutes; then they went outside and left about 10 minutes later.

At the 2013 hearing, Allgood testified that the night of Jones' murder had stood out to him because he learned about the murder shortly afterward. He said that Hicks had burst into his kitchen like "he was just coming in to start a fight or something." Allgood told Hicks to take his muddy boots outside, but Hicks insisted on talking to Bass. Hicks was erratic in speaking to Bass while they were in the kitchen, but when Allgood heard Hicks say that "[i]t was handled," Bass seemed happy.

Allgood further testified that later, in 1996 or 1997, a plain-clothes police officer, accompanied by another man, came to ask him questions about Jones' homicide. Allgood did not know Jones but knew of him. He believed that Jones was also involved in illegal drug activities with Bass. Allgood could not remember the officer's name but said that he identified himself as a police officer and took notes. The officer gave Allgood a "brief synopsis" of the homicide investigation and asked Allgood if he had ever seen Harris, Hicks, and Bass "all together around that time at [Allgood's] house." Allgood told the officer that he did not see them all together. But he specifically testified that he told the officer he "saw [Bass] and Hicks together that night."

However, on cross-examination, the prosecutor asked Allgood the following questions, and Allgood gave the following answers:

> Q. The information in your affidavit pertaining to when . . . Hicks came into your house that night in August of 1995 —
>
> A. Yes, sir.
>
> Q. — did you tell the police officer about that?
>
> A. No. Because he didn't ask me that question.
>
> Q. Did you tell anybody in law enforcement about that until you revealed it when [postconviction counsel's] investigator came and talked to you?
>
> A. No. I didn't.
>
> Q. Your wife? Anybody?
>
> A. No.

Allgood said that he did not tell the police investigator about the information in his affidavit because he had not put the facts all together and it would have hurt his business to talk about some things to police officers.

At the 2013 hearing, Harris offered evidence to show that his trial attorney did not receive any police reports about Allgood and that the prosecutor likely knew about him. Specifically, Harris presented evidence that on December 16, 1996, Officer W. Agnew wrote a "supplementary" police report for the investigation into the murder of Bass. In the report, Agnew stated that he had been asked to find out if Harris knew anything about Bass' death. A box was drawn around text in which Agnew reported that in November 1996, Harris had traded in a "GMC Blazer [for a] Mercedes Benz." The information was relevant because Hicks had testified that Harris owned a Blazer.

After the first day of Harris' second trial, the prosecutor faxed six pages to Harris' attorney: a cover sheet, an unfiled notice to seek endorsement of Agnew and Allgood as witnesses, and all four pages of Agnew's supplemental report. But the original fax information at the top of Agnew's supplemental report showed that his report was part of 29 pages that were faxed to the prosecutor on the morning of July 19, 1999. The prosecutor filed the notice to endorse Agnew and Allgood on July 20.

Harris' attorney could not recall receiving Agnew's report or speaking to the prosecutor about it. Agnew's report did not mention Allgood's name. But Harris' attorney believed that because of the prosecutor's notice to endorse Agnew and Allgood, he would have spoken to the prosecutor about these witnesses. However, he said that if the prosecutor had indicated that she would not call Allgood, he would not have worried about him. He stated that if he had known about the statements in Allgood's 2007 affidavit, he would have investigated to determine whether Hicks "was with others or alone in terms of the story that he related in the first and second trials." He

stated that this information would have undermined Hicks' credibility and reinforced Harris' alibi.

Harris testified that during his second trial, the prosecutor sat at the same table with the defense. He stated that he could see the prosecutor's notice to endorse Agnew as a witness and that Agnew worked in the police department's gang unit. Harris asked the prosecutor what Agnew would say, because Harris was not a gang member. The prosecutor asked Harris whether he had owned a "little Blazer," because Hicks had said he did. Harris told the prosecutor that he had owned a "big Blazer," and the prosecutor said she would not call anyone about the Blazer. When Harris asked what Allgood would say, the prosecutor responded that she was not going to use him. When Harris asked his attorney what Allgood would say, his attorney said he did not have any paperwork on Allgood.

In her 2011 deposition, the prosecutor testified that she could not recall why she had endorsed Agnew or Allgood. She said that in general, she would endorse a witness to "be on the safe side," if she had gotten some information from a police report that caused her to think "maybe there might be something." She also acknowledged the existence of a "gang intelligence unit" in the police department when she was a prosecutor. She said that as a prosecutor, she did not want to know about any of the unit's collected information "that [she could not] tell the defense attorney," and that the unit's policy was not to tell her anything "unless it can be disclosed. . . . If they think it's too sensitive, then [they] don't tell [her]."

### 7. Court's Order

In its 2016 ruling on Harris' motion for postconviction relief, the district court determined that Harris was not entitled to relief on his claims that (1) the prosecutor failed to disclose McClinton's statements to Harris' trial counsel, appellate counsel, or postconviction counsel and (2) if Harris' trial counsel knew about McClinton's information, counsel provided ineffective assistance in failing to call McClinton as

a witness. The court found that there was no evidence that the prosecutor or the defense attorney knew about McClinton's existence: "Given that lack of knowledge, it would be impossible for either of them to know, suspect, look into or learn about the potentially exculpatory evidence [McClinton] recites in his letter to [Harris' postconviction counsel] or in his affidavit."

The court also concluded that Harris was not entitled to relief on his claims that (1) the State failed to disclose Allgood's statements to Harris and (2) if Harris' trial attorney knew about Allgood's statements, counsel provided ineffective assistance in failing to call Allgood as a witness:

> The record does contain some evidence to indicate that the prosecutor knew about . . . Allgood's physical existence and the possibility that he possessed at least some information that was of potential utility in [Harris'] original trial. However, there is no information contained within the record and evidence currently before this Court to indicate that at any time prior to and/or during [Harris'] trial did either the State . . . or defense counsel . . . know about any potential exculpatory information in . . . Allgood's possession. More specifically, there is no evidence before this Court for it to make a determination that [the prosecutor] or [defense attorney] possessed even the slightest bit of information about the potentially exculpatory information contained within . . . Allgood's affidavit . . . until it was brought to their attention as a result of the filing of this postconviction motion in January of 2008. Further, . . . Allgood's testimony at the hearing held on June 28, 2013, corroborates the fact that he did not share, hint at, or in any other manner reveal the potentially exculpatory information contained in [his affidavit] with anyone, including representatives of the State, the defense or any members of law enforcement. . . . Accordingly, the Court finds that this contention is without merit.

As stated, the court did not address Harris' claims regarding Hicks' plea agreement.

## III. ASSIGNMENTS OF ERROR

Harris assigns that the court erred in overruling his third amended motion for postconviction relief for the following reasons: (1) Harris' convictions were procured through prosecutorial misconduct, which violated his right to due process; (2) the court failed to address Harris' claim that the prosecutor improperly misrepresented the nature of Hicks' plea agreement; and (3) Harris' trial counsel provided ineffective assistance.

## IV. STANDARD OF REVIEW

[1-3] In reviewing a trial court's factual findings following an evidentiary hearing in a postconviction case, an appellate court will uphold those findings unless they are clearly erroneous.[11] We independently review questions of law decided by a lower court.[12] The determination of constitutional requirements presents a question of law.[13]

[4] Likewise, when a claim of ineffective assistance of counsel presents a mixed question of law and fact, we review the lower court's factual findings for clear error but independently determine whether those facts show counsel's performance was deficient and prejudiced the defendant.[14]

## V. ANALYSIS

Before addressing the parties' specific arguments regarding Harris' suppression of evidence claims, we set out the standards that guide our review of those claims.

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[11] See *State v. Saylor*, 294 Neb. 492, 883 N.W.2d 334 (2016).

[12] See, *State v. Benavides*, 294 Neb. 902, 884 N.W.2d 923 (2016); *Saylor, supra* note 11.

[13] See, *State v. Smith*, 292 Neb. 434, 873 N.W.2d 169 (2016); *State v. Castillo-Zamora*, 289 Neb. 382, 855 N.W.2d 14 (2014); *State v. Boslau*, 258 Neb. 39, 601 N.W.2d 769 (1999).

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

1. Prosecution's Duty to Disclose Favorable Evidence and Standard of Materiality to Show Due Process Violation

[5-7] In *Brady v. Maryland*,[15] the U.S. Supreme Court held that the prosecution has a duty to disclose all favorable evidence to a criminal defendant prior to trial. Favorable evidence includes both exculpatory and impeachment evidence.[16] The "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[17]

[8,9] Since deciding *Brady*, the U.S. Supreme Court has clarified that the Due Process Clause requires the prosecution to disclose favorable material evidence even if a defense counsel did not request it.[18] Moreover, a prosecutor has a duty to learn of favorable material evidence known to others acting on the government's behalf in a case.[19] Thus, the State's duty to disclose favorable material evidence exists even if the evidence was "'known only to police investigators and not to the prosecutor.'"[20]

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[15] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Accord, e.g., *State v. Jenkins*, 294 Neb. 684, 884 N.W.2d 429 (2016); *State v. Parnell*, 294 Neb. 551, 883 N.W.2d 652 (2016).

[16] See *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), citing *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). Accord, e.g., *Jenkins, supra* note 15; *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999).

[17] *Brady, supra* note 15, 373 U.S. at 87.

[18] *Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999), citing *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). Accord, *State v. Phillips*, 286 Neb. 974, 840 N.W.2d 500 (2013); *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

[19] *Strickler, supra* note 18, quoting *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995).

[20] *Id.*, 527 U.S. at 280-81, quoting *Kyles, supra* note 19.

[10] But the prosecution's undisclosed evidence must be material either to guilt or to punishment, and the prosecution's suppression of favorable evidence violates a defendant's due process right to a fair trial only if the suppressed evidence is sufficiently significant to undermine confidence in the verdict.[21]

[11] In *United States v. Bagley*,[22] the Supreme Court held that the same standard of materiality applies to undisclosed favorable evidence whether a defense attorney made no request, a general request, or a specific request for it.[23] The Court adopted the standard of materiality that it had relied on in *Strickland v. Washington*[24] for all claims of prosecutorial suppression of favorable material evidence: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[25]

[12] Under *Kyles v. Whitley*,[26] the touchstone of a "'reasonable probability'" of a different result is not a sufficiency of the evidence test and does not require a defendant to show that an acquittal was more likely than not with the suppressed evidence. Instead, the question is whether the defendant received a fair trial without the evidence:

> A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial.". . .

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[21] *Brady, supra* note 15; *State v. Lykens*, 271 Neb. 240, 710 N.W.2d 844 (2006), quoting *Strickler, supra* note 18.

[22] *Bagley, supra* note 16.

[23] See *Lykens, supra* note 21.

[24] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Accord *Jackson, supra* note 18.

[25] *Bagley, supra* note 16, 473 U.S. at 682.

[26] *Kyles, supra* note 19, 514 U.S. at 434.

> . . . One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.[27]

Thus, if the *Bagley* standard of materiality is satisfied—i.e., the defendant shows that the prosecution's failure to disclose favorable evidence prejudiced the defendant by undermining confidence in the outcome of the trial[28]—the suppression cannot be found harmless.[29]

As we have recognized,[30] in *Strickler v. Greene*,[31] the Supreme Court set out the three primary components of a *Brady* violation. First, the "evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching."[32] Second, the "evidence must have been suppressed by the State, either willfully or inadvertently."[33] Third, prejudice from the suppression "must have ensued."[34]

[13] But when the State has suppressed more than one item of favorable material evidence, a court must also consider whether prejudice occurred from the suppressed evidence

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[27] *Id.*, 514 U.S. at 434-35 (citation omitted) (cited in *Lykens, supra* note 21). Accord *Castor, supra* note 16.

[28] See *Kyles, supra* note 19. See, also, *Strickler, supra* note 18 (Souter, J., concurring in part, and in part dissenting; Kennedy, J., joins in part); *Lykens, supra* note 21, quoting 5 Wayne R. Lafave et al., Criminal Procedure § 24.3(b) (2d ed. Supp. 2006).

[29] See *Kyles, supra* note 19. Accord *Lykens, supra* note 21.

[30] See *Lykens, supra* note 21.

[31] *Strickler, supra* note 18.

[32] *Id.*, 527 U.S. at 281-82.

[33] *Id.*, 527 U.S. at 282.

[34] *Id.*

collectively, not simply on an item-by-item basis; that is, it must assess its cumulative effect on the fact finder in the light of other evidence.[35]

[14] Under Neb. Rev. Stat. § 29-1912 (Reissue 2008), Nebraska's primary discovery statute in criminal cases, whether a prosecutor's failure to disclose evidence results in prejudice depends on whether the information sought is material to the preparation of the defense, meaning that there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony, or assisting impeachment or rebuttal.[36] Accordingly, we have analyzed whether a prosecutor failed to disclose material evidence under § 29-1912 in an appeal from a postconviction proceeding,[37] which is a remedy available only for violations of a defendant's constitutional rights.[38]

Having set out the relevant standards for evaluating a defendant's suppression claims, we turn to the parties' arguments regarding Harris' specific claims.

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[35] See, *Kyles, supra* note 19; *Castor, supra* note 16. Accord, e.g., *Cone v. Bell*, 556 U.S. 449, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009); *Banks v. Dretke*, 540 U.S. 668, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004); *Rhoades v. Henry*, 638 F.3d 1027 (9th Cir. 2011); *Lambert v. Beard*, 633 F.3d 126 (3d Cir. 2011), *vacated on other grounds and remanded for reconsideration, Wetzel v. Lambert*, 565 U.S. 520, 132 S. Ct. 1195, 182 L. Ed. 2d 35 (2012); *Rocha v. Thaler*, 619 F.3d 387 (5th Cir. 2010); *Doan v. Carter*, 548 F.3d 449 (6th Cir. 2008); *Monroe v. Angelone*, 323 F.3d 286 (4th Cir. 2003); *Boyette v. Lefevre*, 246 F.3d 76 (2d Cir. 2001).

[36] *State v. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997).

[37] See *Jackson, supra* note 18.

[38] See, Neb. Rev. Stat. § 29-3001 (Reissue 2016); *State v. Starks*, 294 Neb. 361, 883 N.W.2d 310 (2016).

### 2. State's Duty to Disclose Favorable Evidence Did Not Apply to Information It Received From McClinton After Harris Was Convicted and Sentenced

According to McClinton's affidavit, 2004 was the first year that he "tried" to contact any law enforcement officers with information about Hicks' confessing to killing Jones. Harris was convicted and sentenced in 1999. We decided his direct appeal in 2002 and his first postconviction appeal in 2004. Harris does not dispute the court's finding that the prosecutor did not know McClinton even existed during Harris' trial or sentencing. But Harris argues that this court should interpret Nebraska's Constitution and postconviction statutes to require an ongoing duty for the State to disclose exculpatory information that it learns about after a defendant is convicted and sentenced. It relies on the U.S. Supreme Court's 2009 decision in *District Attorney's Office for Third Judicial Dist. v. Osborne*.[39] But *Osborne* does not support Harris' argument.

Long before *Osborne*, in a 1976 civil rights case, the Supreme Court stated that at a trial, a prosecutor's duty to disclose favorable evidence is enforced by due process requirements, but that after a trial has concluded, the prosecutor is bound by his or her ethical duties.[40] Later, in a 1986 habeas case, the Court declined to decide whether *Brady* requires a prosecutor to disclose favorable evidence that the prosecutor does not learn about until after a defendant is convicted and sentenced.[41] Since then, various federal courts have held that when state investigators or prosecuting officers know of

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[39] *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009).

[40] See *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976).

[41] See *Monroe v. Blackburn*, 476 U.S. 1145, 106 S. Ct. 2261, 90 L. Ed. 2d 706 (1986) (mem.) (Marshall, J., dissenting; Brennan, J., joins).

favorable evidence before or during a defendant's trial, the State's duty to disclose the evidence continues to posttrial proceedings that are determinative of guilt or innocence.[42] But in the absence of clear guidance, lower federal courts had been split on whether *Brady* requirements extend to favorable evidence that the prosecution does not learn about until after a trial is completed.[43] In *Osborne*, the U.S. Supreme Court effectively resolved that split.

In *Osborne*, a state prisoner sued Alaska state officials in a civil rights action for violating his due process right to obtain biological evidence that was used to convict him of kidnapping and assault offenses. He wanted the evidence to perform DNA testing that was unavailable at the time of his trial. The Ninth Circuit extended a previous holding that the *Brady* disclosure requirements continue to posttrial proceedings based upon a fundamental fairness requirement that the State must come forward with any exculpatory evidence in its possession when a habeas petitioner needs it to make a colorable showing of actual innocence.[44] The circuit court noted that the prisoner had a "potentially viable" state constitutional claim of "actual innocence," and it relied on the "well-established assumption" that a similar claim arose under the federal Constitution and concluded that as a result, these potential claims extended some of the State's *Brady* obligations of disclosure of favorable evidence to the postconviction context.[45] However, the circuit court declined to set out a standard of materiality because it

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[42] See, e.g., *Steidl v. Fermon*, 494 F.3d 623 (7th Cir. 2007); *Smith v. Roberts*, 115 F.3d 818 (10th Cir. 1997).

[43] Compare *Tennison v. City and County of San Francisco*, 570 F.3d 1078 (9th Cir. 2009), and *Smith, supra* note 42, with *U.S. v. Maldonado-Rivera*, 489 F.3d 60 (1st Cir. 2007), and *U.S. v. Jones*, 399 F.3d 640 (6th Cir. 2005).

[44] See *Thomas v. Goldsmith*, 979 F.2d 746 (9th Cir. 1992).

[45] *Osborne v. Dist. Atty's Office for Third Judicial*, 521 F.3d 1118, 1130-31 (9th Cir. 2008), *reversed on other grounds, Osborne, supra* note 39.

concluded the facts of the case were strong enough to warrant disclosure regardless of the standard.

[15] The U.S. Supreme Court reversed. It agreed that Alaska's statute for newly discovered evidence had created a liberty interest for convicted individuals to prove their innocence and that a state-created right can sometimes "'beget yet other rights to procedures essential to the realization of the parent right.'"[46] But it concluded that the Ninth Circuit "went too far . . . in concluding that the Due Process Clause requires that certain familiar preconviction trial rights be extended to protect [the respondent's] postconviction liberty interest."[47] The Court specifically held that *Brady* does not apply after a defendant has been convicted in a fair trial and the presumption of innocence no longer applies:

> A criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man. At trial, the defendant is presumed innocent and may demand that the government prove its case beyond reasonable doubt. But "[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." . . . "Given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty." . . .
>
> The State accordingly has more flexibility in deciding what procedures are needed in the context of postconviction relief. "[W]hen a State chooses to offer help to those seeking relief from convictions," due process does not "dictat[e] the exact form such assistance must assume." . . . [The respondent's] right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief. *Brady* is the wrong framework.

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[46] *Osborne, supra* note 39, 557 U.S. at 68.

[47] *Id.*

> Instead, the question is whether consideration of [the respondent's] claim within the framework of the State's procedures for postconviction relief "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," or "transgresses any recognized principle of fundamental fairness in operation."[48]

The Court concluded that Alaska's procedures were sufficient to vindicate its state-created right to show actual innocence without the need to extend the *Brady* disclosure requirements to postconviction actions.

Harris contends that Nebraska's "postconviction procedures and new trial provisions are fundamentally inadequate to vindicate the substantive rights provided."[49] At the time of his conviction and sentencing, pursuant to Neb. Rev. Stat. § 29-2103(4) (Reissue 1995), a motion for a new trial resting on newly discovered evidence had to be filed within 3 years of the defendant's conviction.[50]

Since Harris' conviction, the Legislature has amended Nebraska's statutes dealing with motions for a new trial.[51] Effective August 30, 2015, a motion for new trial resting on newly discovered evidence must be brought within 5 years of the verdict, "unless the motion and supporting documents show the new evidence could not with reasonable diligence have been discovered and produced at trial and such evidence is so substantial that a different result may have occurred."[52]

But even before the Legislature amended Nebraska's statutes dealing with a motion for a new trial, this court had held open the possibility of postconviction relief for a strong

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[48] *Id.*, 557 U.S. at 68-69 (citations omitted).

[49] Reply brief for appellant at 11-12.

[50] Compare § 29-2103(4) (Reissue 2016).

[51] See 2015 Neb. Laws, L.B. 245, §§ 1 and 2.

[52] § 29-2103 (Reissue 2016).

showing of actual innocence. We have explained that a prisoner's claim that the State was incarcerating an innocent person who could no longer present newly discovered evidence would raise a potential due process violation.[53] *Osborne* did not establish a new substantive right; the Court was merely evaluating whether a state's procedures, specifically Alaska's, were sufficient to "vindicate its state right to postconviction relief."[54]

Harris does not claim that McClinton's affidavit was sufficiently compelling to show his actual innocence in a postconviction proceeding.[55] Nor does Harris claim that Nebraska's procedures are inadequate to protect his statutory postconviction rights. Instead, he claims that Nebraska's statutory rights are inadequate to support a purported right to have the State disclose any exculpatory information that it receives long after a case is closed.

After a case is closed, there may be ethical duties that require prosecutors to take action upon learning of evidence that creates a reasonable likelihood the defendant did not commit the crime.[56] But Nebraska's postconviction statutes provide relief only for constitutional violations that render a conviction void or voidable.[57]

Harris cites no authority to support his argument that the 3-year time limitation for claims of newly discovered evidence violated a recognized principle of fundamental fairness. And his claim that he has a substantive right to have the State disclose exculpatory evidence that it learns about after a final judgment directly conflicts with the U.S. Supreme Court's holding in *Osborne* that *Brady* does not apply to

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[53] See, e.g., *State v. Dubray*, 294 Neb. 937, 885 N.W.2d 540 (2016).

[54] *Osborne, supra* note 39, 557 U.S. at 69.

[55] See *id.*

[56] See Model Rules of Prof. Conduct Rule 3.8(g) (ABA 2014).

[57] *State v. DeJong*, 292 Neb. 305, 872 N.W.2d 275 (2015).

postconviction proceedings.[58] We conclude that the court did not err in denying Harris relief on his claim that the State failed to disclose information McClinton allegedly reported to law enforcement officers in 2004 or later.

### 3. Court Applied Wrong Standards in Determining That State Did Not Violate Duty to Disclose Information About Allgood

The district court concluded that Harris was not entitled to relief on his claims that the State failed to disclose Allgood's statements to a police officer in 1996 or 1997. The court reasoned that the evidence failed to show that the prosecutor "possessed even the slightest bit of information about the potentially exculpatory information contained within . . . Allgood's affidavit." Additionally, the court found that Allgood's testimony showed that he did not reveal any potentially exculpatory information with anyone, "including representatives of the State, the defense or any members of law enforcement."

#### (a) Parties' Contentions Regarding Allgood's Statements

Harris argues that the evidence shows that the prosecutor's practice was to allow law enforcement officers to dictate what information the prosecution would see on a case. Despite this practice, Harris contends that the prosecutor would not have endorsed Allgood as a witness without knowing something about his potential testimony and that the evidence strongly suggests the prosecutor received this information in the missing pages the police department faxed to the prosecutor on July 19, 1999.

Harris also contends that Allgood's statements to the officer who interviewed him about Jones' homicide constituted

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[58] See, *Gavitt v. Born*, 835 F.3d 623 (6th Cir. 2016); *Whitlock v. Brueggemann*, 682 F.3d 567 (7th Cir. 2012).

potentially exculpatory evidence and impeachment evidence. He argues that if his trial counsel had known about Allgood's statements to the officer, he would have contacted him and learned about the rest of the story that was set out in Allgood's affidavit. Harris further contends that Allgood's statements to the officer would have corroborated Harris' alibi defense and permitted him to impeach Hicks' credibility. He argues that Allgood's statements to the officer contradicted Hicks' testimony that he and Harris drove around town together after robbing Jones.

The State contends that Allgood's statements to the officer—i.e., that he did not see Hicks, Harris, and Bass together the night of the murder, but did see Hicks and Bass together—did not constitute evidence favorable to Harris because they were neither exculpatory nor impeaching. It argues that even if Harris' trial counsel had investigated and learned that Hicks was at Allgood's house the night of the murder, that evidence shows at most that Harris was not there when Hicks was or that Hicks was also involved in the murder of Jones. But it would not show that Harris was not involved.

(b) Resolution

[16] The court's reasoning that no suppression occurred because the prosecutor did not know about Allgood's statements to investigators was incorrect. Under both federal and state law, the prosecutor had a duty to learn of favorable material evidence known to others acting on the government's behalf in the case. Thus, the State's duty to disclose favorable material evidence existed even if the evidence was known only to police investigators and not to the prosecutor.

Further, the court's summary conclusion that Allgood's statements were not exculpatory did not comply with the applicable standards for evaluating Harris' claims. Favorable evidence includes both exculpatory and impeachment evidence.

Harris alleged in his motion that Allgood's statements would have corroborated his alibi defense and contradicted Hicks'

testimony that he left the murder scene with Harris and drove around with him, disposing of evidence and distributing the money. Harris also alleged that he would have cross-examined Hicks about his contacts with Bass. His trial attorney stated that knowing whether Hicks "was with others or alone in terms of the story that he related" may have undermined Hicks' credibility and reinforced Harris' alibi.

The court did not consider whether Allgood's statements to the officer would have impeached Hicks' credibility. Nor did the court explain why it concluded that Allgood's statements were not "potentially exculpatory information."

As explained, we do not have the bill of exceptions from Harris' trial. Whether the State suppressed material exculpatory information by not disclosing Allgood's statements must be evaluated in the light of the trial evidence.[59] The court's summary conclusion does not satisfy that requirement. Accordingly, we remand the cause for further clarification as to whether Allgood's statements were not exculpatory or would not have impeached Hicks' credibility.

#### 4. Record Is Unclear as to Which Motion for Postconviction Relief Court Considered

As previously explained, on January 17, 2008, Harris filed a "Second Verified Motion for Postconviction Relief." In that motion, Harris raised the issue of prosecutorial misconduct for failing to disclose potentially exculpatory information within the possession of Allgood and McClinton.

On November 13, 2010, Harris filed a "Motion for Leave to File Third Amended Motion for Postconviction Relief." In that motion, Harris alleged that the motion was identical to his second motion except that it raised two claims involving Hicks' plea agreement: (1) The prosecutor failed to disclose the true plea agreement, and (2) the prosecutor

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[59] See *id*. Accord, e.g., *Canales v. Stephens*, 765 F.3d 551 (5th Cir. 2014).

misrepresented or allowed Hicks to misrepresent the nature of his plea agreement. On December 16, the district court granted the motion for leave and allowed Harris to file a third amended motion for postconviction relief. As mentioned previously, the record reflects that Harris failed to file his third amended postconviction motion after the court gave him leave to do so.

At the commencement of the evidentiary hearing in 2013, the district court announced that the matter was before the court on the third amended motion for postconviction relief. When the court announced that it was hearing Harris' third amended motion, the State did not assert that Harris had failed to file the motion. Instead, the State offered a copy of Harris' third amended motion and the court's docket entries, which showed that the court had given Harris leave to file it.

After clarifying the record, the prosecutor stated that the State had not found a record of Harris' most recent motion. But the State did not contend that Harris' claims regarding Hicks' plea agreement were beyond the scope of the pleadings. Instead, it argued that the court should dismiss Harris' postconviction motion under § 29-3003 because the record failed to show that the court had ever dismissed his motions for a new trial and a writ of error coram nobis.

The record further reflects that Harris presented certain evidence that was relevant only to his claims about Hicks' plea agreement. He questioned his trial attorney about Hicks' shooting of Paylor and Hicks' plea agreement in regard to Jones. He submitted exhibits that showed the State's original information charging Hicks with assault, its amended information charging Hicks with robbery, Hicks' 2011 deposition, Hicks' sentencing hearing, and the court's order sentencing Hicks. The State's only objection to this evidence was that the claim was procedurally barred—not that it was beyond the scope of the pleadings. The court allowed the State to have a continuing objection regarding its procedural bar argument, but overruled the objection. At no point did the State argue

that Harris' evidence was irrelevant to the pleading properly before the court.

However, when the district court issued its order on the merits, the court referenced only that the matter came on for a full hearing on Harris' "Motion for Postconviction Relief." Further, the order addressed Harris' claims for prosecutorial misconduct only for failing to disclose potentially exculpatory information within the possession of Allgood and McClinton. The order was silent as to Harris' claims regarding Hicks' plea agreement.

As a result, we cannot determine from the record whether the district court intentionally or erroneously failed to rule on Harris' claims regarding Hicks' plea agreement. Though an argument can be made that the parties consented to try all of the claims set forth in Harris' third amended motion for postconviction relief, making such determination would be needlessly speculative. The better course is for this matter to be remanded to the district court for clarification as to which motion the court intended to rule on and, if necessary, the entry of an order which dispenses with all of Harris' claims for relief.

### 5. Harris' New Claim of Ineffective Assistance Is Procedurally Barred

In Harris' second motion for postconviction relief, he alleged that if his trial attorneys knew about Allgood and his contacts with Hicks or about the statements that Hicks made to McClinton, then they provided ineffective assistance in failing to call Allgood and McClinton as witnesses. The court found that Harris' attorney did not know about information that Allgood or McClinton possessed. That finding was not clearly wrong, and Harris does not argue otherwise. Instead, he argues that his attorney was ineffective in failing to investigate the significance of Allgood after the prosecutor endorsed him as a witness and then stated that she would not call him to testify. This claim was available to Harris when he tendered

his third amended motion, but he did not raise it. It is now procedurally barred.[60]

## VI. CONCLUSION

We conclude that the court properly denied relief on Harris' claim that the State suppressed evidence of McClinton's statements in his affidavit. We conclude that the court applied the wrong standards in denying Harris relief on his claim that the State suppressed Allgood's statements to police by focusing only on the prosecutor's knowledge of Allgood's statements, by failing to consider whether Allgood's statements would have impeached Hicks' credibility, and by failing to examine whether Allgood's statements were material in the light of the trial evidence. Finally, the court erred in failing to accurately set forth which motion for postconviction relief it intended to address.

If the court concludes that the State suppressed material evidence regarding Allgood's statements to police or Hicks' plea agreement, it must evaluate the materiality of that suppression cumulatively. That is, the prejudicial effect of any new suppression must be considered cumulatively with the State's known suppression of the Cass report.

Affirmed in part, and in part reversed and remanded for further proceedings.

Heavican, C.J., not participating.

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[60] *State v. Phelps*, 286 Neb. 89, 834 N.W.2d 786 (2013).

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

# Farmers Cooperative, a cooperative corporation organized under the laws of the State of Nebraska, appellant, v. State of Nebraska et al., appellees.

# Frontier Cooperative Company, a cooperative corporation organized under the laws of the State of Nebraska, appellant, v. State of Nebraska et al., appellees.

893 N.W.2d 728

Filed April 7, 2017. Nos. S-16-312, S-16-313.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **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.
5. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, a court determines and gives 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.

6. **Statutes.** A statute is ambiguous when the language used cannot be adequately understood from the plain meaning of the statute or when considered in pari materia with any related statutes.
7. **Statutes: Legislature.** When the Legislature provides a specific definition for purposes of a section of an act, that definition is controlling.
8. **Taxation: Agriculture: Words and Phrases.** The phrase "depreciable repairs or parts" in Neb. Rev. Stat. § 77-2708.01 (Cum. Supp. 2016) is ambiguous.
9. **Statutes: Legislature: Intent.** An appellate court can examine an act's legislative history if a statute is ambiguous or requires interpretation.
10. **Statutes: Intent.** In construing a statute, a court looks to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served.
11. **Statutes: Taxation.** Tax exemption provisions are strictly construed, and their operation will not be extended by construction.
12. **Statutes: Legislature: Intent.** The fundamental objective of statutory interpretation is to ascertain and carry out the Legislature's intent. An interpretation that is contrary to a clear legislative intent will be rejected.
13. **Taxation: Agriculture.** Under Neb. Rev. Stat. § 77-2708.01 (Cum. Supp. 2016), the refund for depreciable repairs or parts is to prevent double taxation and to ensure that all depreciable repairs and parts are subject to personal property tax.
14. **Taxation: Agriculture: Words and Phrases.** In Neb. Rev. Stat. § 77-2708.01 (Cum. Supp. 2016), the phrase "depreciable repairs or parts" means repairs or parts that appreciably prolong the life of the property, arrest its deterioration, or increase its value or usefulness, and are ordinarily capital expenditures for which a deduction is allowed only through the depreciation recovery allowance.
15. **Taxation: Proof.** The party claiming an exemption from taxation must establish entitlement to the exemption. A tax exemption is analogous to a tax refund.

Appeals from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Affirmed.

Thomas E. Jeffers and Andrew C. Pease, of Crosby Guenzel, L.L.P., for appellants.

Douglas J. Peterson, Attorney General, and L. Jay Bartel for appellees.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Kelch, and Funke, JJ.

Funke, J.

## I. NATURE OF CASE

Farmers Cooperative (Farmers) and Frontier Cooperative Company (Frontier) (collectively the Cooperatives) appeal from orders by the district court for Lancaster County affirming the decisions of the Nebraska Department of Revenue (Department) and the acting Tax Commissioner of the State of Nebraska which denied, in part, their requested refunds of sales and use taxes paid on the purchase of repairs and parts for agricultural machinery and equipment, under Neb. Rev. Stat. § 77-2708.01 (Cum. Supp. 2016). The district court consolidated the cases for oral arguments. Likewise, this court has consolidated the appeals for oral arguments and decision.

The sole issue presented in each case is how the phrase "depreciable repairs or parts," within § 77-2708.0l, should be interpreted. The district court did not err in affirming the partial denial of the Cooperatives' requested refunds based upon its interpretation of § 77-2708.01. We affirm.

## II. BACKGROUND

### 1. Department's Interpretation of § 77-2708.01

In 1993, the Nebraska Legislature passed 1993 Neb. Laws, L.B. 345, which amended § 77-2708.01 to include the refund of sales and use taxes for depreciable repairs or parts. The relevant version of § 77-2708.01(1) states:

> Any purchaser of *depreciable repairs or parts* for agricultural machinery or equipment used in commercial agriculture may apply for a refund of all of the Nebraska sales or use taxes and all of the local option sales or use taxes paid prior to October 1, 2014, on the repairs or parts.

(Emphasis supplied.)

In the September 2014 "Nebraska Agricultural Machinery and Equipment Sales Tax Exemption Information Guide" (Information Guide), the Department interpreted the phrase "depreciable repairs or parts." The Information Guide defined

repairs and parts as depreciable, "if they will appreciably prolong the life of the property, arrest its deterioration, or increase its value or usefulness, and are ordinary capital expenditures for which a deduction is allowed only through the depreciation/cost recovery allowance." Conversely, according to the Tax Commissioner, the Information Guide explained that nondepreciable repair and replacement parts are those that "keep the property in an ordinary or usable condition, do not increase the value of the agricultural machinery and equipment repaired, or lengthen its life."

The Information Guide informed purchasers of depreciable repairs or parts that they may receive a refund of the sales and use taxes paid thereon by filing a "Nebraska Sales and Use Tax Refund Claim for Agricultural Machinery and Equipment Purchases or Leases, Form 7AG-1" (Form 7AG-1).

### 2. Factual History

The Cooperatives are buyers and sellers of agricultural products and inputs, including purchasing, selling, and storing grain. Both also provide on-farm services and products.

In September 2014, the Cooperatives submitted to the Department several Form 7AG-1's seeking refunds of sales and use taxes. Accompanying the forms were spreadsheets listing the transactions forming the basis of the claims and invoices related to those transactions. Neither of the Cooperatives submitted its personal property tax return or depreciation schedule to verify it had also paid personal property taxes on the agricultural machinery and equipment repairs or parts.

#### (a) Farmers' Refund Claim

Farmers submitted a single Form 7AG-1 for a refund of the sales and use taxes paid on repairs or parts for $1,582.48.

In response, the Department sent an email to Farmers notifying it that some invoices were determined to be for repair, replacement, or maintenance parts. The Department stated that it could refund the taxes paid thereon only if Farmers had paid personal property taxes on the items and requested Farmers

submit a copy of its personal property tax return or depreciation schedule to verify that it had. In October 2014, the Department sent another email to Farmers, asking if Farmers had placed any of the claimed purchases on its personal property tax return. The record does not show that Farmers responded to either email.

In March 2015, the Department notified Farmers that it had completed processing the refund claim and that it had denied a portion of the requested refund, because the taxes were on purchases of nondepreciable repairs or parts. The items disallowed by the Department included, but were not limited to, alternators, bolts, gaskets, sensors, and an air conditioner for "Terragators/Floaters" owned and operated by Farmers. Counsel for Farmers responded in an email contesting the decision and arguing that the definition of depreciable repair and replacement parts used was incorrect.

Nevertheless, the Tax Commissioner issued a letter denying $365.30 of the $1,582.48 refund requested. The Tax Commissioner stated its reasoning for denying $365.30 was that sales and use taxes paid on nondepreciable repair and replacement parts are not refundable, referencing its Information Guide. Farmers did not request a formal hearing by the Department on the Tax Commissioner's decision. Instead, it appealed to the district court for Lancaster County.

(b) Frontier's Refund Claims

Frontier's claim concerns three Form 7AG-1's, one filed in Frontier's name and two filed in its predecessor's name, Husker Cooperative. The Form 7AG-1's requested refunds of $39,907.71, $21,473.43, and $9,834.09.

In March 2015, the Department emailed Frontier to inform Frontier that it had not yet completed its review of the refund claims and requested an extension to do so. Counsel for Frontier responded that it was willing to grant the extension unless it was "solely because [the Department] want[ed Frontier's] property tax information." Counsel for Frontier informed the Department that it would not provide the Department its

personal property tax return, because "nothing in the statutory exemption or relevant definitions requires proof that an item was separately scheduled on a property tax return as a condition to taking the exemption."

The Tax Commissioner timely issued a letter denying $20,437.44 of the $49,333.57 refund requested in Frontier's three claims. In April 2015, the Tax Commissioner sent a replacement letter correcting the total amount denied as $42,319.10 and the total refund requested as $71,215.23. The Tax Commissioner stated its reasoning for the partial denial was that sales and use taxes paid on nondepreciable repair and replacement parts are not refundable, referencing its Information Guide. The items disallowed by the Department included, but were not limited to, alternators, bolts, gaskets, sensors, and hoses for "Terragators/Floaters" owned and operated by Frontier. Frontier did not request a formal hearing by the Department on the Tax Commissioner's decision. Instead, it appealed to the district court for Lancaster County.

(c) District Court's Decisions

In each order, the district court identified the issue as the definition of the phrase "depreciable repairs or parts." It determined that the phrase was ambiguous, because it was defined neither in § 77-2708.01 nor elsewhere in Chapter 77 of the Nebraska Revised Statutes and ordinary definitions of "depreciable" did not clarify the meaning. Upon examining the legislative history, the court determined that the Department's interpretation of § 77-2708.01 in its Information Guide—which relied on the definition of "depreciable" in the Farmer's Tax Guide[1] published by the Internal Revenue Service (IRS)—was the correct interpretation.

The court stated that the Cooperatives both had the burden to prove their purchases qualified as depreciable repairs or parts. It determined that both Cooperatives had notice of

[1] U.S. Dept. of Treasury, Internal Revenue Service, Farmer's Tax Guide, Pub. No. 225 (2016).

what repairs and parts were depreciable from the Information Guide and failed to provide sufficient evidence to verify that the repairs and parts were depreciated. Therefore, the court affirmed the Tax Commissioner's partial denials. The Cooperatives each appealed.

## III. ASSIGNMENTS OF ERROR

The Cooperatives assign, restated, that the court erred in affirming the Tax Commissioner's partial denial of their claims and in finding that the Department's interpretation of the phrase "depreciable repairs or parts" under § 77-2708.01 is correct.

## IV. STANDARD OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.[2] When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[3]

[3] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[4]

## V. ANALYSIS

### 1. Phrase "Depreciable Repairs or Parts" in § 77-2708.01 Is Ambiguous

All the parties argue that the phrase "depreciable repairs or parts" is unambiguous. However, the phrase "depreciable

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[2] *Stewart v. Nebraska Dept. of Rev.*, 294 Neb. 1010, 885 N.W.2d 723 (2016).

[3] *Id.*

[4] *Id.*

repairs or parts" is defined in neither § 77-2708.01 nor any related statutes. Further, the parties provide different interpretations of the phrase.

[4-6] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[5] In discerning the meaning of a statute, a court determines and gives 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.[6] However, a statute is ambiguous when the language used cannot be adequately understood from the plain meaning of the statute or when considered in pari materia with any related statutes.[7]

The Cooperatives argue that the proper interpretation of depreciable repairs and parts within § 77-2708.01 should be as set forth in Neb. Rev. Stat. § 77-119 (Reissue 2009). Section 77-119 defines "[d]epreciable tangible personal property" as "tangible personal property which is used in a trade or business or used for the production of income and which has a determinable life of longer than one year." The Cooperatives' contention that § 77-119's definition of the phrase "depreciable tangible personal property" should apply is based upon Neb. Rev. Stat. § 77-101 (Reissue 2009), which states that "[f]or purposes of Chapter 77 and any statutes dealing with taxation, unless the context otherwise requires, the definitions found in sections 77-102 to 77-132 shall be used."

An obvious problem arises with the Cooperatives' argument—despite that both § 77-119 and § 77-2708.01 contain the word "depreciable," the statutes use the term to describe

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[5] *Id.*

[6] *Archer Daniels Midland Co. v. State*, 290 Neb. 780, 861 N.W.2d 733 (2015).

[7] *Project Extra Mile v. Nebraska Liquor Control Comm.*, 283 Neb. 379, 396, 810 N.W.2d 149, 164 (2012).

two different things. In § 77-119, "depreciable" is used to describe "tangible personal property," while in § 77-2708.01, "depreciable" is used to describe "repairs or parts." As a result, it is evident that the phrases "tangible personal property" and "repairs or parts" are different. Though parts may be tangible personal property, repairs, such as labor and services, are not. The presence of "repairs" in § 77-2708.01 makes the context different from mere tangible personal property.

The Cooperatives counter that pursuant to the Nebraska tax regulation 316 Neb. Admin. Code, ch. 1, § 094.03 (2005), sales of repair and replacement parts for agricultural machinery and equipment used in commercial agriculture are subject to sales tax, but charges for labor to repair agricultural machinery and equipment are not subject to sales tax, provided the charges are separately itemized on the billing invoice. However, this argument is unavailing, because § 77-2708.01 still applies to labor when it is not separately itemized. Therefore, § 77-119's definition of the phrase "depreciable tangible personal property" is not informative.

Also relied upon by the Cooperatives is Neb. Rev. Stat. § 77-2704.36 (Cum. Supp. 2016), which states that "[s]ales and use tax shall not be imposed on the gross receipts from the sale . . . of depreciable agricultural machinery and equipment purchased . . . for use in commercial agriculture." While the phrase "depreciable agricultural machinery and equipment" is defined in neither § 77-2704.36 nor related statutes, it has been defined by the Department in its own regulations. The tax regulation 316 Neb. Admin. Code, ch. 1, § 094.01C (2005), defines "depreciable agricultural machinery and equipment" as "agricultural machinery and equipment that has a determinable life of longer than one year." As a result, the Cooperatives contend that the phrase "depreciable repairs or parts" used in § 77-2708.01 should be interpreted consistently with the phrase "depreciable agricultural machinery and equipment" used in § 77-2704.36, and thus comprise all repairs and parts with a determinable life of longer than 1 year.

Again, we disagree with the argument that "depreciable" must be defined consistently throughout our statutes when it is used in differing contexts. Pursuant to the Nebraska tax regulation 316 Neb. Admin. Code, ch. 1, § 094.02 (2005), depreciable agricultural machinery and equipment are exempt from sales and use taxes. However, pursuant to § 094.03 and 316 Neb. Admin. Code, ch. 1, § 094.03A (2005), depreciable repairs and replacement parts are taxable, but are eligible for a refund. The Legislature's decision to treat "depreciable agricultural machinery and equipment" and "depreciable repairs or parts" differently for sales and use tax purposes, providing an exemption for the former and a refund for the latter, further shows there is a difference.

The Department argues that the definition of the phrase "depreciable repairs or parts" included in its Information Guide is supported by both the dictionary definitions of depreciable, depreciation, and depreciate and the IRS' definition of depreciable in its Farmer's Tax Guide.

[7] When the Legislature provides a specific definition for purposes of a section of an act, that definition is controlling.[8] However, in the case before us, we have found no clear definition of the phrase "depreciable repairs or parts" in our statutes, and therefore we look to whether the ordinary meaning of "depreciable" may provide the plain meaning of the phrase. One dictionary definition of "depreciable" is "capable of depreciating or being depreciated in value [or] capable of being depreciated for tax purposes."[9] Merriam-Webster's definition of "depreciate" is "to lower the price or estimated value of [or] to deduct from taxable income a portion of the original cost of (a business asset) over several years as

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[8] *Trumble v. Sarpy County Board*, 283 Neb. 486, 810 N.W.2d 732 (2012).

[9] "Depreciable," Dictionary.com Unabridged, http://www.dictionary.com/browse/depreciable (last visited Mar. 31, 2017).

the value of the asset decreases."[10] Finally, the Black's Law Dictionary definition of "depreciation" is "[a] reduction in the value or price of something . . . a decline in an asset's value because of use, wear, obsolesence, or age."[11]

These definitions show that neither parties' interpretation of the phrase "depreciable repairs or parts" is supported by the ordinary meaning of depreciable or its variations. We agree with the Department's argument that many items with a determinable life of greater than 1 year, such as a bolt or gasket, cannot properly be placed on a depreciation schedule. However, the definitions also lend no support to the Department's interpretation that it is the repair or parts enhancement of another object that makes it depreciable. Further, many repairs or parts that do not enhance the value of another object are capable of being depreciated.

The Department also argues that the IRS' Farmer's Tax Guide supports its definition of depreciable repairs and parts. The Farmer's Tax Guide states that taxpayers can generally "deduct most expenses for the repair and maintenance of . . . farm property. . . . However, repairs to, or overhauls of, depreciable property that substantially prolong the life of the property, increase its value, or adapt it to a different use are capital expenses."[12] It defines a "capital expense" as "a payment, or a debt incurred, for the acquisition, improvement, or restoration of an asset that is expected to last more than one year."[13] As an example of a capital expense, it lists "[r]epairs

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[10] "Depreciate," Merriam-Webster.com, https://www.merriam-webster.com/dictionary/depreciate (last visited Mar. 31, 2017). Accord "Depreciate," Dictionary.com Unabridged, http://www.dictionary.com/ browse/depreciate (last visited Mar. 31, 2017). See, also, "Depreciate," Oxford English Dictionary Online, http://www.oed.com/view/Entry/50419 (last visited Mar. 31, 2017).

[11] Black's Law Dictionary 535 (10th ed. 2014).

[12] Farmer's Tax Guide, *supra* note 1 at 20.

[13] *Id.* at 23.

to machinery [and] equipment . . . that prolong their useful life, increase their value, or adapt them to different use."[14]

[8] While the Farmer's Tax Guide shows that the IRS treats depreciable repairs or parts as capital expenses, which comports with the Department's definition, we cannot glean from § 77-2708.01 that this was the meaning intended by the Legislature, because it did not incorporate the phrase "capital expenses" into the statute. Therefore, we find the phrase "depreciable repairs or parts" ambiguous.

### 2. Legislative Intent

[9-12] An appellate court can examine an act's legislative history if a statute is ambiguous or requires interpretation.[15] In construing a statute, a court looks to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served.[16] Tax exemption provisions are strictly construed, and their operation will not be extended by construction.[17] Nevertheless, the fundamental objective of statutory interpretation is to ascertain and carry out the Legislature's intent.[18] An interpretation that is contrary to a clear legislative intent will be rejected.[19]

All the parties agree that the intent of § 77-2708.01 was to avoid double taxation. More specifically, the legislation sought to provide a sales tax refund to purchasers of certain repairs and parts for agricultural machinery and equipment which were subject to personal property tax.

The Department argues that the Legislature, by referencing the IRS standard, stated that it intended the phrase "depreciable

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[14] *Id.* at 24.

[15] *Dean v. State*, 288 Neb. 530, 849 N.W.2d 138 (2014).

[16] *State v. Duncan*, 294 Neb. 162, 882 N.W.2d 650 (2016).

[17] *Bridgeport Ethanol v. Nebraska Dept. of Rev.*, 284 Neb. 291, 818 N.W.2d 600 (2012).

[18] *Dean, supra* note 15.

[19] *Id.*

repairs or parts" to be defined as it is in the Information Guide. Finally, the Department agrees applicants are not statutorily required to submit their personal property tax returns, but acknowledges that taxpayers have the burden to show that they are entitled to a refund.

The 1993 amendment to § 77-2708.01 which included the refund for depreciable repairs or parts was added to L.B. 345 as amendment 2590, referred to as the "Wickersham amendment." Senator W. Owen Elmer introduced the "Wickersham amendment," which contained the same language as an amendment Senator William Wickersham had added to another bill earlier that session. Senator Elmer explained the purpose of the Wickersham amendment as follows:

> Anytime that you purchase a piece of farm machinery, you . . . put it on the depreciation schedule . . . and now you don't have to pay the sales tax but you do have to pay the personal property tax on the piece of machinery. Now, you have a piece of equipment that needs repair. If it is major in nature, those repairs have to be put on the personal property tax depreciation schedule and you also have to pay sales tax on that. Double taxation like that is not very fair . . . .[20]

Senator Elmer then relinquished his opening time to Senator Wickersham to explain further. Senator Wickersham stated:

> [C]urrently repair parts on farm machinery and equipment can be subject to double taxation. They can have both a sales tax and personal property tax applied to them that is unlike the treatment of the primary piece of equipment that might be repaired if it's depreciable. And I want to emphasize, we are only talking about depreciable repair parts.[21]

Senator George Coordsen provided further explanation of what the Wickersham amendment would apply to:

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[20] Floor Debate, L.B. 345, 93d Leg., 1st Sess. 7317-18 (June 3, 1993).

[21] *Id.* at 7318.

> Bear in mind, this is not all major farm equipment. It relies totally upon the definition in [IRS] statutes as it applies to that individual piece of equipment within the individual farming operation. So not all what we might interpret as being major repairs do, in fact, enhance the value of that piece of equipment substantially. Therefore, they would never be required by the person preparing the . . . income tax form to be depreciated but rather would be taken as an ordinary expense in the year of purchase. Again, to reiterate what Senator Wickersham is trying to accomplish is a situation where the parts in a major repair are liable for the sales tax, where the parts and the labor involved are then required to be depreciated for a period of time that is reckoned to be the life of that repair . . . .[22]

Senator Coordsen also discussed the reason that the issue of double taxation on depreciable repairs or parts occurs. He said, "I was not aware that the federal government mandated the depreciation of repairs that appreciably enhanced the value of a piece of equipment . . . on the farmer's federal income tax [return,] which then force[s] it to show up on [the farmer's] report for personal property tax purpose[s]."[23]

In response to a question about whether a tractor blade would qualify as a depreciable part, Senator Ron Withem explained:

> [T]he triggering mechanism is whether the repair part or the repair becomes part of a product that is, in fact, depreciated, and whether or not the tractor or the blade on the tractor would be depreciable property on which the owner of it would pay property tax on its depreciated value. That case then they'd get the rebate back. If it was not depreciated, then they wouldn't get the rebate back.[24]

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[22] *Id.* at 7327-28.

[23] *Id.* at 7322-23.

[24] *Id*. at 7335.

Senator Coordsen then provided further insight on the question, stating:

> One, it has to be depreciable in a trade or business, and, two, and, number two, and more importantly, that repair and the labor associated with it, must appreciably, and I don't know what the measure is, it takes an [IRS] audit to determine that, appreciably enhance the value of that piece of equipment that it must be depreciated. For all practical purposes, 90 or more percent, and I suspect it is more than that, of all farm equipment repaired would remain subject to the sales tax under the Wickersham amendment. It is a very narrow double taxation when viewed from what I believe to be the intent of all of our personal property tax . . . .[25]

To solve the double taxation problem, the Legislature chose to employ a refund system, rather than the exemption system currently in effect for depreciable agricultural machinery and equipment, so that a paper trail would exist to prove the personal property taxes were actually being paid, before the sales and use tax was refunded. Senator Wickersham explained: "[T]he amendment that you have before you calls for a rebate only on depreciable repair parts because that makes that system accountable and, in fact, it is my belief that that is the only way to make that accountable, and certainly wish it to be accountable."[26] However, the Legislature recognized that its decision to use a refund system would result in some individuals continuing to be subjected to double taxation. This decision was evidenced by Senator Wickersham's statement that "[w]e'd have folks, I suppose, who might . . . might not be able to take advantage or would not take advantage of a rebate provision simply because of the passage of time and maybe the loss of records."[27]

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[25] *Id.* at 7336.

[26] *Id.* at 7321.

[27] *Id.* at 7326.

The Cooperatives argue that their interpretation of § 77-2708.01 accomplishes the legislative intent of preventing double taxation by requiring sale taxes to be paid on repairs and parts with a determinable life of less than 1 year and requiring property taxes to be paid on repairs and parts with a determinable life greater than 1 year. The Cooperatives further argue that because the Department's regulations treat depreciable repairs or parts as depreciable tangible personal property to make it subject to personal property taxes, under its regulatory interpretation of Neb. Rev. Stat. § 77-202(3) (Cum. Supp. 2016), we must apply the definition of depreciable in § 77-119 to repairs or parts to prevent double taxation.

The Cooperatives are correct that § 77-202(3) requires the payment of property taxes on tangible personal property which is not depreciable tangible personal property as defined in § 77-119. Further, pursuant to 316 Neb. Admin. Code, ch. 1, § 094.05 (2005), personal property tax must be paid on depreciable repair parts, even if sales tax is paid on the item. Lastly, pursuant to § 094.03, repairs and replacement parts for agricultural machinery and equipment are subject to sales tax.

However, the Department's definition of depreciable repairs and parts does not create inconsistency between the meaning of "depreciable" for sales and use taxes and for personal property taxes, because 350 Neb. Admin. Code, ch. 20, § 001.02C (2009), makes only repairs or parts that qualify as capital expenses subject to personal property taxes. Further, as set forth in the tax regulation § 094.03A, "[t]he [sales] tax paid on purchases of depreciable repair and replacement parts is eligible for a refund, including the [sales] tax paid on the related repair or maintenance labor charges." Therefore, double taxation is avoided by providing documentation that repairs and parts are included on personal property tax returns or depreciation schedules.

The Cooperatives also argue that § 77-2708.01, which must be narrowly construed, does not require personal property tax returns be submitted to obtain the tax refund. However, as

mentioned later, the claimant maintains the burden to show that personal property tax has been paid on depreciable repairs and parts before the claimant is entitled to a sales tax refund.

[13] The legislative history set forth above shows that the intent of creating the refund for depreciable repairs or parts, in § 77-2708.01, was to prevent double taxation but also to ensure that all depreciable repairs and parts were subject to personal property tax. It also establishes that the Legislature intended the phrase "depreciable repairs or parts" to be defined under the guidance of the IRS.

[14] The Legislature's example that a refund pursuant to § 77-2708.01 would apply to a tractor blade attached to a tractor provides further confirmation that the Department's interpretation is correct by fully detailing the definitions of "depreciable" and "nondepreciable" repairs and parts included in the Information Guide. Therefore, we interpret the phrase "depreciable repairs or parts" as repairs or parts that appreciably prolong the life of the property, arrest its deterioration, or increase its value or usefulness, and are ordinarily capital expenditures for which a deduction is allowed only through the depreciation recovery allowance.

### 3. The Cooperatives Failed to Establish They Were Entitled to Refund of Taxes Denied by Tax Commissioner

[15] The party claiming an exemption from taxation must establish entitlement to the exemption.[28] A tax exemption is analogous to a tax refund.[29] The Department's Information Guide provided the correct definition of the phrase "depreciable repairs or parts," which informed the public of what items qualified for the tax refund. Accordingly, the Cooperatives had notice of items of which they were entitled to a refund.

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[28] *Bridgeport Ethanol, supra* note 17.

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

Neither party provided the Department with the information it needed to verify that the claimed repairs and parts were taxed as personal property. The Department provided Farmers with notice that it needed to submit its personal property tax return or depreciation schedule before it could receive a refund of certain taxes it requested, but Farmers never submitted such documents. Frontier preemptively notified the Department that it would not provide its personal property tax return or depreciation schedule unless it was being audited. Neither of the Cooperatives requested a formal hearing from the Department to review the Tax Commissioner's decision, so no additional evidence was developed on the record regarding the denied claims. Further, the Cooperatives did not submit any additional evidence to the district court on their appeals.

Accordingly, the court concluded that it could not determine whether the items submitted for a refund were taxed as personal property and qualified for a refund based on the invoices alone. The court's decisions conformed to the law, were supported by competent evidence, and were neither arbitrary, capricious, nor unreasonable. Accordingly, we find no errors on the record in either case.

## VI. CONCLUSION

For the reasons discussed above, we affirm both decisions of the district court.

Affirmed.

Stacy, J., not participating.

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

# In re Interest of Becka P. et al., children under 18 years of age. State of Nebraska, appellee, v. Robert P. and Veronica M., appellants.

894 N.W.2d 247

Filed April 7, 2017. Nos. S-16-646 through S-16-648.

1. **Juvenile Courts: Jurisdiction.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
3. **Juvenile Courts: Jurisdiction: Appeal and Error.** In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
5. **Juvenile Courts: Final Orders: Appeal and Error.** A proceeding before a juvenile court is a "special proceeding" for appellate purposes.
6. **Final Orders: Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
7. **Juvenile Courts: Parental Rights: Final Orders: Time.** Whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the

length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed.

8. **Constitutional Law: Parental Rights.** Parents have a fundamental liberty interest in directing the education of their children.
9. **Parental Rights: Final Orders: Time: Appeal and Error.** Orders which temporarily suspend a parent's custody, visitation, or education rights for a brief period of time do not affect a substantial right and are therefore not appealable.
10. **Parental Rights: Final Orders: Time.** An order appointing an educational surrogate which has no limitation on its duration or scope is not a temporary order, but, rather, one which affects the parents' substantial right to direct the education of their child.
11. **Jurisdiction: Appeal and Error.** Generally, once an appeal has been perfected to an appellate court, the trial court is divested of its jurisdiction to hear a case involving the same matter between the same parties; however, there is statutory authority allowing the juvenile court to retain or continue jurisdiction while appeals are pending.
12. **Juvenile Courts: Jurisdiction: Parental Rights: Appeal and Error.** Although a juvenile court retains jurisdiction over a juvenile while an appeal is pending, such continuing jurisdiction is not without limits; for example, the continuing jurisdiction of a juvenile court pending an appeal does not include the power to terminate parental rights.
13. **Juvenile Courts: Jurisdiction: Final Orders: Appeal and Error.** Pending an appeal from an adjudication, the juvenile court does not have the power to enter a permanent dispositional order.
14. **Juvenile Courts: Jurisdiction: Appeal and Error.** The extent of the juvenile court's jurisdiction over a juvenile while an appeal is pending must be determined by the facts of each case.
15. ____: ____: ____. A juvenile court has continuing jurisdiction to issue and rule upon an order to show cause seeking enforcement of a previous order while the order of adjudication is pending on appeal.
16. **Juvenile Courts: Contempt.** Juvenile courts, whether separate juvenile courts or county courts sitting as juvenile courts, are courts of record with the statutory authority to punish contemptuous conduct.

Appeals from the County Court for Garden County: Randin Roland, Judge. Affirmed.

Michael R. Snyder, of Snyder & Hilliard, P.C., L.L.O., for appellants.

Philip E. Pierce, Garden County Attorney, for appellee.

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

Stacy, J.

Robert P. and Veronica M. appeal from orders of the county court for Garden County, sitting as a juvenile court, appointing an "educational surrogate" after Robert and Veronica refused to complete consent forms necessary to authorize speech and language and early childhood development assessments previously ordered by the court. We affirm.

## FACTS

Robert and Veronica are the parents of Becka P.; Robert P., Jr. (Robert Jr.); and Thomas P. In December 2015, the State filed juvenile petitions, alleging the children—who were ages 4, 2, and 1, respectively—came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2015) due to the faults and habits of their parents. The cases were consolidated for trial, and the juvenile court entered orders finding the allegations of the petitions were true as to all three children. The orders of adjudication placed custody of the children with the Nebraska Department of Health and Human Services (DHHS) and, among other things, ordered a "language and speech assessment" for Becka and an "early childhood development assessment" for Robert Jr. and Thomas. All assessments were to be conducted on the children by an "Educational Services Unit" (ESU).

The parents appealed the adjudication orders in all three cases. The appeals were consolidated, and on October 19, 2016, the Nebraska Court of Appeals affirmed the adjudications in an unpublished memorandum opinion in cases Nos. A-16-351 through A-16-353. The mandate issued November 23.

While the parents' appeals were pending before the Court of Appeals, the county attorney charged with enforcing court orders filed an "Affidavit and Application for Order to Show Cause" in the juvenile court. This application asked that the parents and DHHS be ordered to appear and show cause why

they should not be held in contempt for failing to comply with the assessments previously ordered by the court. The record indicates the court issued an order to show cause in each of the three cases and consolidated the matters for purposes of the hearing.

A show cause hearing was held in May 2016. Evidence introduced by the State showed the parents had signed the informed consent forms needed by the ESU to proceed with the assessments, but had added language indicating their signatures were not voluntary, and had refused to consent to the release of information between the ESU and the programs it uses to conduct the evaluations. As such, the ESU did not consider the consent forms sufficient to permit the assessments to be performed and the evaluations to be completed. There was evidence that DHHS had not signed the consent forms, but that pertinent regulations precluded DHHS from signing such consents for children who are wards of the State.

After hearing the evidence, the court declined to make any finding of contempt and instead decided to appoint an "educational surrogate" to authorize the necessary consents. The following colloquy took place on the record:

> THE COURT: . . . I'm going to appoint [an] educational surrogate for all three children. There are no limitations on that whatsoever . . . .
>
> . . . .
>
> [Parents' counsel]: — I assume before you appoint . . . a surrogate, you'll give a short time for [the parents] to sign [the] documents?
>
> THE COURT: Okay. No. We're done. She's a surrogate. . . .
>
> [Parents' counsel]: Okay.
>
> THE COURT: Because I'm not going to come back here when they refuse to do something in the future.
>
> . . . .
>
> . . . I'm not going to find anyone in contempt. I don't think it's necessary.

> . . . .
>
> . . . I'm going to appoint [an attorney] as the surrogate to have educational rights for all three children.
>
> As I understand from the testimony presented today, that will allow the evaluations to go through. . . .
>
> I believe the adjudications are up on appeal. I think we have a status hearing set just to monitor how the appeal is progressing.
>
> . . . .
>
> . . . We'll schedule it for August 4th at 2:00 p.m. And if we're still waiting for an appellate decision at that time, we'll certainly entertain a motion to continue that out probably for another month or so to monitor the ruling.
>
> All prior orders not in conflict are continued. Court's adjourned.

After the show cause hearing, the court entered an order in each child's case which provided that a particular attorney was "appointed as educational surrogate for the minor child herein and shall have all educational rights for the minor child."

Robert and Veronica timely appealed from the May 2016 orders appointing an educational surrogate in each child's case. We moved these appeals to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

## ASSIGNMENTS OF ERROR

Robert and Veronica assign, consolidated and restated, that the juvenile court erred in (1) ordering them to show cause why they should not be held in contempt, and subsequently appointing an educational surrogate, while appeals of the adjudications were pending in the Court of Appeals and (2) appointing an educational surrogate in a civil contempt proceeding without giving them an opportunity to purge their contempt by completing the assessment consent forms.

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[1] Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

## 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.[2]

[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[3]

## ANALYSIS

### Orders Appointing Educational Surrogate Were Final Orders

[3] The State argues the orders appointing an educational surrogate were not final, appealable orders. In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[4]

Neb. Rev. Stat. § 43-2,106.01(1) (Reissue 2016) gives appellate courts jurisdiction to review "[a]ny final order or judgment entered by a juvenile court . . . ." No one argues that the orders appointing an educational surrogate are judgments under Neb. Rev. Stat. § 25-1301 (Reissue 2016), so whether we have jurisdiction to review the juvenile court's orders depends on whether Robert and Veronica have appealed from final orders.

[4,5] Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.[5] Because

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[2] *In re Interest of Danaisha W. et al.*, 287 Neb. 27, 840 N.W.2d 533 (2013).

[3] *Id.*

[4] *Id.*

[5] *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012); *In re Adoption of Amea R.*, 282 Neb. 751, 807 N.W.2d 736 (2011).

a proceeding before a juvenile court is a "special proceeding" for appellate purposes,[6] the pertinent inquiry is whether the order appointing an educational surrogate affected a substantial right. We conclude it did.

[6,7] A substantial right is an essential legal right, not a mere technical right.[7] Whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed.[8] This court has considered both the object and duration of the orders at issue here, and we conclude the orders affect a substantial right.

[8] The object of the orders appointing an educational surrogate is the fundamental right of Robert and Veronica to direct the education of their children. The U.S. Supreme Court has recognized parents have a fundamental liberty interest in directing the education of their children.[9] And this court has recognized there "can be no doubt that the object of [an order prohibiting a parent from homeschooling her child] is of sufficient importance to affect a substantial right."[10] Here, although the educational surrogate was appointed to address the parents' refusal to consent to court-ordered assessments, the orders gave the surrogate "all educational rights for the minor child" and the court clarified on the record that "[t]here are no limitations on [the appointment] whatsoever . . . ."

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[6] *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008).

[7] *In re Interest of Octavio B. et al.*, 290 Neb. 589, 861 N.W.2d 415 (2015).

[8] *Id.*

[9] See, *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923).

[10] *In re Interest of Cassandra B. & Moira B.*, 290 Neb. 619, 625, 861 N.W.2d 398, 403 (2015).

We are persuaded on this record that the object of the orders appointing an educational surrogate is of sufficient importance to affect a substantial right.

[9] The second prong of the substantial right analysis requires consideration of the length of time over which the parent-child relationship may reasonably be expected to be disturbed.[11] Orders which temporarily suspend a parent's custody, visitation, or education rights for a brief period of time do not affect a substantial right and are therefore not appealable.[12]

[10] Here, neither the language of the orders appointing the educational surrogate nor the court's remarks on the record denote a temporary interruption of the parents' rights to direct the education of their children. To the contrary, the court's remarks indicate the educational surrogate was appointed with "no limitations on that whatsoever" and the court wanted the appointment to continue in case the parents "refuse to do something in the future." Because there was no limit on the duration or scope of the educational surrogate's appointment, we conclude these were not temporary orders, but, rather, orders which affected the parents' substantial right to direct the education of their child.[13] The orders were therefore final orders, and we proceed to consider the errors assigned on appeal.

Robert and Veronica challenge the appointment of an educational surrogate on two grounds. First, they argue the juvenile court lacked jurisdiction to issue or rule upon the orders to show cause while the adjudications were pending on appeal. Next, they argue the orders appointing an educational surrogate were improper sanctions for civil contempt, because they were not afforded "an opportunity to purge their contempt by signing the testing authorization forms." We consider each argument in turn.

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[11] *Id.*

[12] *Id.*

[13] See *id.*

### Juvenile Court Had Jurisdiction to Issue and Rule Upon Orders to Show Cause

Robert and Veronica argue the juvenile court was without power to issue orders to show cause or appoint an educational surrogate while their appeals of the adjudications were pending before the Court of Appeals. They contend the appeal divested the juvenile court of jurisdiction to issue or rule upon the orders to show cause. In this regard, Robert and Veronica do not contend that the surrogate was unnecessary or that the ordered assessments were unrelated to the basis for adjudication. Nor do they challenge the juvenile court's authority to appoint an educational surrogate generally. Rather, they assign and argue that because the adjudication appeals were pending, the juvenile court lacked authority to take any action.

[11-15] Nebraska case law generally holds that once an appeal has been perfected, the trial court is divested of its jurisdiction to hear a case involving the same matter between the same parties.[14] However, Neb. Rev. Stat. § 43-2,106 (Reissue 2016) provides in relevant part:

> When a juvenile court proceeding has been instituted before a county court sitting as a juvenile court, the original jurisdiction of the county court shall continue until the final disposition thereof and *no appeal shall stay the enforcement of any order entered in the county court*. After appeal has been filed, the appellate court, upon application and hearing, may stay any order, judgment, or decree on appeal if suitable arrangement is made for the care and custody of the juvenile. The county court shall continue to exercise supervision over the juvenile until a hearing is had in the appellate court and the appellate court enters an order making other disposition.

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[14] *In re Interest of Tabatha R.*, 255 Neb. 818, 587 N.W.2d 109 (1998).

(Emphasis supplied). In *In re Interest of Jedidiah P.*,[15] we explained that although a juvenile court retains jurisdiction over a juvenile while an appeal is pending, such continuing jurisdiction is not without limits. For example, the continuing jurisdiction of a juvenile court pending an appeal from an adjudication does not include the power to terminate parental rights[16] or to enter a permanent dispositional order.[17] As such, the extent of the juvenile court's jurisdiction must be determined by the facts of each case.[18] The question presented here is whether, while the orders of adjudication were pending on appeal, the juvenile court had continuing jurisdiction to issue and rule upon orders to show cause seeking enforcement of its previous orders requiring a speech and language assessment. We conclude it did.

[16] The juvenile court's adjudication orders placed custody of the children with DHHS and, among other things, ordered that assessments be conducted by the ESU. When the State learned the assessments had not yet occurred because DHHS and the parents had refused to complete the necessary forms, the State sought to enforce the court's orders by filing an affidavit and application for order to show cause in each case. Juvenile courts, whether separate juvenile courts or county courts sitting as juvenile courts, are courts of record with the statutory authority to punish contemptuous conduct.[19] Section 43-2,106 expressly provides that "no appeal shall stay the enforcement of any order entered in the county court [sitting as a juvenile court]." Because the proceedings were enforcing

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[15] *In re Interest of Jedidiah P.*, 267 Neb. 258, 673 N.W.2d 553 (2004).

[16] *Id.*, citing *In re Interest of Joshua M. et al.*, 4 Neb. App. 659, 548 N.W.2d 348 (1996), *reversed in part on other grounds* 251 Neb. 614, 558 N.W.2d 548 (1997).

[17] *Id.*, citing *In re Interest of Andrew H. et al.*, 5 Neb. App. 716, 564 N.W.2d 611 (1997).

[18] *Id.*

[19] *In re Interest of Thomas M.*, 282 Neb. 316, 803 N.W.2d 46 (2011).

previous orders of the juvenile court, we find no merit to the parents' contention that the juvenile court lacked authority to issue or rule upon the orders to show cause while the orders of adjudication were on appeal.

### Orders Appointing Educational Surrogate Were Not Premised on Finding of Contempt

Robert and Veronica argue the juvenile court erred in imposing "an unconditional punishment of removal of educational rights in a civil contempt proceeding, without giving [them] an opportunity to purge their contempt by signing the testing authorization forms." The parents argue that the court imposed a punitive sanction in a civil contempt proceeding, and they suggest a proper sanction for civil contempt "should have allowed them to purge the contempt by . . . sign[ing] the [authorization] forms for the tests."[20]

This assignment of error assumes the court ordered the appointment of an educational surrogate as a sanction for a finding of civil contempt. But that is incorrect. The record shows the court specifically declined to find either the parents or DHHS in contempt of court for failing to complete the necessary authorizations. The orders appointing an educational surrogate were not imposed as a sanction for civil contempt, because there was no finding of contempt made by the court. We find this assignment of error is factually unsupported and therefore lacks merit.

## CONCLUSION

For the foregoing reasons, the orders of the juvenile court are affirmed.

Affirmed.

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[20] Brief for appellants at 9.

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

# Clarence E. Mock III, Special Administrator of the Estate of Carl Landgraf, deceased, appellant and cross-appellee, v. Gail L. Neumeister and Marlene Neumeister, appellees and cross-appellants.

892 N.W.2d 569

Filed April 14, 2017. No. S-15-1226.

1. **Property: Undue Influence: Equity: Appeal and Error.** An action to set aside inter vivos transfers of property on the basis that they were made as the result of undue influence is one in equity and, as such, is reviewed by an appellate court de novo on the record.
2. **Judgments: Evidence: Appeal and Error.** Despite de novo review, when credible evidence is in conflict on material issues of fact, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
3. **Costs: Appeal and Error.** The decision of a trial court regarding taxing of costs is reviewed for an abuse of discretion.
4. **Undue Influence: Property: Proof.** The elements which must be proved in order to vitiate a transfer of property on the ground of undue influence are that (1) the transferor was subject to undue influence, (2) there was an opportunity to exercise such influence, (3) there was a disposition to exercise such influence, and (4) the transfer was clearly made as the result of such influence.
5. **Undue Influence: Deeds: Words and Phrases.** The undue influence which will void a deed is an unlawful or fraudulent influence which controls the will of the grantor.
6. **Deeds: Conveyances: Undue Influence.** A court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance but only with whether it was the voluntary act of the grantor.

7. **Deeds: Undue Influence: Proof.** The burden is on the party alleging the execution of a deed was the result of undue influence to prove such undue influence by clear and convincing evidence.
8. **Evidence: Words and Phrases.** Clear and convincing evidence is evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.
9. **Undue Influence.** Mere suspicion, surmise, or conjecture does not warrant a finding of undue influence; instead, there must be a solid foundation of established facts on which to rest the inference of its existence.
10. **Appeal and Error.** To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
11. **Undue Influence: Proof.** Undue influence is usually difficult to prove by direct evidence, and it rests largely on inferences drawn from facts and circumstances surrounding the testator's life, character, and mental condition.
12. ____: ____. It is not necessary for a court in evaluating the evidence of undue influence to separate each fact supported by the evidence and pigeonhole it under one or more of the four essential elements. The trier of fact should view the entire evidence and decide whether the evidence as a whole proves each element of undue influence.
13. **Equity: Costs.** The taxation of costs in equitable actions is governed by Neb. Rev. Stat. § 25-1711 (Reissue 2016).
14. **Costs: Statutes.** Unlike Neb. Rev. Stat. §§ 25-1708 and 25-1710 (Reissue 2016), which provide that costs shall be allowed of course to the successful party, Neb. Rev. Stat. § 25-1711 (Reissue 2016) gives the court discretion to tax costs and to apportion such costs between the parties.

Appeal from the District Court for Otoe County: David K. Arterburn, Judge. Affirmed.

Thomas M. Locher and Joseph J. Kehm, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., and William R. Reinsch, of Reinsch, Slattery, Bear & Minahan, P.C., L.L.O., for appellant.

Jeanette Stull and Justin J. Knight, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellees.

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

Cassel, J.

## I. INTRODUCTION

This is an appeal from a decree refusing to set aside lifetime transfers of real estate claimed to be the result of undue influence. The ultimate issue before the district court and now before this court is whether the appellant proved by clear and convincing evidence that the deeds were the result of undue influence. Upon our de novo review, we conclude that the appellant failed to meet his burden of persuasion. And because we find no abuse of discretion by the district court in declining to tax costs of depositions, we affirm the district court's decree.

## II. BACKGROUND

This is a fact-intensive case. The district court heard testimony from 33 live witnesses and received over 200 exhibits during an 8-day trial. After briefly summarizing the contested transactions and the proceeding challenging them, we will set forth the evidence from the trial at considerable length.

### 1. Transactions Attacked

On June 11, 2011, a couple of weeks prior to Carl Landgraf's 87th birthday, he executed two joint tenancy warranty deeds conveying approximately 1,000 acres of his farmland to Gail L. Neumeister and Marlene Neumeister. In July 2012, Landgraf executed deeds to fix an error in the earlier deeds. The total recited consideration for the four deeds was $4.

### 2. Proceeding Attacking Transactions

After Landgraf's death, the probate court appointed Clarence E. Mock III as special administrator of Landgraf's estate. Mock sued the Neumeisters, alleging that the deeds were the product of undue influence by the Neumeisters and should be set aside.

The Neumeisters denied that the deeds were the product of undue influence. But in the event that the district court set

aside the transfers, they filed a counterclaim requesting to be compensated for improvements made upon the land following the transfer.

### 3. Facts Developed at Trial

#### (a) Before Transaction

##### *(i) Landgraf's Family*

Landgraf was born in 1924, the youngest of three sons. Neither Landgraf nor his brothers married or had children. Landgraf and his brother, Jerome Landgraf (Jerome), were preceded in death by their parents and brother. They lived nearly their entire lives on the property originally owned by their parents. Between the two brothers, Jerome was the spokesperson and decisionmaker. Their house lacked modern amenities. It had limited electricity. It lacked plumbing and a working furnace or stove. Because there was no bathroom, Landgraf often used a bucket for a toilet.

The Catholic faith was important to Landgraf's family. Landgraf attended Mass and holy days regularly. Items signaling faith and devotion decorated Landgraf's house. According to a relative's testimony, there was a desire to "pay back" the Catholic church because the church helped Landgraf's grandparents when they immigrated to the United States due to religious persecution.

In 1995, Jerome began living in a nursing home. He died on August 25, 2000. Landgraf inherited Jerome's interest or was a joint owner with right of survivorship with Jerome for Jerome's interest in personal and real property.

##### *(ii) Landgraf's Land*

Landgraf owned several tracts of farmland in Otoe County, Nebraska. His home was located on a farm near Dunbar, Nebraska, which consisted of approximately 1,000 acres of land. When Landgraf's father was in charge, the family farmed most of the land. After Landgraf's father died, Landgraf and Jerome "kept putting more and more to grass." They farmed

some of the land, but primarily used it for livestock. After Jerome entered the nursing home, this land was farmed by Gail for approximately 10 years. Landgraf also owned farms some distance from his home. These farms were composed of approximately 80 acres and 160 acres and were farmed by Robert and Jacqueline Knake and Robert Witte, respectively.

*(iii) Relationship With Farmers*

a. Neumeisters

In 1978, Gail began helping his brother perform haying work for Landgraf and Jerome. When Gail's brother moved in 1983, Gail took over the haying work. In 1995, after Jerome entered the nursing home, Gail stopped haying and began farming Landgraf's land. He had a 60-40 lease arrangement with Landgraf in which Landgraf received 40 percent of the income and paid 40 percent of expenses.

In 2004, Gail told Landgraf that he did not want to farm the land anymore and Landgraf became very upset. According to Gail, Landgraf offered to cosign on a $67,000 note if Gail continued to farm the land. The lender subsequently sued the Neumeisters for failure to pay the loan. In May 2006, the day before Gail's equipment and other collateral were to be taken by the lender, Gail wrote a check for $75,000 payable to himself that Landgraf signed.

Landgraf's attorney, Richard Hoch, tried to work with the Neumeisters to document some obligation to repay Landgraf, but he was unsuccessful because the Neumeisters never returned the instruments that Hoch prepared for their signatures. According to Gail, the arrangement to repay Landgraf was for Gail "to keep farming or be around" and to "work it off." But by the time the loan was paid off, Gail had ceased farming. Gail stopped farming Landgraf's land in 2005, because "the input costs were higher than the output costs." Gail testified that he worked off the debt by controlling weeds, cleaning a road ditch, cutting trees, fixing a roof, and various other things.

Gail also claimed that he worked off the debt by performing work for Landgraf under the Environmental Quality Incentives Program (EQIP). This was a "cost share" program with the government concerning conservation work. Landgraf had three 10-year EQIP contracts. Gail was the "operator" on the contracts and also acted as the contractor doing the conservation work. He was to perform the work without being compensated by Landgraf.

Yearly status reviews were performed on EQIP contracts to check progress. Because costs increased every year, there was an incentive to complete the work under the contracts sooner rather than later. Gail failed to perform the work in a timely manner. In 2007, with essentially only 2 years left on the contracts, only 30 percent of the work had been completed. If the contracts were not completed as required, the landowner—i.e., Landgraf—was subject to liquidated damages.

A resource conservationist with the Natural Resources Conservation Service testified that Landgraf had "a hard time understanding what was going on" and expressed fear about the potential penalties. The conservationist communicated with Hoch about drafting a letter on Landgraf's behalf to request that the contracts be canceled. The conservationist felt that Landgraf's "lack of understanding, his state of mind, [and] his anxiety were circumstances that would warrant" the waiver of penalties upon cancellation. Hoch testified that Landgraf was upset that the work under the contracts was not getting accomplished, and Hoch assisted Landgraf in obtaining cancellation without penalties. The conservationist later met with Landgraf and Gail, and he testified that Gail was very angry about the cancellation of the contracts and that Landgraf was very nervous and uncomfortable. At trial, Gail explained that he was "a little hurt because the amount of work that I put into it, I never got paid for."

Landgraf was concerned about Gail's not farming the land. Gail continued to store his equipment on Landgraf's land after he stopped farming for Landgraf. There was also evidence

that Gail ran a cow/calf operation and kept the livestock on Landgraf's pasture without compensating Landgraf. Hoch suggested that Landgraf find another tenant, but Landgraf was reluctant to terminate Gail's lease. Gail was unsure whether he continued to have a lease with Landgraf after he stopped farming the land, but he testified that he did not pay anything on any such lease from and after 2005. Gail knew that others were interested in farming Landgraf's land. He testified that he suggested Landgraf should rent the land to someone else and that he brought someone to try to rent pasture from Landgraf but Landgraf refused. The Knakes offered to farm the land, but Landgraf declined the offer due to uncertainty about Gail's reaction. Robert testified that Landgraf complained about not getting enough money off the land to pay the taxes, but that Landgraf feared Gail would never repay him for the loan if Landgraf leased the land to someone else. Hoch obtained a proposal from an individual concerning a 5-year lease, but Landgraf similarly did not accept it.

In 2005, Gail had a discussion with Landgraf about a sale and gift of approximately 10 acres of Landgraf's land. The land included a residence across the road from Landgraf's home. After completion of a survey, Landgraf told Hoch that he did not want to sell all that land. The transaction did not occur. According to Gail, he declined the gift because it would cost too much money to rehabilitate the house on the property. Hoch testified that "major work" needed to be done to restore the house, but he had the impression that the transaction did not occur because Landgraf disagreed with where the stakes were laid out by the survey and did not want to convey that much property.

There is no dispute that the Neumeister family helped Landgraf. If Landgraf or Jerome needed something, they called the Neumeisters for help. Marlene testified that she visited Landgraf two to three times a week after Jerome died. An individual who farmed across the road from Landgraf observed Gail help Landgraf but never saw anyone else help

him. Another witness observed Gail helping Landgraf "[a] lot." Gail considered himself to be Landgraf's primary caregiver after Jerome died. Marlene testified about how Gail missed time with his family in order to help Landgraf. Even after Gail ceased farming Landgraf's land in 2005, he continued to help Landgraf with whatever Landgraf needed or wanted and visited Landgraf "probably every other day or every three days." Gail helped Landgraf because they were "pretty close friends."

b. Knakes

The Knakes had long farmed the 80-acre parcel owned by Landgraf. Robert farmed it for 61 years, and Jacqueline helped farm the land since 1973. They—like Gail—had a 40-60 crop share arrangement with Landgraf.

*(iv) Earlier Estate Planning*

a. 1999 Estate Planning Documents

In 1999, Hoch prepared a will and a charitable trust for Landgraf. Landgraf's will named Gail as the personal representative and bequeathed all farm equipment to him. It gave various sums of money to a number of recipients, including Gail, and gave the remainder of the estate to the charitable trust. The charitable trust specified that upon Landgraf's death, all non-real-estate assets would be held in trust for 25 years and all net income would be divided in one-fourth interests and paid on an annual basis to St. Mary's Catholic Church of Nebraska City, Nebraska; St. Benedict's Catholic Church of Nebraska City; St. Paulinus Catholic Church of Syracuse, Nebraska; and Lourdes Central Catholic School of Nebraska City. The charitable trust directed that the real estate be held for 50 years after Landgraf's death and then sold, with the proceeds divided equally between the same four charitable beneficiaries.

Gail drove Landgraf to the law office and watched Landgraf sign the documents. Gail testified that during the meeting,

Landgraf whispered to him that "this isn't the way I really want it." Gail told Landgraf that he could either sign the documents or ask Hoch to change them.

Hoch testified that Landgraf spent a lot of time thinking about his estate planning, and Hoch could not imagine that the documents did not reflect Landgraf's wishes. According to Hoch, Landgraf knew what he wanted in terms of estate planning: He wanted to have a trust, to have his farmland not sold, and to have the Catholic church as the final recipient. Hoch also testified that Landgraf "was not a sophisticated client" and that he needed somebody to help him with legal and financial matters.

b. Relationship With Hoch After 1999

Hoch continued to represent Landgraf after preparing the 1999 estate planning documents. Hoch assisted with Jerome's estate by closing the guardianship and conservatorship matter and opening an intestate estate. As noted, Hoch helped Landgraf with regard to the loan that Landgraf cosigned and the EQIP contracts. But Hoch did not recall performing any legal work for Landgraf after 2007.

A witness recalled an event at a bank in 2006 in which Landgraf approached Hoch and "was venting some of his anger" and was "evidently and apparently, very . . . troubled with a previous discussion; perhaps, an argument." Gail testified that in 2007, Landgraf told him that he had been "bullied" by Hoch but that Landgraf would not say what Hoch had done.

Hoch described his last memory of seeing Landgraf, which occurred in 2007. He saw Landgraf crying and shaking on a street in Nebraska City, and Landgraf said that he needed Hoch's help. Landgraf told Hoch that "they're trying to take my land" and that "[t]hey're trying to make a new will." Landgraf told Hoch that Gail and John Horan, an attorney, were trying to make Landgraf "change things and take his land." Hoch felt

that Landgraf exhibited diminished capacity at that time. He discouraged Landgraf from continuing a business relationship with Gail, but Landgraf did not heed Hoch's advice. Hoch called Horan and relayed what had happened. Horan recalled that Hoch told him Landgraf was mad at Hoch because Hoch told Landgraf that Landgraf was "probably going to have to go in a nursing home."

c. 2007 Meeting With Horan

In June 2007, Gail called Horan and said that he wanted Horan to speak with Landgraf about estate planning. Horan and two other attorneys had represented Gail in 2002 or 2003 in connection with an automobile accident. According to Gail, Landgraf selected Horan and Gail speculated that it could have been because Horan provided services for Gail's father-in-law, with whom Landgraf spoke. According to Jacqueline, Landgraf said that Gail talked him into going to see Gail's attorney rather than Hoch and that Landgraf did not want to do so.

Before Horan met with Landgraf, he received a call from Hoch expressing concern that Landgraf may not be doing what Landgraf wanted to do. When Horan met with Gail and Landgraf about changing Landgraf's will, Landgraf stated, upon Horan's inquiry, that he wanted Gail to be present during the consultation. Landgraf told Horan that he was thinking about "gifting or selling" 240 acres to the Neumeisters. Landgraf expressed concern about having to pay capital gains taxes if he sold the land, and Horan explained that a gift would not involve any out-of-pocket expense to Landgraf in taxes. The topic never went beyond dealing with the 240 acres of land. The meeting concluded by Horan's telling Landgraf to let Horan know whether Landgraf wanted to sell the property or give it away, and Horan would then prepare the appropriate paperwork. Horan never heard back from Landgraf. He did not have any concerns that Gail was influencing Landgraf.

*(v) Adult Protective Services Investigations*

The Nebraska Department of Health and Human Services investigated two intakes concerning Landgraf. The first intake, in 2007, was prompted by Landgraf's passing out at a funeral, being filthy and confused, and having a sunken face and grayish coloring. Landgraf thanked the adult protective services worker for checking on him, assured the worker that he did not need assistance, and asked not to be checked on again. The department found self-neglect.

In August 2009, the department received another intake regarding Landgraf. This intake concerned financial exploitation by Gail. The worker testified that Landgraf was "very guarded with his information and at times possibly a little paranoid." When asked if Landgraf expressed being upset with Gail about anything, the worker testified that "all he told me was that it was being taken care of; that I did not need to worry about it." Landgraf again refused any assistance. The worker found no evidence of wrongdoing by Gail. He testified that Landgraf was not a vulnerable adult, that he could make his own decisions, and that he was able to "protect himself."

*(vi) Other Pertinent Testimony*

a. Piper Testimony

Irene Piper met Landgraf in approximately 2008. She began taking him pies on a regular basis. Landgraf told her that he never wanted to see his land sold. With land and equipment being so expensive, Landgraf felt that it was impossible to be able to buy both land and equipment to farm, so he planned to give—not sell—his land "to his farmers." These discussions occurred between 2008 and 2011. Landgraf never mentioned wanting to give his land to a church. He was upset that someone had given money directly to a church in order to keep the church open and, shortly thereafter, the church closed; thus, the money did not benefit the community.

Piper met Gail on one occasion, and Landgraf introduced him as the person who took care of Landgraf. Piper did not feel that Gail interfered with her ability to communicate with Landgraf. She testified that Landgraf did not express any fear of Gail or show any sign that he was uncomfortable around Gail. Piper testified that she stopped taking pies to Landgraf, and instead sent the pies through Gail, when she determined that Landgraf was becoming increasingly frail.

b. Easter Testimony

Arlene Easter knew Landgraf from when she and her husband did custom farming for him and from selling him crop insurance. She testified that Landgraf wanted a popular level of insurance coverage and, even though she sensed that Gail likely wanted better coverage as the operator, she thought Landgraf got his way in those situations. Easter always felt like Landgraf was sufficiently able to make decisions in both the crop insurance and the banking context. She had the impression that Gail and Landgraf were friends and that they liked one another.

c. Knake Family Testimony

Jacqueline felt that Landgraf's mental capacity remained consistent over the years. Landgraf became more talkative after Jerome's death, and Jacqueline would speak with him in her vehicle in Landgraf's yard because he would not allow her in his house. If Landgraf heard a vehicle drive by, he would ask if it was Gail. Jacqueline testified that Landgraf seemed to have a sigh of relief if it was not Gail driving by. Landgraf told the Knakes that shortly after they would leave, Gail would arrive and want to know why the Knakes were there.

Craig Knake, the Knakes' son, recalled an occasion in 2009 where he and Landgraf spoke for 4 to 5 hours in Craig's vehicle. Every time someone drove by, Landgraf seemed nervous and asked if it was Gail. Late that night, Gail pulled in behind Craig and Landgraf and asked what Craig was doing there. Craig testified that Landgraf "kind of went to mute." On other

occasions when Craig spoke with Landgraf, he would notice Gail drive by several times. According to Craig, Landgraf shook when discussing Gail. Landgraf told Craig that Gail said Landgraf needed to see a new attorney, that Landgraf said he did not want to go, but that Gail grabbed Landgraf by the arm and said they needed to go talk to the attorney.

Landgraf told Robert that Gail wanted a gift of some land, and Robert suggested that Landgraf give Gail "the 380 across the road" if Gail could get the money to farm it. Robert had the impression that Landgraf and Gail had a close relationship and that Landgraf trusted Gail. He thought that Gail had "some" influence over Landgraf's business decisions.

#### d. Testimony Concerning Susceptibility to Undue Influence

Dr. Bennett Blum, a physician specializing in psychiatry with subspecialties in forensic psychiatry and geriatric psychiatry, performed an assessment related to the deeds at issue. He never met Landgraf, but he reviewed depositions, legal briefs, discovery responses, the deeds at issue, documents from various attorney files, medical records, records from the Department of Health and Human Services, and police reports. He testified that "any type of decreased general function leads to increased dependency or increased reliance on someone else and, therefore, could increase the susceptibility to being manipulated and, therefore, to undue influence." Blum opined that during the period from 2007 through 2013, Landgraf suffered from a class of cognitive ability referred to as "impaired executive functions" that was mild to moderate in severity. He testified that the ability to understand deeds and the consequences of executing deeds or contracts required intact executive functions. According to Blum, people who are particularly stubborn or rigid are one of the easiest types of personalities to manipulate. Blum believed that Landgraf's cognitive impairment existed during 2011 and that Landgraf was unduly influenced in connection with the deeds.

At least eight witnesses familiar with Landgraf testified that he was stubborn and not easily persuaded. Hoch testified that Landgraf did not make decisions on the spur of the moment. And an individual who assisted Landgraf with the preparation of tax documents testified that Landgraf always seemed to be of sound mind.

Other testimony offered insight on Landgraf's relationship with Gail. An individual who owned land next to Landgraf testified that in March 2011, Landgraf told him that things were "not too good," because the Neumeisters were "not doing what they're supposed to be doing." When asked why Landgraf did not just tell them to leave, Landgraf said that he could not and that he was "scared of them." Another witness testified that Landgraf depended on Gail. But at least six witnesses did not believe that Landgraf was afraid of Gail. Others testified that Landgraf did not express resentment or anger toward Gail.

(b) 2011 Estate Planning

Gail testified that in 2011, Landgraf wanted to change his estate planning documents after an incident in which Landgraf's pastor asked Gail to speak to Landgraf about getting his property in better shape. Gail testified that when he told Landgraf about the conversation, Landgraf "got all upset and slapped his legs and says why are they always in my business?" The pastor did not recall any such conversation.

According to Gail, Landgraf handed him an envelope and asked him to have Marlene type the writing on the envelope. Neither Gail nor Marlene discussed the notes on the envelope with Landgraf. Marlene typed the notes onto three pages of paper, which pages were half filled, at most. Landgraf's signature appears on two of the three pages, but Gail did not recall when or why Landgraf signed those pages.

After Marlene typed the notes, Landgraf wanted to know what lawyer he could see. Gail mentioned Hoch and Horan, but Landgraf said no. Gail and Landgraf drove to Humboldt,

Nebraska, to see Kelly Werts. Gail testified that he did not know Werts or anyone at that law firm, although a secretary in the firm testified that Gail worked with her husband.

Landgraf told Werts about his desire to change his estate plan. Werts felt that Landgraf seemed alert and intelligent. Gail testified that at the time of that meeting, he had no idea how Landgraf wanted to change his estate. Werts testified that when it became clear estate planning was the focus of the meeting, Werts asked Landgraf if Gail could stay in the room and Landgraf said yes. According to Werts, Gail's role during the meeting was as "a bystander," but he clarified some details regarding the EQIP program. Werts saw no evidence that Gail had influenced Landgraf to meet with Werts or that Gail was influencing any decisions that Landgraf made during the meeting.

Werts provided insight on why Landgraf did not return to Hoch for changes to Landgraf's estate planning documents. He testified that Hoch had earlier refused to make the changes that Landgraf wanted. According to Werts, Landgraf expressed "a general frustration that [Hoch] wasn't doing what [Landgraf] wanted done specific to current changes that he wanted to make" and referred to Hoch's interference in "making [Gail] a . . . tenant on a farm and some [Farm Service Agency] programs and EQIP programs." Werts thought that Landgraf believed all the Nebraska City attorneys were "in cahoots" with one another and felt that if he spoke with an attorney from out of town, there may not be as much sharing of information.

Landgraf handed Werts the typewritten sheets with Landgraf's instructions, and Werts went through them line by line to confirm that they represented Landgraf's wishes. Landgraf told Werts that he wanted to give the farm to the Neumeisters in exchange for their paying Landgraf's bills. Landgraf wanted to give 160 acres of land as an outright gift to the Neumeisters and then to sell the other acres to the Neumeisters at $350 per acre—a sale that Werts acknowledged

would be significantly less than fair market value. Landgraf wanted to give the Knakes and Witte the lands they were respectively farming upon Landgraf's death. Landgraf did not want money to be distributed to the specified charities outright; instead, he wanted it to be held in trust and "doled out" as needed by the charities.

Based on the meeting, Werts' understanding was that Landgraf's ultimate goal was to have Gail pay his bills. He suggested that a better structure, which would be easier to explain on a tax return, would be to sell some land for a fair market price to the Neumeisters and then to give as a gift the balance of the acres. Thus, Werts prepared deeds giving the Neumeisters 852.82 acres as a gift and transferring 148.09 acres to them in return for a promissory note of $296,180. Werts also prepared a trust deed for the Neumeisters to sign in order to secure payment of the note with a lien on the property.

Werts drafted the "Carl Landgraf Revocable Living Trust." The trust directed that upon Landgraf's death, the trustee—Gail—was to distribute real estate to the Knakes and Witte and all remaining real or tangible personal property held by the trust to Gail. Upon Landgraf's death, any indebtedness owed by the Neumeisters was forgiven. According to the document, the remainder of the trust property was to be held and managed for seven designated charities, which included the four charities named in the 1999 charitable trust. Fifteen years after Landgraf's death, the trustee was instructed to distribute any remaining principal and interest equally to St. Mary's Catholic Church in Nebraska City and St. Paulinus Catholic Church in Syracuse.

On June 11, 2011, in addition to the two joint tenancy warranty deeds at issue, Landgraf also signed the Carl Landgraf Revocable Living Trust and powers of attorney naming Gail as power of attorney for both financial matters and health care decisions. The secretary at Werts' law firm testified that she would not have notarized the deeds if she had concerns

that Landgraf was being unduly influenced at the time they were signed. Werts was not present on either occasion when Landgraf signed the deeds conveying land to the Neumeisters. The Neumeisters did not sign the promissory note or the trust deed prepared by Werts; Gail testified that Landgraf did not want the Neumeisters to sign them.

Landgraf gave the property to the Neumeisters outright rather than holding it in trust, and Gail testified that Landgraf said "now you can deal with everything." Gail "figured [Landgraf] was tired of the people hounding him and bugging him." Gail explained that "the county [had told Landgraf to deal] with the trees [and] the thistle problem" and that others were telling Landgraf what he should be doing with the farm. Werts testified that there was some urgency on Landgraf's part in getting the deeds prepared so that Gail could commence farming.

### (c) After Transaction

#### *(i) Farming*

After the deeds were signed, Gail began farming the property. He had a good crop and did not share any of the proceeds with Landgraf.

#### *(ii) Post-Transfer Payments*

Landgraf continued to live in his house after giving the property to the Neumeisters. Gail testified that the understanding was that he would take care of all of Landgraf's bills as long as Landgraf lived, including electric bills, telephone bills, and groceries. The expenses were to be paid with Gail's money. Landgraf's money would be used if Landgraf wanted "something special" and for contributions to the church, medical expenses, and nursing home costs. However, the evidence showed that Gail paid for some things, such as Landgraf's power bill and attorney fees, with Landgraf's money.

Gail was supposed to use his money to pay the real estate taxes on the land leased by the Knakes and Witte. An exhibit

showed that Gail generally used his funds to pay those taxes for the second half of the 2010 taxes through 2014. However, Landgraf paid the second half of the taxes for 2011. Gail testified that Landgraf did so because Landgraf needed some expenses to offset the extra money that the Witte property was going to bring. After Landgraf died, Gail paid the taxes out of Landgraf's revocable trust.

*(iii) Reliance on Gail*

In the fall of 2011, Landgraf began driving less and Gail provided him with transportation. When Landgraf completely ceased driving, Gail drove Landgraf to Mass every week.

An exhibit containing telephone records showed Landgraf's telephone calls. Between January 30, 2012, and January 24, 2013—when Landgraf entered the nursing home—Gail either called or received a call from Landgraf's telephone line 6,142 times. Those calls accounted for 81 percent of all of Landgraf's incoming or outgoing telephone calls during that time period.

*(iv) Landgraf's Hospitalization and Stay in Nursing Home*

On January 25, 2013, Gail took Landgraf to a hospital. When Landgraf arrived at the hospital, he was covered with fecal matter. Landgraf was then moved to a nursing home. Gail visited Landgraf at the nursing home almost every day. The director of social services at the nursing home testified that when Landgraf became upset, he would want to talk to Gail and would become calm after doing so.

Landgraf had anxiety and fear about theft of his property at the farm. To try to resolve this fear while Landgraf was in the nursing home, Gail and Landgraf planned to erect a building on the farm and to move the contents of Landgraf's house and outbuildings into it. They planned to put a bedroom, kitchen, and bathroom in one corner of the building for Landgraf's use. Gail purchased materials for the building using funds from Landgraf's revocable trust.

On March 6, 2013, Landgraf had an emergency surgery. Gail was present for the surgery. The following day, Landgraf returned to the nursing home. Also on March 7, Gail used the power of attorney to write a check transferring money from Landgraf's personal checking account to the revocable trust account in order to cover the cost of the building materials and the nursing home payments. On March 10, Landgraf died unexpectedly. Because the funds from the March 7 check were not deposited until March 12—2 days after Landgraf's death—Gail reimbursed Landgraf's estate from the trust in the amount of $47,500. Gail ultimately did not construct the building due to Landgraf's death.

*(v) Criminal Investigation*

In May or June 2013, the Nebraska State Patrol received a complaint about a large amount of property that had been transferred from Landgraf to Gail for little consideration. There was concern that Landgraf was coerced or not competent to transfer that property. A criminal investigator interviewed Gail twice concerning the circumstances of the property transfer. Gail told the investigator that the idea to transfer the property was Landgraf's and that Landgraf wanted the individuals who farmed the ground to own the property after Landgraf's death. Gail falsely told the investigator that Landgraf went to Werts' office without Gail and that Landgraf never loaned Gail money. After subpoenaing bank records, the investigator was satisfied that Gail had not taken actions to benefit himself.

### 4. Pertinent Motions During Trial

At one point during the trial, the Neumeisters moved to dismiss for lack of evidence. Counsel explained, "I know [Mock] hasn't officially declared that [he has] rested, but for purposes of preserving the record, my understanding from the case law is that's the bench trial equivalent of a directed verdict." The district court overruled the motion.

At the end of the Neumeisters' case in chief, Mock moved to dismiss the Neumeisters' counterclaim. The district court overruled the motion.

At the close of all the evidence, the Neumeisters renewed their motion to dismiss for want of evidence. Mock also renewed his motion to dismiss the Neumeisters' counterclaim. The district court overruled both motions.

Also at the close of the evidence, the Neumeisters submitted their motion to determine and tax costs. They requested costs of $3,025.59.

### 5. District Court's Decree

Following the trial, the district court entered a comprehensive 38-page decree. The court stated that it must "consider a contrasting issue in the realm of the burden of proof." The court explained:

> [I]t is not completely clear . . . whether proof of a confidential or fiduciary relationship coupled with such suspicious circumstances in a conveyance case strictly applies. The Court does believe, based on the language found in [*In re Estate of Clinger*[1]], however, that it is likely applicable. As previously stated, the Supreme Court has clearly delineated a higher standard of proof for the contestant with regard to cases of conveyance as opposed to will contests. Therefore, there is some precedent for treating the two scenarios differently. Ultimately, the case law is clear that the contestant ([Mock]) carries a clear and convincing burden of proof in order to prevail on his claim of undue influence and, therefore, must prove those elements accordingly. This Court will certainly consider any and all evidence of a confidential or fiduciary relationship coupled with suspicious circumstances . . . that have been proven in this case in determining whether [Mock] has met his burden. But the ultimate burden will remain with [Mock].

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[1] *In re Estate of Clinger*, 292 Neb. 237, 872 N.W.2d 37 (2015).

The district court found that evidence showed a confidential relationship between Landgraf and Gail prior to the execution of the 2011 deeds and trust. The court reasoned that because significant evidence existed which would both support and negate an inference that the deeds were the result of undue influence, it could not find that Mock had met his burden of proof by clear and convincing evidence. The court therefore found in favor of the Neumeisters on the claim of undue influence and determined that their counterclaim was moot.

The court sustained the Neumeisters' motion to tax costs as to mileage fees, witness fees, and postage. The court overruled the motion as to deposition costs.

Mock appealed, and the Neumeisters filed a cross-appeal. We granted Mock's petition to bypass review by the Nebraska Court of Appeals.

## III. ASSIGNMENTS OF ERROR

Mock assigns that the district court erred in (1) "failing to set aside the disputed instruments because [Mock's] evidence shows a confidential or fiduciary relationship coupled with suspicious circumstances sufficient to justify an inference of undue influence," (2) "failing to set aside the disputed instruments because [the Neumeisters] failed to rebut the inference of undue influence," and (3) "failing to dismiss the counterclaim of [the Neumeisters] as a matter of law."

On cross-appeal, the Neumeisters allege that the district court abused its discretion in refusing to tax the costs of original depositions to Mock as part of the judgment.

## IV. STANDARD OF REVIEW

[1,2] An action to set aside inter vivos transfers of property on the basis that they were made as the result of undue influence is one in equity and, as such, is reviewed by an appellate court de novo on the record.[2] Despite de novo review, when

[2] See *Peterson v. Peterson*, 230 Neb. 479, 432 N.W.2d 231 (1988).

credible evidence is in conflict on material issues of fact, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.[3]

[3] The decision of a trial court regarding taxing of costs is reviewed for an abuse of discretion.[4]

## V. ANALYSIS

### 1. Undue Influence

#### (a) Settled Principles of Law

We begin by summarizing well-settled principles governing an action to set aside a deed on the basis of undue influence. This establishes our framework.

[4-6] The elements which must be proved in order to vitiate a transfer of property on the ground of undue influence are that (1) the transferor was subject to undue influence, (2) there was an opportunity to exercise such influence, (3) there was a disposition to exercise such influence, and (4) the transfer was clearly made as the result of such influence.[5] The undue influence which will void a deed is an unlawful or fraudulent influence which controls the will of the grantor.[6] The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance but only with whether it was the voluntary act of the grantor.[7]

[7-9] The burden is on the party alleging the execution of a deed was the result of undue influence to prove such

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[3] See, *Hopkins v. Hopkins*, 294 Neb. 417, 883 N.W.2d 363 (2016); *Goff v. Weeks*, 246 Neb. 163, 517 N.W.2d 387 (1994).

[4] *Martensen v. Rejda Bros.*, 283 Neb. 279, 808 N.W.2d 855 (2012).

[5] *Fremont Nat. Bank & Trust Co. v. Beerbohm*, 223 Neb. 657, 392 N.W.2d 767 (1986).

[6] *Rule v. Roth*, 199 Neb. 746, 261 N.W.2d 370 (1978).

[7] *Caruso v. Parkos*, 262 Neb. 961, 637 N.W.2d 351 (2002).

undue influence by clear and convincing evidence.[8] Clear and convincing evidence is evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.[9] Mere suspicion, surmise, or conjecture does not warrant a finding of undue influence; instead, there must be a solid foundation of established facts on which to rest the inference of its existence.[10]

(b) Contrasting Standards

Mock's petition for bypass proposed to address whether the standard of proving undue influence should be different depending upon whether the transfer was inter vivos or testamentary. Traditionally, we have applied different burdens of proof. In an equitable action, the proponent of an undue influence theory bears the burden to prove each of the elements by clear and convincing evidence.[11] On the other hand, in a will contest, undue influence need only be proved by the greater weight of the evidence.[12]

[10] But Mock's brief assigns no error to the district court's application of the equity standard, and his brief recites it in defining our scope of review. To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error.[13] Because he did neither, we do not address it.

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[8] *Id.*

[9] *In re Estate of Mecello*, 262 Neb. 493, 633 N.W.2d 892 (2001).

[10] *Caruso v. Parkos, supra* note 7; *Craig v. Kile*, 213 Neb. 340, 329 N.W.2d 340 (1983); *McDonald v. McDonald*, 207 Neb. 217, 298 N.W.2d 136 (1980); *Zych v. Zych*, 183 Neb. 708, 163 N.W.2d 882 (1969).

[11] *Goff v. Weeks, supra* note 3.

[12] See, *Hartley v. Metropolitan Util. Dist.*, 294 Neb. 870, 885 N.W.2d 675 (2016) (equivalent burdens); *In re Estate of Price*, 223 Neb. 12, 388 N.W.2d 72 (1986) (will contest burden).

[13] *In re Claims Against Pierce Elevator*, 291 Neb. 798, 868 N.W.2d 781 (2015).

### (c) Mock's Formulation of Error

#### *(i) Parties' Contentions*

Mock's first two assignments of error assert, respectively, that his evidence justified an inference of undue influence and that the Neumeisters failed to rebut the inference. This formulation appears to be driven by language from two of our opinions: *In re Estate of Hedke*[14] and *In re Estate of Clinger*.[15]

[11] In *In re Estate of Hedke*, we discussed a "presumption of undue influence." We began with a truism: One does not exert undue influence in a crowd; it is usually surrounded by all possible secrecy. This led to the unremarkable legal proposition that undue influence is usually difficult to prove by direct evidence and that it rests largely on inferences drawn from facts and circumstances surrounding the testator's life, character, and mental condition.[16] Depending upon the evidence in a particular case, these inferences may drive a fact finder's conclusion.

But, after observing that the ultimate burden of persuasion for undue influence remains with the contestant throughout the trial, we stated that our "case law on the proof necessary to rebut a presumption of undue influence is inconclusive."[17]

Mock now invites us to "clarify that the burden[-]shifting framework [of *In re Estate of Hedke* and *In re Estate of Clinger*] applies to the undue influence challenge to inter vivos conveyances of real property in this case."[18] On the other hand, the Neumeisters assert that in *In re Estate of Clinger*, we "altogether abandoned the 'presumption of undue influence.'"[19]

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[14] *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009).

[15] *In re Estate of Clinger, supra* note 1.

[16] See *In re Estate of Hedke, supra* note 14.

[17] *Id.* at 745, 775 N.W.2d at 29.

[18] Brief for appellant at 6.

[19] Brief for appellees at 12.

Moreover, they argue that we "create[d] even more confusion" by discussing an inference of undue influence.[20]

*(ii) Reasoning of* In re Estate of Clinger

In *In re Estate of Clinger*, one of the issues on appeal was the trial court's refusal of the contestants' proposed instructions regarding a "presumption" of undue influence. We reaffirmed our holding from 1977[21] and declared that "the concept referred to as a 'presumption of undue influence' in will contests is not a true presumption" within the meaning of Neb. Rev. Stat. § 27-301 (Reissue 2016).[22] We noted that several of our cases after 1977 referred to an "'inference' of undue influence,"[23] and we discouraged use of the phrase "presumption of undue influence."

Our core holding in *In re Estate of Clinger* merely rejected using the term "presumption of undue influence" in a jury instruction. We observed that "sound reasons dictate against using the language of presumption in charging the jury in a will contest"[24] and that "the language of presumption becomes unimportant and potentially misleading"[25] where the contestant met the burden of going forward and the proponent met the burden of producing contrary evidence. We explained that in a jury trial, "[a]n instruction that a 'presumption' of undue influence exists would conflict with the statutory burden of persuasion that must be satisfied by the contestant" and "could easily be seen by a jury as placing the judge's imprimatur on the contestant's claim."[26] Thus, our holding

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[20] *Id.* at 14.

[21] See *McGowan v. McGowan*, 197 Neb. 596, 250 N.W.2d 234 (1977).

[22] *In re Estate of Clinger, supra* note 1, 292 Neb. at 253, 872 N.W.2d at 51.

[23] *Id.* at 249, 872 N.W.2d at 48.

[24] *Id.* at 252, 872 N.W.2d at 50.

[25] *Id.* at 253, 872 N.W.2d at 50.

[26] *Id.* at 253, 872 N.W.2d at 50-51.

in *In re Estate of Clinger* really has little to do with the case before us.

In the course of discussing the difference in terminology, we observed: "If a contestant's evidence shows a confidential or fiduciary relationship, coupled with other suspicious circumstances, the contestant has introduced evidence sufficient to justify an inference of undue influence. In other words, that evidence is sufficient to sustain the contestant's prima facie case of undue influence."[27] This was not new. We had previously said:

> In an undue influence case the burden of proof, or the risk of nonpersuasion on that issue, is on the plaintiff and remains there throughout the trial. . . . In an action based on undue influence, when a confidential relationship exists between the parties, and a prima facie case is established, the burden of proof remains on the plaintiff, but the burden of going forward with the evidence shifts to the defendants.[28]

We then said that "[t]he inference of undue influence may be rebutted by proof that the testator had competent independent advice and that the will was his or her own voluntary act."[29] But the case from which we drew this language added, "or by other evidence of the circumstances surrounding the execution of the will."[30] This language from *In re Estate of Clinger* and our statement in *In re Estate of Hedke* about inconclusive case law seems to have distracted the parties from the decisive question.

*(iii) Effect of Inferences*

Given Mock's assignments of error, the burden-shifting framework is of little import in this case. Mock's first two

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[27] *Id.* at 253, 872 N.W.2d at 51.

[28] *Anderson v. Claussen*, 200 Neb. 74, 80, 262 N.W.2d 438, 441-42 (1978).

[29] *In re Estate of Clinger, supra* note 1, 292 Neb. at 253-54, 872 N.W.2d at 51.

[30] *In re Estate of Novak*, 235 Neb. 939, 947, 458 N.W.2d 221, 227 (1990).

assignments of error assert that the district court erred in failing to set aside the disputed instruments. He challenges the court's ultimate conclusion and does not assert error in failing to grant the bench trial equivalent of a directed verdict.

A motion to dismiss at the close of all the evidence has the same legal effect as a motion for directed verdict.[31] A party against whom a motion to dismiss is directed is entitled to have all relevant evidence accepted or treated as true, every controverted fact as favorably resolved, and every beneficial inference reasonably deducible from the evidence.[32] A "prima facie case" means that evidence sufficiently establishes elements of a cause of action and, notwithstanding a motion for a directed verdict in a jury trial or a motion to dismiss in a nonjury trial, allows submission of the case to the fact finder for disposition.[33] Although Mock moved to dismiss the Neumeisters' counterclaim, he never moved for the bench trial equivalent of a motion for directed verdict as to his claim. Admittedly, a plaintiff has little reason to do so in a bench trial. And while the Neumeisters did move to dismiss Mock's case, both at the close of his case and at the close of evidence, they assign no error to the overruling of their motions.

Because no error is assigned to any ruling on a motion to dismiss made during the trial, the question is not whether Mock sustained his initial burden of production or whether the Neumeisters thereafter sustained some burden of production. The district court effectively determined that each had done so. The court properly gave its attention to the ultimate issue—whether Mock sustained his burden of persuasion.

The question now is whether this court, upon our de novo review, will reach a different conclusion regarding the

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[31] *American Central City v. Joint Antelope Valley Auth.*, 281 Neb. 742, 807 N.W.2d 170 (2011).

[32] *Id.*

[33] *Id.*

elements of undue influence, taking into account the inferences flowing from the evidence. We return to where we began. The four elements of undue influence are settled law. And the district court ultimately focused on the correct elements.

In our de novo review, witness credibility is crucial. Mock dedicated a portion of his brief to attack Gail's credibility, and we have considered his arguments. But we also give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.[34]

### (d) Evidence as to Undue Influence

[12] In the context of a will contest, we have stated that it is not necessary for a court in evaluating the evidence to separate each fact supported by the evidence and pigeonhole it under one or more of the four essential elements and that the trier of fact should view the entire evidence and decide whether the evidence as a whole proves each element of undue influence.[35] We apply the same concept to a claim of undue influence in an action to set aside a deed.

The evidence shows that Gail was long a part of Landgraf's estate planning and that Landgraf had previously contemplated giving or selling some of his land to Gail. Landgraf's 1999 will nominated Gail as the personal representative, bequeathed all of Landgraf's farm equipment to Gail, and gave Gail $2,000. Gail was present when Landgraf executed the 1999 estate planning documents, and Hoch testified that he would not have allowed Landgraf to sign the will if Hoch had concerns about undue influence by Gail. In August 2005, Hoch prepared a real estate transfer statement in connection with a gift to the Neumeisters of approximately 10 acres of Landgraf's land, but the transaction never occurred. In 2007,

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[34] See *Hopkins v. Hopkins, supra* note 3.

[35] See *In re Estate of Hedke, supra* note 14.

Landgraf conferred with Horan about "gifting or selling" 240 acres to the Neumeisters, but Horan never heard back from Landgraf. Horan did not have any concerns that Gail was influencing Landgraf. Then, in 2011, Landgraf met with Werts about giving a quarter of his land immediately to Gail and selling other land to the Neumeisters for $350 per acre. As noted at the outset, Landgraf ultimately gave approximately 1,000 acres to the Neumeisters. Werts did not believe that Landgraf's conveyances to the Neumeisters were the result of undue influence.

After Jerome died in 2000, Landgraf had no surviving immediate family. We agree with the district court's finding that "over time, . . . Landgraf developed a very close and almost familial relationship with Gail." The evidence established that Landgraf depended on Gail and called on Gail whenever he needed assistance. While that may have made Landgraf more susceptible to influence by Gail, it also provides a logical reason for Landgraf to give a considerable amount of his real estate to the Neumeisters.

Piper, who appears to be a disinterested witness, testified that Landgraf told her he planned to give his land "to his farmers." That is precisely what Landgraf did through his 2011 estate planning documents. Although the Neumeisters had stopped farming Landgraf's land in 2005, no one has farmed it since that time. And while the Neumeisters received considerably more land and received it immediately, Landgraf also gave to the Knakes and to Witte the land each was farming. Mock does not contend that those gifts were the result of undue influence.

This was not a clear-cut case. At first blush, Mock's recitation of facts in his brief makes a strong argument. But the Neumeisters' evidence reveals a more nuanced situation. After carefully considering the entirety of the record, we are not firmly persuaded that the deeds executed by Landgraf were the result of undue influence asserted upon him by Gail.

### 2. Counterclaim

The district court determined that the Neumeisters' counterclaim was moot. On appeal, Mock requests that we dismiss the counterclaim for lack of evidence if we reverse the district court's decision regarding the setting aside of the deeds. Because we affirm the court's decision that the deeds were not the result of undue influence, we need not further address this assigned error.

### 3. Taxing of Costs of Original Depositions

Prior to entry of the decree, the Neumeisters filed a motion to determine and tax costs, seeking $3,025.59 to be taxed as part of the judgment. Those costs included expenses paid for the original depositions of five individuals. On cross-appeal, the Neumeisters argue that the district court erred in failing to tax the costs for original depositions against Mock. We disagree.

[13] This action sounds in equity. The taxation of costs in equitable actions is governed by Neb. Rev. Stat. § 25-1711 (Reissue 2016).[36] This statute provides that "the court may award and tax costs, and apportion the same between the parties . . . as in its discretion it may think right and equitable."[37] Although the statute addresses when a court may tax costs, it does not specify what costs are taxable.[38]

[14] Assuming without deciding that the depositions could be taxed as costs, the district court was not required to tax those costs to Mock. Unlike Neb. Rev. Stat. §§ 25-1708 and 25-1710 (Reissue 2016), which provide that costs "shall be allowed of course" to the successful party, § 25-1711 gives the court discretion to tax costs and to apportion such costs

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[36] *City of Falls City v. Nebraska Mun. Power Pool*, 281 Neb. 230, 795 N.W.2d 256 (2011).

[37] § 25-1711.

[38] See *City of Falls City v. Nebraska Mun. Power Pool, supra* note 36.

between the parties. We cannot say that the court abused its discretion in declining to tax the deposition costs to Mock.

## VI. CONCLUSION

We conclude that Mock failed to prove by clear and convincing evidence that the deeds at issue were the result of undue influence. We find no abuse of discretion by the court in declining to tax the costs of depositions to Mock. Accordingly, we affirm the district court's decree.

Affirmed.

Kelch and Funke, JJ., not participating.

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

# Midland Properties, L.L.C., and Jerry Morgan, appellants, v. Wells Fargo, N.A., et al., appellees.

893 N.W.2d 460

Filed April 14, 2017. No. S-16-260.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Trial: Evidence: Appeal and Error.** An appellate court reviews the trial court's conclusions with regard to evidentiary foundation for an abuse of discretion.
4. **Pleadings: Appeal and Error.** Permission to amend a pleading is addressed to the discretion of the trial court, and an appellate court will not disturb the trial court's decision absent an abuse of discretion.
5. **Summary Judgment: Proof.** A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that if the evidence presented for summary judgment remains uncontroverted, the moving party is entitled to judgment as a matter of law.
6. ____: ____. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party.
7. **Evidence: Witnesses.** Communications by telephone are admissible in evidence where otherwise relevant to the fact or facts in issue, provided

the identity of the person with whom the witness spoke or the person whom he or she heard speak is satisfactorily established.

8. **Torts: Intent: Proof.** To succeed on a claim for tortious interference with a business relationship or expectancy, a plaintiff must prove (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.
9. **Summary Judgment: Affidavits.** Affidavits and other sworn statements offered in support or opposition of summary judgment shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Appeal from the District Court for Douglas County: Timothy P. Burns, Judge. Affirmed.

Douglas W. Ruge for appellants.

Jennifer L. Andrews and Alison M. Gutierrez, of Kutak Rock, L.L.P., for appellee Wells Fargo, N.A.

Thomas J. Young, and Lilly Richardson-Severn, of H & S Partnership, L.L.P., for appellees HBI, L.L.C., and H & S Partnership, LLP.

Heavican, C.J., Wright, Cassel, Stacy, Kelch, and Funke, JJ.

Cassel, J.

## I. INTRODUCTION

This appeal arises from an action for wrongful foreclosure of a deed of trust, quiet title, tortious interference with business relationships, and declaratory relief. The district court granted summary judgment of dismissal and denied leave to file an amended complaint. Because there was no genuine issue of material fact and no abuse of discretion in denying leave to amend, we affirm the judgment.

## II. BACKGROUND

### 1. Foreclosure

Jerry Morgan purchased property in Douglas County, Nebraska, by obtaining a loan secured by a deed of trust. He conveyed the property to his company, Midland Properties, L.L.C., and managed the property as a rental.

Wells Fargo, N.A., was eventually assigned the lender's interest in the promissory note and deed of trust. Several years later, it initiated a nonjudicial foreclosure on the deed of trust, citing as cause Morgan's failure to make payments as they became due. HBI, L.L.C., purchased the property at a trustee's sale and later conveyed the property to H & S Partnership, LLP (H&S).

### 2. Proceedings on Amended Complaint

Morgan and Midland Properties (collectively appellants) filed an amended complaint against Wells Fargo, HBI, and H&S. Appellants generally alleged that they were not in default on the loan, that Wells Fargo wrongfully foreclosed, and that there were irregularities in the assignment of the deed of trust and promissory note, in the substitution of trustees, and in the trustee's sale. The complaint also alleged that Wells Fargo, or its agents, improperly interacted with appellants' tenants before the trustee's sale, thereby committing tortious interference with business relationships and causing $50,000 in damages. Appellants sought declaratory relief, monetary damages, and equitable relief setting aside the trustee's sale and quieting title to the property.

Wells Fargo filed a motion for summary judgment. Appellants later moved for leave to file a "Second Amended Complaint" that added another defendant. After a hearing, the court found that Wells Fargo established a prima facie case for summary judgment. The court disregarded certain statements offered in Morgan's affidavit and deposition as hearsay and otherwise found that appellants offered only general allegations

unsupported by the evidence. Because the court determined that appellants' evidence failed to rebut Wells Fargo's evidence, it sustained the motion for summary judgment and dismissed the amended complaint. After finding that appellants failed to show why another defendant should be added so late in the proceeding, the court also denied appellants' motion to file a second amended complaint.

A timely appeal followed, which we moved to our docket.[1]

## III. ASSIGNMENTS OF ERROR

Appellants made four assignments of error which, consolidated and restated, assert that the district court erred in (1) determining that there was no genuine issue of material fact, (2) excluding Morgan's testimony of (a) conversations with Wells Fargo representatives for lack of proper foundation and (b) statements from appellants' tenants establishing wrongful interference, and (3) not allowing appellants to file a second amended complaint which added another defendant. Our restatement renders moot Wells Fargo's suggestion that appellants' first three assignments were too generalized and vague.

## IV. STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[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]

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

[2] *Bixenmann v. Dickinson Land Surveyors*, 294 Neb. 407, 882 N.W.2d 910 (2016), *modified on denial of rehearing* 295 Neb. 40, 886 N.W.2d 277.

[3] *Id.*

[3] An appellate court reviews the trial court's conclusions with regard to evidentiary foundation for an abuse of discretion.[4]

[4] Permission to amend a pleading is addressed to the discretion of the trial court, and an appellate court will not disturb the trial court's decision absent an abuse of discretion.[5]

## V. ANALYSIS

### 1. Summary Judgment

[5,6] A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that if the evidence presented for summary judgment remains uncontroverted, the moving party is entitled to judgment as a matter of law.[6] After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party.[7]

All of appellants' arguments opposing the entry of summary judgment are premised on excluded evidence which they contend established genuine issues of material fact. According to appellants, the district court improperly excluded and disregarded parts of Morgan's deposition and affidavit testimony. Specifically, they allege that Morgan's testimony concerning conversations with Wells Fargo employees were admissible as nonhearsay and refuted Wells Fargo's right to foreclosure. They also allege that reports from his tenants were admissible as "rebuttal" evidence and supported their claim for tortious interference with business relationships.[8]

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[4] See *State v. Casterline*, 293 Neb. 41, 878 N.W.2d 38 (2016).

[5] *Golnick v. Callender*, 290 Neb. 395, 860 N.W.2d 180 (2015).

[6] *SID No. 196 of Douglas Cty. v. City of Valley*, 290 Neb. 1, 858 N.W.2d 553 (2015).

[7] *Id.*

[8] Brief for appellants at 17.

(a) Right to Foreclosure

Appellants claimed that Wells Fargo had no right to foreclosure, because Morgan was not in default and had insufficient notice. They rely upon Morgan's deposition testimony that unknown representatives of Wells Fargo told him not to make the payments and they would not foreclose. Wells Fargo initially offered evidence to the contrary.

Wells Fargo established that Morgan failed to make payments as they were due and that it notified him of the default and its consequences. It acknowledged that Morgan was approved for a trial mortgage modification period but that his application was ultimately denied due to title issues. It also produced evidence of compliance with all notice and recording requirements for the trustee's sale. Documents that appellants produced, which Wells Fargo had sent to Morgan's address, directly contradicted the verbal instructions Morgan claimed to have received. This was sufficient to establish that Wells Fargo was entitled to judgment as a matter of law. Thus, the burden shifted to appellants to present evidence showing an issue of material fact.

Appellants offered Morgan's deposition. He testified to telephone conversations during which he was "instructed by Wells Fargo personnel not to make any . . . payments until they gave [him] the test payments to pay" for the trial mortgage modification period. He also claimed that he was never told that his loan modification request was denied and that "Wells Fargo personnel told [him] they wouldn't foreclose" on the property. But appellants failed to establish the required foundation.

[7] Morgan was unable to identify any of the purported representatives or specify any date of a conversation. It is well established that communications by telephone are admissible in evidence where otherwise relevant to the fact or facts in issue, provided the identity of the person with whom the witness spoke or the person whom he or she heard speak is

satisfactorily established.[9] Morgan could not do so. Based upon this lack of foundation, the district court excluded Morgan's deposition testimony. We find no abuse of discretion in excluding this evidence.

Because the district court did not abuse its discretion in disallowing Morgan's testimony, appellants failed to establish the existence of a genuine issue of material fact. Therefore, Wells Fargo was entitled to summary judgment on the claims for declaratory relief, quiet title, and wrongful foreclosure.

(b) Tortious Interference

[8] To succeed on a claim for tortious interference with a business relationship or expectancy, a plaintiff must prove (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.[10]

Wells Fargo established that its records did not indicate any representatives would have had contact with appellants' tenants prior to the trustee's sale. It produced evidence that it hired an independent contractor who performed multiple "occupancy checks" of the property subject to foreclosure and made direct contact once with an individual identified as "mortgagor" (Morgan). This does not suggest interaction with *the tenants*. Wells Fargo also offered the affidavit of one of appellants' tenants, who denied ever being "contacted by Wells Fargo, or any agent or employee of Wells Fargo, by phone or in person." Thus, the burden shifted to appellants to establish a genuine issue of material fact regarding their claim for tortious interference.

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[9] *Linch v. Carlson*, 156 Neb. 308, 56 N.W.2d 101 (1952).

[10] *Steinhausen v. HomeServices of Neb.*, 289 Neb. 927, 857 N.W.2d 816 (2015).

Appellants offered Morgan's testimony of reports from all four of his tenants, including the affiant, alleging that they had been harassed by different Wells Fargo representatives. In their brief, appellants implicitly concede that this testimony is hearsay. But they argue that such statements are admissible as "rebuttal," since Wells Fargo offered the affidavit of one of the four tenants. This argument is contrary to law.

[9] Affidavits and other sworn statements offered in support or opposition of summary judgment shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.[11] Morgan admitted during his deposition that he lacked personal knowledge of any communications made by Wells Fargo or its representatives to appellants' tenants. Appellants failed to produce an affidavit or deposition from any of the tenants, based on personal knowledge, to establish a genuine issue of fact. Morgan's testimony was entirely dependent upon inadmissible hearsay. Therefore, the district court was correct in excluding such statements from the evidence.

Because there was no genuine issue of material fact regarding the absence of any act of interference on the part of Wells Fargo or its independent contractor, the district court correctly granted summary judgment dismissing appellants' claim for tortious interference with a business relationship.

### 2. Motion for Leave to Amend

Lastly, appellants argue that the district court abused its discretion in denying their motion for leave to file a successive amended complaint. We disagree.

Appellants attempted to add Wells Fargo's independent contractor as a defendant to their claim for tortious interference nearly 9 months after the deadline to amend pleadings.

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

They claimed not to know of the independent contractor until 2 months before they filed their motion. However, the record shows that Wells Fargo identified the independent contractor at a deposition at least 7 months before they filed their motion to amend.

Appellants have failed to explain why another defendant should be added so late in the proceeding. We also note that such a claim would be futile for the same reasons that it was unsuccessful against Wells Fargo. Therefore, the district court did not abuse its discretion in denying their motion.

## VI. CONCLUSION

The district court properly excluded evidence for lack of foundation and hearsay. As a result, the admitted evidence did not support appellants' claims or establish a genuine issue of material fact. Because we also conclude that the district court did not abuse its discretion in denying appellants' motion for leave to amend their complaint, we affirm its judgment.

Affirmed.

Miller-Lerman, J., not participating.

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

# Ginger Cove Common Area Company, appellee, v. Scott Wiekhorst, appellant.

893 N.W.2d 467

Filed April 14, 2017. No. S-16-515.

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. **Motions to Vacate: Appeal and Error.** An appellate court reviews a ruling on a motion to vacate for abuse of discretion.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction over an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken.
5. **Final Orders: Appeal and Error.** The primary reason for requiring a final order to dispose of all the issues presented in an action is to avoid piecemeal appeals arising out of the same operative facts.
6. **Final Orders.** An order is final for purposes of appeal under Neb. Rev. Stat. § 25-1902 (Reissue 2016) if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
7. **Final Orders: Appeal and Error.** An order affects a substantial right if it affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.
8. ____: ____. An order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review.
9. **Pretrial Procedure: Final Orders: Appeal and Error.** Discovery orders are not generally subject to interlocutory appeal because the underlying litigation is ongoing and the discovery order is not considered final.

10. **Records: Proof: Appeal and Error.** In appellate proceedings, unless there is proof to the contrary, the journal entry in a duly authenticated record of the trial court imports absolute verity.
11. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.

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

F. Matthew Aerni, of Berry Law Firm, for appellant.

Andrew J. Wilson and Lawrence J. Roland, of Gross & Welch, P.C., L.L.O., for appellee.

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

Cassel, J.

## INTRODUCTION

Following a judgment against Scott Wiekhorst for unpaid assessments, he appealed to challenge an order entered 2 months earlier—which overruled his motion to vacate or set aside an order of sanctions. Because neither that order nor the sanctions order were final orders, Wiekhorst properly waited until final judgment to appeal. But because he failed to present a record to support his assigned error, we affirm.

## BACKGROUND

Ginger Cove Common Area Company (Ginger Cove) sued Wiekhorst and two other individuals for unpaid annual assessments. The transcript does not show that the other two individuals were served within 6 months from the filing of the complaint; thus, it appears that the action against them stood dismissed by operation of law.[1]

[1] See Neb. Rev. Stat. § 25-217 (Reissue 2016).

Wiekhorst filed a counterclaim with his answer. He alleged that Ginger Cove violated its fiduciary duty, and he sought relief for the alleged violations.

The following timeline is pertinent:

- 09/22/2015: Ginger Cove filed a motion for discovery sanctions and set a hearing for October 1 at 8:30 a.m.
- 09/29/2015: The district court dismissed the case for lack of prosecution.
- 10/01/2015: At 8:08 a.m., Ginger Cove moved to reinstate the case and set the hearing for 8:30 a.m. that same day. The certificate of service showed electronic service on Wiekhorst's counsel.
- 10/05/2015: The court entered an order to reinstate the case.
- 10/05/2015: Ginger Cove refiled its motion for sanctions. Its notice of hearing showed that the hearing was set for October 1 at 8:30 a.m., and its certificate of service showed that a copy of the motion was served on September 17.
- 10/06/2015: The court entered an order on the motion for sanctions. The court found Wiekhorst in contempt and ordered that Wiekhorst's counterclaims be stricken.
- 10/06/2015: The court entered another order to reinstate the case.
- 10/07/2015: The court again dismissed the case for lack of prosecution.
- 12/10/2015: Ginger Cove filed a motion for an order reinstating the case. The motion did not contain a notice of hearing, and the attached certificate of service showed that it was mailed on October 13.
- 12/10/2015: The court reinstated the case.
- 01/14/2016: Wiekhorst moved for an order vacating and setting aside the sanctions.
- 02/19/2016: The court denied Wiekhorst's motion following a hearing.
- 04/20/2016: The court entered judgment against Wiekhorst after a bench trial.
- 05/20/2016: Wiekhorst filed a notice of appeal.

## ASSIGNMENT OF ERROR

Wiekhorst alleges that the district court erred in denying his motion to vacate the order of sanctions.

## 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.[2]

[2] An appellate court reviews a ruling on a motion to vacate for abuse of discretion.[3]

## ANALYSIS

### Jurisdiction

[3-5] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[4] For an appellate court to acquire jurisdiction over an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken.[5] The primary reason for requiring a final order to dispose of all the issues presented in an action is to avoid piecemeal appeals arising out of the same operative facts.[6]

There is no dispute that Wiekhorst filed a timely appeal from the final judgment. But because Wiekhorst's appeal challenges an order entered 2 months earlier, Ginger Cove claims that we lack jurisdiction to review that order. The jurisdictional inquiry concerns whether the February 2016 order was a final order. If it was, Wiekhorst's failure to appeal within 30 days deprives us of jurisdiction to review that order. If it

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[2] *Guardian Tax Partners v. Skrupa Invest. Co.*, 295 Neb. 639, 889 N.W.2d 825 (2017).

[3] *Obad v. State*, 277 Neb. 866, 766 N.W.2d 89 (2009).

[4] See *Deines v. Essex Corp.*, 293 Neb. 577, 879 N.W.2d 30 (2016).

[5] *In re Adoption of Madysen S. et al.*, 293 Neb. 646, 879 N.W.2d 34 (2016).

[6] *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012).

was not final, Wiekhorst properly waited to appeal from the final judgment.

[6-8] An order is final for purposes of appeal under Neb. Rev. Stat. § 25-1902 (Reissue 2016) if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.[7] 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.[8] An order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review.[9]

[9] The October 2015 order imposing the discovery sanction was not a final order. In that order, the district court found Wiekhorst in contempt of the court's prior order compelling Wiekhorst to respond to Ginger Cove's discovery requests and ordered that Wiekhorst's counterclaim be stricken as a sanction. Discovery orders are not generally subject to interlocutory appeal because the underlying litigation is ongoing and the discovery order is not considered final.[10] Further, the order does not fit within any of the final order categories of § 25-1902. It did not dispose of the whole merits of the case and leave nothing for the court's further consideration.[11] It was not made during a special proceeding. It was not made after a judgment was rendered. We conclude that the order imposing the sanction was interlocutory—it was a discovery ruling that can be adequately reviewed on appeal from the final judgment.

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[7] *Deines v. Essex Corp., supra* note 4.

[8] See *id.*

[9] See *id.*

[10] See *Furstenfeld v. Pepin*, 287 Neb. 12, 840 N.W.2d 862 (2013).

[11] See *Cattle Nat. Bank & Trust Co. v. Watson*, 293 Neb. 943, 880 N.W.2d 906 (2016).

The February 2016 order was not final, because it did not affect a substantial right. Ginger Cove claims that the order affected the subject matter of the litigation because it "completely eliminated a claim or defense that was available to [Wiekhorst] prior to the order from which he is now appealing."[12] We disagree. It was the interlocutory October 2015 order that eliminated Wiekhorst's counterclaim as a sanction; the February 2016 order refusing to vacate the sanction order therefore did not diminish a claim that was available to Wiekhorst before the court entered the order. The February 2016 order left the parties in the same posture as they were in before its entry.

Because neither the October 2015 order nor the February 2016 order were final, we have jurisdiction to consider any challenges directed to them upon Wiekhorst's timely appeal from the final judgment.

## Merits

Wiekhorst argues that the district court erred in denying his motion to vacate the order of sanctions and that he was denied procedural due process. He contends that after the case was dismissed on September 29, 2015, he did not receive timely notice of the motion to reinstate the case or of the motion for sanctions.

Wiekhorst relies on the transcript to support his claim. He asserts that "[t]here is simply nothing on the record demonstrating [he] had timely notice of any Motion to Reinstate, nor of the Motion for Sanctions filed on October 6[, 2015]."[13] The transcript shows electronic service on Wiekhorst's counsel of Ginger Cove's October 1, 2015, motion to reinstate the case. According to the motion, the matter was set to be heard 22 minutes after the motion was filed. It appears that on October 5, Ginger Cove refiled its September 22 motion for sanctions.

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[12] Brief for appellee at 8.

[13] Brief for appellant at 6.

Thus, both motions showed a hearing date of October 1 at 8:30 a.m. Wiekhorst's argument is premised upon an assumption—that the hearing on Ginger Cove's motion for sanctions actually took place on October 1—after the case had been dismissed on September 29 and before it was reinstated on October 5.

But the transcript does not establish *when* the hearing on Ginger Cove's motion for sanctions actually occurred, nor does it definitively establish that notice of hearing was *not* given to Wiekhorst's counsel. The court's sanctions order shows that the judge dated his signature (i.e., "rendition"[14]) on October 5, 2015—the same date the case was reinstated. The transcript does not show that the sanctions order was made during the period when the case stood dismissed. And while the transcript does not affirmatively establish that notice was given, it likewise does not definitely establish that notice was *not* given.

[10] In appellate proceedings, unless there is proof to the contrary, the journal entry in a duly authenticated record of the trial court imports absolute verity.[15] In the sanctions order, the court specifically stated, "The record shall reflect that there was proper notice of the hearing on this Motion served on all parties and their respective attorneys, and that counsel for [Ginger Cove] appeared and no other party or counsel was present." Wiekhorst had the duty to produce evidence to the contrary. The transcript did not do so.

[11] Although we have a bill of exceptions, it does not provide the missing "proof to the contrary."[16] It does not contain the hearings on the motions to reinstate, the motion for sanctions, or the motion to vacate the order of sanctions. As a general proposition, it is incumbent upon the appellant to present a

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[14] See Neb. Rev. Stat. § 25-1301(2) (Reissue 2016).

[15] *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006); *Alder v. First Nat. Bank & Trust Co.*, 241 Neb. 873, 491 N.W.2d 686 (1992).

[16] See *id.*

record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.[17] Without a bill of exceptions from the pertinent hearings, we do not know what arguments were made or if any evidence—for example, an affidavit detailing notice provided to Wiekhorst's counsel—was offered. Because we have no bill of exceptions from those hearings, the "absolute verity"[18] conferred upon the district court's order dictates the outcome of this appeal.

## CONCLUSION

Because Wiekhorst failed to present a record to support his assigned error, we affirm the district court's order overruling Wiekhorst's motion to vacate or set aside its order imposing sanctions.

Affirmed.

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[17] *Pierce v. Landmark Mgmt. Group*, 293 Neb. 890, 880 N.W.2d 885 (2016).

[18] See cases cited *supra* note 15.

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

# State of Nebraska, appellee, v. Dawnelle C. Todd, appellant.

894 N.W.2d 255

Filed April 14, 2017. No. S-16-621.

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: Judgments: 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. 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. But an appellate court independently reviews questions of law in appeals from the county court.
3. **Pleadings.** Issues regarding the grant or denial of a plea in bar are questions of law.
4. **Judgments: Appeal and Error.** On a question of law, an appellate court reaches a conclusion independent of the court below.
5. **Motions for Mistrial: Juries: Appeal and Error.** A trial court's determination to declare a mistrial based on its finding that a manifest necessity exists for discharging the jury is reviewed for an abuse of discretion.
6. **Constitutional Law: Double Jeopardy.** The Double Jeopardy Clauses of both the federal and the Nebraska Constitutions protect a defendant against a second prosecution for the same offense after an acquittal or conviction.
7. **Double Jeopardy: Motions for Mistrial.** A mistrial does not automatically terminate jeopardy, because a trial can be discontinued when particular circumstances manifest a necessity for doing so, and when failure to discontinue would defeat the ends of justice.

8. ____: ____. Double jeopardy does not arise if the State can demonstrate manifest necessity for a mistrial declared over the objection of the defendant.
9. **Double Jeopardy: Motions for Mistrial: Records.** A specific finding of manifest necessity is not necessary to prevent termination of jeopardy if the record provides sufficient justification for the mistrial ruling.
10. **Motions for Mistrial: Records.** Where the reason for a mistrial is not clear from the record, the uncertainty with respect to manifest necessity must be resolved in favor of the defendant.

Appeal from the District Court for Dodge County, Geoffrey C. Hall, Judge, on appeal thereto from the County Court for Dodge County, Kenneth Vampola, Judge. Judgment of District Court affirmed.

Adam J. Sipple, of Johnson & Mock, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, Erin E. Tangeman, and, on brief, George R. Love for appellee.

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

Miller-Lerman, J.

## NATURE OF CASE

Dawnelle C. Todd appeals the decision of the district court for Dodge County affirming the order of the Dodge County Court which denied Todd's plea in bar. The county court had found that events at trial amounted to a manifest necessity to declare a mistrial and that therefore, the Double Jeopardy Clause did not prohibit a new trial. We affirm the district court's decision.

## STATEMENT OF FACTS

In the early hours of September 3, 2014, a police officer stopped the vehicle driven by Todd because she failed to stop at a sign and was driving on the painted median. After the officer noted signs of intoxication, the officer administered a

preliminary breath test, which Todd failed. The officer arrested Todd and administered a chemical breath test that showed a result of .132 blood alcohol content. The State filed a complaint in the Dodge County Court charging Todd with driving under the influence in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2010), a Class W misdemeanor under Neb. Rev. Stat. § 60-6,197.03(1) (Cum. Supp. 2014).

Prior to trial, the State filed a motion for an order in limine in the county court. In its motion, the State sought to prohibit Todd from "offering evidence, argument or comment in the presence of the jury [regarding a] choice of evils defense pursuant to Neb. Rev. Stat. § 28-1407." Todd wished to present a "choice of evils" defense in which she sought to claim that when she was stopped by the officer, she was attempting to escape from a frightening situation and driving was her only means to reach a place of safety. Todd offered a proposed jury instruction to the effect that the jury must find her not guilty if it found she had acted to avoid a greater harm.

At a hearing on the State's motion in limine, Todd testified regarding the circumstances that she claimed supported a choice of evils defense. She testified that on the night of September 2, 2014, she was drinking at her brother's residence in Fremont, Nebraska, and that she intended to stay the night there because she had been drinking and "was not safe to drive." Todd decided to go out to get some food, and she gave her car keys to Paige Bjorklund, a woman Todd had met that night. Todd rode in the passenger seat, while Bjorklund drove Todd's car. Todd could not remember everything that happened, but at some point, she woke up and found herself alone in her vehicle on a dark residential street. Todd noticed that she was no longer wearing the tank tops she had previously been wearing and that from the waist up, she was wearing only her bra. She could not find her car keys or cell phone, and so she climbed into the back seat to look for them. Not finding them there, she covered herself in a blanket and went to sleep in the back seat.

Sometime later, Todd awoke when Bjorklund and another woman approached the vehicle. Todd opened the door, and Bjorklund tossed her car keys to her and walked away. Todd asked about her cell phone, but the women did not reply. Todd moved up to the driver's seat and, after waiting a while, decided to "drive away to find a lighted area, a public place." Todd testified that she "did not feel safe" and that she felt "very disoriented" and thought that her condition was the result of more than the effects of alcohol. She did not know why she was no longer wearing her tank tops or why her cell phone was missing, and she thought she might have been assaulted. Todd testified that she wanted to get away from Bjorklund and that she thought driving away from the scene was the least harmful way to avoid being assaulted again. She drove about two blocks before the officer stopped her vehicle.

The county court sustained the State's motion in limine and refused Todd's proposed instruction. The court found that the proposed instruction was not warranted by the evidence. The court cited precedent to the effect that the choice of evils defense requires, inter alia, that the defendant reasonably believed that his or her action was necessary to avoid a specific and immediate harm. The court noted that although Todd identified Bjorklund, "the facts presented in this case are based on generalized belief and conjecture, and are insufficient to supply a factual basis of an immediate harm, either actual or reasonably believed by Todd to be certain to occur."

Todd testified in her own defense at the trial. She testified regarding the events that led to her being stopped by the police officer, including drinking at her brother's house, leaving to get food with Bjorklund, waking up alone in the car on a residential street with her tank tops off, Bjorklund's approaching the car and throwing Todd's keys into the car, and Bjorklund's walking away with the other woman. Todd also testified that she was scared when she woke up in the car; however, the court sustained the State's objections when

defense counsel asked Todd why she felt scared, disoriented, and confused when the police officer stopped her. In addition, the court sustained the State's objections to various other questions defense counsel posed to Todd regarding her fears and her reasons for driving the car away from the scene where she woke up. The court also struck certain answers that Todd gave before the court's ruling sustaining the State's objections. Such answers included Todd's testimony to the effect that getting the car keys back took some of her fear away because "[i]t was an escape route" and that her purpose for driving was "[t]o get away."

After the court sustained multiple objections and struck multiple answers in a short period of time, the State requested to be heard outside the jury's presence. After the jury left the courtroom, the State asserted that "despite a specific order from this Court not to ask questions, elicit testimony, make argument regarding justification or this being necessary or a necessity, defense counsel continues down the line of questioning." The State noted that Todd had "testified that this was necessary for her to escape." After argument by both parties, the State moved for a mistrial. After further argument, the court stated that it had "specifically told [Todd] to wait to answer — questions were asked and to answer the questions and to not volunteer [but s]he volunteered this term, escape route." The court sustained the State's motion and declared a mistrial. The court stated that it would "set this down for further trial on [a later date]" and "[s]tart all over again."

Todd thereafter filed a plea in bar asking that the case be dismissed with prejudice. She argued that a retrial would violate constitutional protections against double jeopardy, because jeopardy had attached when the jury was sworn in at the first trial and jeopardy had terminated when the court declared a mistrial without finding a manifest necessity to do so.

After a hearing, the county court ruled on Todd's plea in bar. In its order, the county court stated that the record was

clear that it had "previously and specifically deemed as inadmissible" evidence which would support Todd's justification theory, and it rejected Todd's argument that the State had opened the door to such evidence. The court also rejected Todd's argument that "'strictest scrutiny'" of manifest necessity should apply to the court's analysis, because the State had used its superior resources to harass or achieve a technical advantage over Todd or because the State moved for a mistrial in order to buttress weaknesses in its evidence. The court stated that the evidence presented by the State was sufficient to overcome any motion to dismiss that might have been filed when the State rested its case.

Regarding whether there was a manifest necessity to declare a mistrial, the county court stated that it "ultimately granted the mistrial due to the accumulated effect of statements and questions, whether objected to or not, the likelihood of which could affect the impartiality of one or more jurors." The court cited specific statements made and questions asked by defense counsel during voir dire, opening statements, and cross-examination of the officer during the State's case, which statements and questions related to the disallowed defense. The court determined that following these earlier violations of its order in limine, two statements Todd made during her testimony in her own defense—in which she justified her driving as "'an escape route'" and an attempt to "'get away'"—had "tipped the scale toward a mistrial." The county court acknowledged that at the time it declared a mistrial, it did not explicitly state that there was a "'manifest necessity'" to do so. However, the court concluded that the record in this case provided sufficient justification for its declaration of a mistrial and that therefore, jeopardy had not terminated. The county court denied Todd's plea in bar.

Todd appealed to the district court and claimed that the county court erred when it denied her plea in bar and when it sustained the State's motion in limine. The district court rejected Todd's arguments and affirmed the county court's

rulings. In its order, the district court cited precedent of this court to the effect that the decision to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. The district court stated that the "question as to whether or not jeopardy terminated upon the granting of the mistrial is a separate and different question." After reviewing the county court record, the district court stated that, "sitting in a position of appellate review," the district court would "not disturb the holding of the Dodge County Court that the 'entire record' supports a finding of manifest necessity for the mistrial absent an abuse of discretion." The district court concluded that "[w]hen the entire record is considered, no such abuse can be found." The district court then stated, "[T]his Court affirms the decision of the Dodge County Court regarding its ruling on [Todd's] Plea in Bar and the State's Motion in Limine."

Todd appeals the district court's order affirming the county court's rulings.

## ASSIGNMENT OF ERROR

Todd claims, restated, that the district court erred when it applied an incorrect standard of review and affirmed the denial of her plea in bar. Todd does not assign error to the district court's affirmance of the county court's order sustaining the State's motion in limine.

## STANDARDS OF REVIEW

[1,2] 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. Pester*, 294 Neb. 995, 885 N.W.2d 713 (2016). 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*. But we independently review questions of law in appeals from the county court. *Id*.

[3,4] Issues regarding the grant or denial of a plea in bar are questions of law. *State v. Arizola*, 295 Neb. 477, 890 N.W.2d 770 (2017). On a question of law, an appellate court reaches a conclusion independent of the court below. *Id*.

[5] A trial court's determination to declare a mistrial based on its finding that a manifest necessity exists for discharging the jury is reviewed for an abuse of discretion. See *State v. Williams*, 278 Neb. 841, 774 N.W.2d 384 (2009).

## ANALYSIS

### *Standards of Review: District Court Properly Reviewed County Court's Ruling Declaring a Mistrial Based on Manifest Necessity for Abuse of Discretion.*

Todd contends that the district court used the wrong standard of review when it affirmed the county court's denial of her plea in bar. Todd specifically argues that the district court reviewed the county court's denial of her plea in bar for an abuse of discretion, whereas the ruling on the plea in bar should have been reviewed as a question of law. As set forth below, although the ultimate ruling on a plea in bar is a question of law, to the extent the issue raised by the plea in bar involves a trial court's declaration of a mistrial based on its determination that a manifest necessity requires it to do so, such trial court ruling is reviewed for an abuse of discretion.

Todd relies on *State v. Williams, supra*, wherein we recited the proposition that issues regarding the grant or denial of a plea in bar are questions of law and that on a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. Todd appears to overlook the fact that in *Williams*, we also stated

the proposition that a trial court's determination of whether a manifest necessity existed for discharging the jury and declaring a mistrial is reviewed for an abuse of discretion. *Id*.

[6-8] In *Williams*, as in the present case, the ruling appealed was the denial of a plea in bar in which the defendant sought dismissal on the basis that jeopardy had terminated when the court declared a mistrial and a retrial would violate constitutional protections against double jeopardy. In *Williams*, we set forth the law regarding double jeopardy after declaration of a mistrial as follows:

> The Double Jeopardy Clauses of both the federal and the Nebraska Constitutions protect a defendant against a second prosecution for the same offense after an acquittal or conviction. Stated another way, "[a] State may not put a defendant in jeopardy twice for the same offense." In *Arizona v. Washington*, [434 U.S. 497, 503, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978),] the U.S. Supreme Court explained why the declaration of a mistrial in a criminal prosecution may trigger the constitutional protection afforded by the Double Jeopardy Clause:
>
> "Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's 'valued right to have his trial completed by a particular tribunal.' The reasons why this 'valued right' merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." [*Id*., 434 U.S. at 503-05.]

> In a case tried to a jury, jeopardy attaches when the jury is impaneled and sworn. However, a mistrial does not automatically terminate jeopardy, because "'a trial can be discontinued when particular circumstances manifest a necessity for doing so, and when failure to discontinue would defeat the ends of justice.'" Double jeopardy does not arise if the State can demonstrate manifest necessity for a mistrial declared over the objection of the defendant.

278 Neb. at 846-47, 774 N.W.2d at 389.

In *State v. Williams*, 278 Neb. 841, 774 N.W.2d 384 (2009), having determined as a matter of law the circumstances under which the declaration of a mistrial does or does not implicate double jeopardy concerns, we turned to consider whether there was a manifest necessity for a mistrial in that specific case. In reviewing the decision of the trial court to declare a mistrial, we again cited *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978), to note that a trial judge's decision to declare a mistrial is accorded great deference by a reviewing court, which has an obligation to satisfy itself that the trial judge exercised sound discretion in declaring a mistrial. *State v. Williams, supra*. We ultimately concluded that the trial court "did not abuse its discretion in ordering the mistrial" and that "[a]ccordingly, jeopardy did not terminate and retrial is not barred by principles of double jeopardy." *Id*. at 854, 774 N.W.2d at 394.

Thus, in *State v. Williams, supra*, we decided the ultimate question raised by the plea in bar, i.e., whether retrial was barred by principles of double jeopardy, as a question of law. However, as a preliminary step to deciding that question of law, we needed to review the trial court's declaration of a mistrial based on its determination that there was a manifest necessity to do so. Because a trial court's determination of a manifest necessity for a mistrial is to be accorded great deference, we reviewed that specific determination for an abuse of discretion. *Id*.

We have applied two-level standards of review in other cases challenging the denial of a plea in bar. In *State v. Muhannad*, 290 Neb. 59, 858 N.W.2d 598 (2015), the defendant claimed that the prosecutor provoked the defendant to move for a mistrial and that because of the prosecutor's conduct, it would be unfair under double jeopardy principles to conduct a second trial. In that circumstance, we stated that "[w]hile the denial of a plea in bar generally involves a question of law, we review under a clearly erroneous standard a finding concerning the presence or absence of prosecutorial intent to provoke the defendant into moving for a mistrial." *State v. Muhannad*, 290 Neb. at 64, 858 N.W.2d at 603. In that case—as in this case—the ultimate determination was a question of law, but a part of the analysis required a different standard of review.

In the present case, Todd takes issue with the district court's statement in its order to the effect that because there was "no such abuse," it would not disturb the county court's ruling declaring a mistrial based on manifest necessity and then in the next sentence, that it would affirm the denial of the plea in bar. We acknowledge that the district court may not have been entirely clear in making the distinction we made above regarding the different standards to be applied when reviewing the ruling on the mistrial as distinguished from the ruling on the plea in bar. However, as we explain later in this opinion wherein we affirm the district court's order, we find as unavailing Todd's effort to conflate the district court's rulings on the mistrial and plea in bar as though both had been decided by application of the abuse of discretion standard. The district court properly reviewed the county court's ruling declaring a mistrial based on manifest necessity for abuse of discretion, and its declaration that the plea in bar "is a separate and different question" satisfies us that the district court actually evaluated the plea in bar as a question of law.

*District Court Did Not Err When It Affirmed County Court's Denial of Todd's Plea in Bar.*

Having clarified the appropriate standards of reviews, we apply them to this case. The substance of Todd's claim is that the district court erred when it affirmed the county court's denial of her plea in bar. We have reviewed the record and applied the de novo standard of review to the legal question of whether a plea in bar should have been granted. Finding no error, we reject this assignment of error.

In her plea in bar, Todd claimed that a retrial after the county court declared a mistrial based on manifest necessity would violate her rights against double jeopardy. However, as noted above, we have held that the bar against double jeopardy does not arise if the State can demonstrate manifest necessity for a mistrial declared over the objection of the defendant. *State v. Williams*, 278 Neb. 841, 774 N.W.2d 384 (2009). We emphasize that this proposition applies in situations where a mistrial is granted over the objection of the defendant; a different standard applies when mistrial is granted at the urging of the defendant. See *State v. Cisneros*, 248 Neb. 372, 535 N.W.2d 703 (1995) (noting that absent intentional conduct on part of prosecutor to goad defendant into moving for mistrial, defendant cannot raise bar of double jeopardy to second trial after succeeding in bringing first trial to close on his or her own motion). See, also, *State v. Muhannad*, 290 Neb. 59, 858 N.W.2d 598 (2015).

As in *State v. Williams, supra*, which we have described above, the instant case is one in which a mistrial was granted over the defendant's objections. In *Williams*, the reason for granting a mistrial was the "'"classic basis"'" for mistrial—a deadlocked jury. 278 Neb. at 851, 774 N.W.2d at 392. The basis for the mistrial in this case was not a deadlocked jury; instead, the basis for the mistrial was described by the county court as "the accumulated effect of statements and questions" by defense counsel that the court determined were in

violation of its ruling on the motion in limine and which the court further determined "could affect the impartiality of one or more jurors."

[9,10] The county court did not explicitly characterize its basis for mistrial as "manifest necessity" at the time it declared a mistrial. However, when it ruled on Todd's plea in bar, the county court noted the principles surrounding the manifest necessity requirement and concluded that the record provided sufficient justification for its ruling. The county court's failure to use the language of manifest necessity at the time of the ruling declaring a mistrial is not determinative. We have recognized that a specific finding of manifest necessity is not necessary to prevent termination of jeopardy if the record provides sufficient justification for the mistrial ruling. *State v. Jackson*, 274 Neb. 724, 742 N.W.2d 751 (2007) (citing *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978)). We have also stated that "[w]here the reason for a mistrial is not clear from the record, the uncertainty with respect to manifest necessity must be resolved in favor of the defendant." *State v. Jackson*, 274 Neb. at 731, 742 N.W.2d at 757. Thus, the appropriate inquiry on appellate review is whether the record provides sufficient justification of a manifest necessity to declare a mistrial; if the record is not clear, then uncertainty will be resolved in favor of the defendant.

In view of the foregoing, we review the county court's declaration of a mistrial in light of precedent regarding the type of reasoning that indicates the existence of a manifest necessity for a mistrial. In this case, the record demonstrates a high degree of necessity to declare a mistrial.

The U.S. Supreme Court has indicated that there is a spectrum of degrees of necessity and stated that manifest necessity requires a "'high degree'" of necessity. *Arizona v. Washington*, 434 U.S. at 506. At one end of the range are cases where "the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that

the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused." *Id.*, 434 U.S. at 508. The Court stated that these types of cases should be subject to "strictest scrutiny" and therefore were less likely to support manifest necessity. *Id.* The Court stated that "[a]t the other extreme is the mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict . . . ." *Id.*, 434 U.S. at 509. The Court described this as "the classic basis for a proper mistrial." *Id.* The deadlocked jury circumstance illustrates manifest necessity for a mistrial and a second trial will not be barred by principles of double jeopardy under this circumstance.

In *Arizona v. Washington*, 434 U.S. at 510, "the trial judge [had] ordered a mistrial because the defendant's lawyer made improper and prejudicial remarks during his opening statement to the jury." The Court found these facts to be somewhere "along the spectrum" between the extremes mentioned above. *Id*. The Court reviewed the trial judge's declaration of mistrial and concluded that "the mistrial order [was] supported by the 'high degree' of necessity which is required in a case of this kind." *Id.*, 434 U.S. at 516. In reaching this conclusion, the Court noted that the trial judge did not act "irrationally or irresponsibly," but instead, the record indicated that "[d]efense counsel aired improper and highly prejudicial evidence before the jury, the possible impact of which the trial judge was in the best position to assess," and that "the trial judge did not act precipitately in response to the prosecutor's request for a mistrial," but instead, the judge "gave both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial." *Id.*, 434 U.S. at 514-16. The court was persuaded by a record that indicated "the trial judge acted responsibly and deliberately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding." *Id.*, 434 U.S. at 516.

As in *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978), the county court's reasons for

declaring a mistrial based on manifest necessity in this case were found along the spectrum. We do not think that the record supported Todd's contrary argument, rejected by the county court, that "strictest scrutiny" should apply, because the State was using its superior resources to harass or achieve a technical advantage over Todd or because the State moved for a mistrial in order to buttress weaknesses in its evidence. The county court declared a mistrial because it determined that defense counsel had repeatedly attempted to present evidence to the jury in violation of the court's order in limine. The county court explained that it declared a mistrial because it determined that defense counsel's actions could affect the impartiality of the jurors. As in *Arizona v. Washington*, the trial judge in this case was in the best position to assess the potential impact on the jury. The record shows that the county court acted responsibly and deliberately rather than precipitately. The court did not declare mistrial upon the first violation of the order in limine. Instead, the court initially attempted the conservative measure of striking answers it found to have violated its order in limine. After a number of violations, the court declared a mistrial only after two additional occurrences that it determined had "tipped the scale toward a mistrial." After these occurrences, the court heard and considered arguments from both sides.

Similar to the reasoning in *Arizona v. Washington, supra*, we believe that the record in this case supports a finding of manifest necessity, and we therefore conclude that the district court did not err when it determined that the county court did not abuse its discretion when it declared a mistrial based on its determination that a manifest necessity required it to do so.

Referring to *Arizona v. Washington, supra*, we have stated: "Double jeopardy does not arise if the State can demonstrate manifest necessity for a mistrial declared over the objection of the defendant." *State v. Williams*, 278 Neb. 841, 847, 774 N.W.2d 384, 389 (2009). It logically follows that the district

court did not err when it concluded that the county court had articulated a manifest necessity to declare a mistrial and that therefore, double jeopardy did not bar a retrial. Consequently, the district court did not err when it denied Todd's plea in bar. We reject Todd's assignment of error.

## CONCLUSION

We conclude that the district court did not err in determining that the county court did not abuse its discretion when it found a manifest necessity to declare a mistrial and that the district court did not err in determining as a matter of law that double jeopardy did not bar a retrial. We therefore affirm the district court's order affirming the order of the county court which denied Todd's plea in bar.

Affirmed.

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

# Jay Bergmeier, appellant and cross-appellee, v. Nanci B. Bergmeier, appellee and cross-appellant.

894 N.W.2d 266

Filed April 21, 2017. No. S-15-1189.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Divorce: Property Division.** The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
4. ____: ____. Under Neb. Rev. Stat. § 42-365 (Reissue 2016), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital, setting aside the nonmarital property to the party who brought that property to the marriage. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
5. ____: ____. Generally, all property accumulated and acquired by either spouse during a marriage is part of the marital estate.
6. **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 on the matters at issue. When

evidence is in conflict, 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. **Alimony.** The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in Neb. Rev. Stat. § 42-365 (Reissue 2016) make it appropriate.
8. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.
9. **Alimony.** The primary purpose of alimony is to assist an ex-spouse for a period of time necessary for that individual to secure his or her own means of support.
10. ____. In an alimony award, the ultimate criterion is one of reasonableness.

Appeal from the District Court for Douglas County: Marlon A. Polk, Judge. Affirmed in part as modified, and in part reversed and remanded with directions.

Aaron F. Smeall, of Smith, Slusky, Pohren & Rogers, L.L.P., for appellant.

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

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

Miller-Lerman, J.

## NATURE OF CASE

Jay Bergmeier filed a complaint for dissolution of marriage, and Nanci B. Bergmeier filed a "counter-complaint." The district court for Douglas County filed a dissolution decree in which it, inter alia, determined that Jay's future "termination payments" and "extended termination payments" that he was expected to receive after the dissolution as a "captive agent" of State Farm Insurance Company (State Farm) were marital

property and awarded Nanci a portion thereof. The district court also divided the parties' liabilities and other assets, and it awarded Nanci alimony and attorney fees. Jay appeals, and Nanci cross-appeals. We affirm in part as modified and in part reverse, and remand with directions to the district court as set forth below.

## STATEMENT OF FACTS

Jay and Nanci were married in August 1981. Jay and Nanci adopted two children during their marriage; the parties' children were no longer minors at the time of the divorce proceedings.

At the time they married, Jay and Nanci were both teachers. During the marriage, Nanci left teaching to stay home and raise the parties' children. During this time, Nanci also obtained a master's degree in health education.

During the marriage, Jay also left teaching and started working in insurance in 1986. Jay entered into an agreement with State Farm pursuant to State Farm's "Form AA4," and thus, Jay became a "captive agent" of State Farm. Although a signed copy of Form AA4 is not in evidence, the record contains an unsigned copy of Form AA4. As a captive agent, Jay does not own the insurance policies in the way an independent agent would; instead, the policies are owned by State Farm. Furthermore, Jay does not own the clients' accounts or renewal rights. On January 7, 2014, State Farm's counsel sent Jay a letter in response to Jay's "request for assistance regarding compensation payments due under [Jay's] Agent Agreement." The letter states:

> You have no proprietary interest in the business generated under your State Farm Agent's Agreement. The policies credited to your account belong to State Farm and may be reassigned by State Farm to the accounts of other State Farm agents. The physical customer records and the right to use those records to solicit renewals—commonly referred to as the "expirations"—belong to State Farm.

The letter goes on to explain that pursuant to section II of Form AA4,

> agents are compensated for soliciting new business and for servicing existing business. Service compensation is paid for providing personal service to State Farm policyholders, assisting adjusters in reporting and handling claims, and promoting and advancing the interests of the Company. Service compensation is earned on a day to day basis.

Under section III of Form AA4, an agent has the right to terminate the agreement. After termination, the agent may not act or represent himself or herself in any way as an agent or representative of State Farm, the agent must return all property belonging to State Farm within 10 days after termination of the agreement, and the agent may not compete with State Farm for a period of 12 months following termination of the agreement.

Under Form AA4, an agent, upon certain contingencies being met, is entitled to two forms of termination payments: termination payments and extended termination payments. Termination payments are described in section IV of Form AA4. Section IV provides that termination payments will be made in the event the agreement is terminated 2 or more years after its effective date. The January 7, 2014, letter from counsel for State Farm to Jay describes these termination payments as follows:

> Under Section IV, you have a contract right to termination payments if you comply with certain conditions at the time the Agreement is terminated. Termination payments are based on the service compensation paid to the agent in the twelve month period preceding the termination of the Agreement. Termination payments are paid in sixty monthly installments beginning in the month next following the termination of the Agreement.

Section IV further states that an agent may qualify for termination payments so long as all property belonging to State

Farm has been returned within 10 days following the termination and the agent does not compete with State Farm for a period of 12 months.

Extended termination payments are described in section V of Form AA4. Section V provides that an agent qualifies for extended termination payments if the agent qualifies for termination payments under section IV and if at the time of termination of the agreement the agent was 62 years of age or older, had at least 20 years of service as a State Farm agent, and had 10 years of continuous service as a State Farm agent immediately preceding the date that the agreement was terminated. With respect to extended termination payments, the January 7, 2014, letter states: "Extended termination payments, like termination payments, are based on the service compensation paid in the twelve month period preceding the termination of the Agreement. Extended termination payments begin in the 61st month following the termination of the Agreement and continue for the lifetime of the agent." Section V provides that if the agent is 65 years of age or older at the time of termination of the agreement, the agent will receive the full amount of the extended termination payments. However, if the agent is 62, 63, or 64 years of age at the time of termination, the extended termination payments will be actuarially reduced.

In 2005, the parties formed Bergy Properties, L.L.C. The parties were the managing members of Bergy Properties, and they each held a 50-percent interest in the business. Bergy Properties owns an office building in Omaha, Nebraska, that was appraised at $1.4 million.

On May 7, 2012, Jay filed a complaint for dissolution of marriage. Nanci filed her answer and counter-complaint on May 31. Jay filed his reply to the counter-complaint on June 4.

A trial was held on January 12, March 11, and April 2, 2015. Evidence was adduced at trial regarding the parties' assets and liabilities. Jay generally testified regarding his insurance

business. Jay operated his business under the name "Jay M. Bergmeier Agency, Inc.," and it reported: $1,018,059 in revenues in 2010; $957,318 in revenues in 2011; $867,538 in revenues in 2012; and $864,679 in revenues in 2013. Jay testified that he was still operating his insurance business at the time of trial. Nanci testified that at the time of trial, she was working part time as a substitute teacher and part time for the National Safety Council.

On August 11, 2015, the district court filed the decree of dissolution of marriage. In the decree, some awards were listed by a narrative under individually numbered paragraphs. Some assets and liabilities were covered by individually numbered paragraphs, but others were contained in a table.

With respect to alimony, the court ordered Jay to pay Nanci $2,000 per month and continuing until the last day of the month in which Nanci reaches the age of 65, until she remarries or dies, until Jay begins receiving termination payments, or until further order of the court, whichever occurs first. With respect to real and personal property, each party was awarded insurance policies held in their respective names.

As noted, the decree set forth a table in which it listed certain of the parties' marital assets and marital liabilities. In the table, the district court designated which party would receive which assets and liabilities. The table, in summary, indicates that Jay was awarded a timeshare in Arizona, Nanci was awarded a timeshare in Missouri, and the parties were each awarded a 25-percent share of the parties' 50-percent interest in a timeshare in Mexico. With respect to vehicles, Jay was awarded a Mitsubishi, a Suburban, two "Sea Doos," and a "Shorelander" trailer, and he was ordered to pay the lease on a Buick. Nanci was awarded a paddle boat and trailer, and she was ordered to surrender the lease on a Subaru. With respect to bank accounts, Jay and Nanci were each awarded 50 percent of the joint account at Bank of Bennington. Jay was awarded the account at State Farm Credit Union. Nanci was awarded the account at First National Bank and the checking

and savings accounts at US Bank. Jay and Nanci were each awarded his or her own 401K and Roth IRA accounts. Jay was awarded the two businesses formed during the marriage: the Jay M. Bergmeier Agency and Bergy Properties. Jay was assigned all of the parties' liabilities.

Regarding property not included in the table, the district court awarded Jay four season tickets to University of Nebraska-Lincoln football games and Nanci two season tickets. The parties were awarded household goods, furniture, and jewelry that were in their respective possession at the time of the dissolution proceedings. Each party was ordered to be responsible for any debts that party incurred since the parties' separation on January 4, 2013.

With respect to equalizing the marital estate, in a paragraph titled "Equalization of Marital Estate," the district court stated:

> Having equitably divided the marital estate, exclusive of [Jay's] Termination and Early Termination Payments, the Court finds that the resulting net value of the Parties' marital estate, is -$52,960.00 and that each party shall be responsible for fifty percent (50%) of such deficiency[.] The Court further finds that [Nanci's] portion of such deficiency shall be paid to [Jay] by reducing [Nanci's] interest in [Jay's] Termination Payments, as set forth hereinafter.

With respect to termination payments, the district court stated in the decree:

> The Court finds that [Jay's] Termination Payments are a marital asset subject to division. The Court further finds that the value of the marital portion of such assets [is] $802,040.00. This amount is determined by calculating the termination payments [Jay] would have received had [Jay] retired in January of 2014. Each party is awarded 50% thereof with [Nanci's] portion being reduced by $26,480.00. As such, [Nanci] is awarded $374,540.00 of [Jay's] Termination Payment. Such amount shall be

> paid to [Nanci] by [Jay] at such time as [Jay] begins receiving such payments. [Jay] shall remitting [sic] 50% of his Termination payments received each month within 15 days of receipt and shall continue to remit such percentage each month until such time as [Jay] has paid to [Nanci] the sum of $374,000.00 as required hereunder.

With respect to "extended termination payments," the district court stated in the decree:

> The Court finds that [Jay's] Extended Termination Payments are a marital asset subject to division. In the event [Jay] should qualify for and then receive such Extended Termination Payments, [Jay] shall remit 50% of such Extended Termination Payments amount received each month within 15 days of receipt and shall continue to remit such payment each month until such time as [Jay] or [Nanci] shall die, subject to the joint survivor option hereinafter set forth. [Jay] shall be required to name [Nanci] as his surviving spouse beneficiary for all such Extended Termination Payments, through the joint and survivor option which [Jay] shall be required to elect.

The district court also awarded Nanci attorney fees in the amount of $12,500.

On August 17, 2015, Nanci filed a motion to alter or amend and/or motion for new trial. After a hearing on the motion, on November 17, the district court filed its order, in which it denied Nanci's motion for new trial and granted in part her motion to alter or amend. The district court stated:

> [Nanci's] Motion to Alter or Amend shall be granted in part to provide that to the extent that the Decree does not include all debts as set forth in [Nanci's] Credit Report and [Nanci's] List of Debts marked as Exhibit 95 and Exhibit 96 respectively, offered and received into evidence, it shall be amended to provide that in addition to the debts set forth in the Decree that [Jay] is to

> assume, pay, hold [Nanci] harmless, and refinance said obligations to remove [Nanci] from any liability thereon, specifically on those debts set forth on Exhibit 96 . . . as well as those debts on [Nanci's] Credit Report (Exhibit 95), except her JC Penny and Younkers card that were her individual liability.

Jay appeals, and Nanci cross-appeals.

## ASSIGNMENTS OF ERROR

Jay claims, restated, that the district court erred when it determined that the termination payments and extended termination payments were marital assets and awarded Nanci a portion thereof.

Nanci claims on cross-appeal that the district court erred when it (1) failed to order Jay to pay the amount of his termination payments awarded to Nanci in a lump sum or, in the alternative, in payments commencing immediately upon the entry of the decree with postjudgment interest; (2) assigned 50 percent of the responsibility of the deficiency in the marital value to Nanci; and (3) awarded Nanci alimony until she turned 65 years old instead of at the commencement of her receipt of termination payments.

## STANDARDS OF REVIEW

[1,2] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Devney v. Devney*, 295 Neb. 15, 886 N.W.2d 61 (2016). This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. *Sellers v. Sellers*, 294 Neb. 346, 882 N.W.2d 705 (2016). 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. *Devney v. Devney, supra*.

## ANALYSIS

*Termination Payments and Extended Termination Payments.*

Jay claims that the district court erred when it treated the termination payments and extended termination payments as marital property. We find no merit to this assignment of error.

As an initial matter, we are aware that other jurisdictions have considered the contract at issue in this case—State Farm's Form AA4. There is a split among the other jurisdictions as to whether the termination payments and extended termination payments under the contract are marital or nonmarital property. Some jurisdictions have determined that the termination payments are marital property. See, *In re Marriage of Skaden*, 19 Cal. 3d 679, 566 P.2d 249, 136 Cal. Rptr. 615 (1977); *Ray v. Ray*, 916 S.W.2d 469 (Tenn. App. 1995); *Matter of Marriage of Wade*, 923 S.W.2d 735 (Tex. App. 1996); *In re Marriage of Garceau v. Garceau*, 232 Wis. 2d 1, 606 N.W.2d 268 (Wis. App. 1999). Other jurisdictions have determined that the termination payments are nonmarital property. See, *Lawyer v. Lawyer*, 288 Ark. 128, 702 S.W.2d 790 (1986); *In re Marriage of Frazier*, 125 Ill. App. 3d 473, 466 N.E.2d 290, 80 Ill. Dec. 838 (1984); *Mallett v. Mallett*, 323 S.C. 141, 473 S.E.2d 804 (S.C. App. 1996). We agree with the reasoning of those jurisdictions that have determined that termination payments are marital property.

Jay argues that the termination payments and the extended termination payments should be classified as nonmarital property, because at the time the decree was entered, it was uncertain whether Jay would actually receive the payments and, if so, what the value of the payments would be. While it is true that Jay does not have an indefeasible right to a certain benefit, namely the termination payments and the extended termination payments, he does have an accrued contractual right subject only to minimal qualifying conditions, including actual termination and delivery of State Farm's property. Jay may choose to squander this contractual right or forfeit it by violating

a noncompete provision in the contract, but that should not affect its status as marital property. We are persuaded that the State Farm contract, which was acquired during the marriage, had a substantial value and was properly considered a part of the marital estate.

As noted above, we are aware that other jurisdictions have determined that termination payments under this same contract have no value for division as marital property. These jurisdictions have focused on the fact that the actual value of the contract depends on the activities of the husband who is in the relationship with State Farm that occur after the marriage has been dissolved. See, e.g., *Lawyer v. Lawyer, supra*; *In re Marriage of Frazier, supra*. We choose not to adopt the conclusion that, for that reason, the wife should be denied any interest whatsoever in a substantial asset which was acquired during the marriage. Accordingly, we determine that the district court did not err when it determined that the termination payments and extended termination payments are marital property. We reject Jay's assignment of error urging a contrary conclusion.

Although we determine that the district court correctly classified both termination payments as marital property, we determine that on this record, the district court abused its discretion when it assigned the specific value to the termination payments. The district court assigned a value to the termination payments based on what the value would have been if Jay had terminated his contract with State Farm in January 2014. But Jay did not terminate his relationship with State Farm in January 2014, and the record shows that he continued to work for State Farm at the time of trial in 2015. We further note that the court did not determine a present value of the asset as of the time of trial, which approach has been found elsewhere not to be an abuse of discretion. See *Ray v. Ray, supra*. Accordingly, assigning a specific value to the termination payments as of January 2014 was improper because, inter alia, the value chosen was stale, it was not warranted by the facts, and

the actual value depends on factors that have not yet occurred, such as the date of Jay's termination and total sales for the 12 months immediately preceding his termination.

Additionally, we determine that the court abused its discretion when it awarded Nanci 50 percent of the termination payments and the extended termination payments if and when Jay receives them at some point after the marriage has been dissolved. Instead of 50 percent, in keeping with our jurisprudence in this area, we believe Nanci's percentage of termination payments should reflect the duration the asset was possessed during the course of the marriage. That is, payments to Nanci are dependent on the amount of time that Jay will have been in a working relationship with State Farm both during and after the parties' marriage when Jay starts receiving termination payments.

As to how to calculate what percentage of the termination payments Nanci should be awarded, we look for guidance to divorce cases involving pensions. See *Klimek v. Klimek*, 18 Neb. App. 82, 775 N.W.2d 444 (2009). See, also, *Webster v. Webster*, 271 Neb. 788, 716 N.W.2d 47 (2006); *Koziol v. Koziol*, 10 Neb. App. 675, 636 N.W.2d 890 (2001). In these cases, it has been noted that the marital estate includes only that portion of the pension which is earned during the marriage, and contributions to pensions before marriage or after dissolution are not assets of the marital estate. See *Koziol v. Koziol, supra*. The cases have used the "coverture formula" to determine the marital portion, which has been described as follows:

> "Simplified, the coverture formula provides that the numerator of the fraction used to determine the marital portion is essentially the number of months of credible service of the employed spouse while married and therefore is the pension contribution *while married* and that the denominator is the total number of months that the spouse has [been] or will be employed which resulted in the pension the employee will receive. This denominator

> number includes and will include the time the employed spouse worked before, during, and after the marriage."

*Klimek v. Klimek*, 18 Neb. App. at 93-94, 775 N.W.2d at 454, quoting *Koziol v. Koziol, supra* (emphasis in original). The ex-spouse is awarded a percentage of the marital portion. We determine that this formula should be applied in this case.

Therefore, we reverse the portion of the district court's decree in which it assigned a specific value to the termination payments and awarded Nanci 50 percent of all the payments. We direct the district court to amend the order of dissolution to provide that when termination payments commence, the marital portion of the termination payments and extended termination payments shall be determined using the formula set forth above, and to order that Nanci receive 50 percent of the marital portion of the termination payments and extended termination payments. We further direct the district court to order that Jay shall remit to Nanci her percentage of the termination payments and extended termination payments, if and when he starts to receive them, each month within 15 days of Jay's receipt of the payment.

We acknowledge that Nanci claims on cross-appeal that the district court erred when it ordered that Jay pay Nanci her portion of the termination payments as he receives them and that Nanci contends that the district court "abused its discretion in failing to order Jay to pay the amount of his termination payments awarded to Nanci in a lump-sum, or in the alternative in payments commencing immediately upon entry of the Decree with post-judgment interest." In view of our determinations set forth above, we reject this assignment of error, and we direct the district court to award Nanci her percentage of the termination payments as set forth above.

*Division of Marital Property Other Than Termination Payments and Extended Termination Payments.*

Nanci generally claims on cross-appeal that the district court erred in its division of the marital property, exclusive

of the termination payments and extended termination payments. For the reasons set forth below, we agree with certain of Nanci's claims.

[3,4] We first review general standards relating to property division. Under Nebraska's divorce statutes, "[t]he purpose of a property division is to distribute the marital assets equitably between the parties." Neb. Rev. Stat. § 42-365 (Reissue 2016). The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Sellers v. Sellers*, 294 Neb. 346, 882 N.W.2d 705 (2016). We have stated that under § 42-365, the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital, setting aside the nonmarital property to the party who brought that property to the marriage. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Sellers v. Sellers, supra*.

With respect to the first step—classifying the parties' property as marital or nonmarital and setting aside the nonmarital property to the party who brought that property to the marriage—Nanci argues that the district court abused its discretion when it classified certain debts as marital property, including a certain Slate/Chase credit card, a certain United Mileage Plus credit card, a GE Capital Retail Bank credit card, a Younkers credit card, and a US Bank line of credit. The total balance of these debts amounts to $42,832.83. Nanci argues these debts should have been classified as nonmarital property because they were incurred by Jay after the parties separated. In support of her argument that these debts were incurred after the parties were separated, Nanci points to Jay's answers to interrogatories provided to Nanci in September 2012, in which Jay provided a list of credit cards he believed showed the debt incurred during the marriage. Nanci asserts that these additional debts were presented to her for the first

time at trial, and she testified that she had no prior knowledge of these additional debts. Jay, on the other hand, testified that these debts were incurred during the marriage before the parties separated.

[5,6] We have stated that generally, all property accumulated and acquired by either spouse during a marriage is part of the marital estate. *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016). The burden of proof rests with the party claiming that property is nonmarital. *Sellers v. Sellers, supra*. Our standard of review in this action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Devney v. Devney*, 295 Neb. 15, 886 N.W.2d 61 (2016). 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 on the matters at issue. When evidence is in conflict, 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. *Freeman v. Groskopf*, 286 Neb. 713, 838 N.W.2d 300 (2013). With this standard of review in mind, based upon our de novo review of the record, we cannot say that the district court abused its discretion when it determined that these debts identified by Nanci were marital property and included them in the marital estate. We find no error with respect to this portion of the district court's decree.

Nanci additionally argues that the district court erred when it found that the marital estate was deficient in the amount of $52,960 and ordered that each party be responsible for half of the deficiency. Nanci contends that "[u]nder the relative economic circumstances of the parties, the trial court's order leads to grave economic inequities between the parties, resulting in an abuse of discretion." Brief for appellee on cross-appeal at 31. Because the district court's order dividing the marital estate is unclear, we cannot adequately address this argument.

As stated above, under the second step of the three-step process of the equitable divisions of property, the district court is to value the marital assets and marital liabilities of the parties. Under the third step, the district court is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. See *Sellers v. Sellers*, 294 Neb. 346, 882 N.W.2d 705 (2016). In its decree, the district court set forth a table which divided the assets between the parties and assigned the liabilities to Jay. However, the table set forth in the decree does not specify the value of any of these assets or liabilities.

In the paragraph titled "Equalization of Marital Estate," the district court offered this conclusory statement:

> Having equitably divided the marital estate, exclusive of [Jay's] Termination and Early Termination Payments, the Court finds that the resulting net value of the Parties' marital estate, is -$52,960.00 and that each party shall be responsible for fifty percent (50%) of such deficiency[.] The Court further finds that [Nanci's] portion of such deficiency shall be paid to [Jay] by reducing [Nanci's] interest in [Jay's] Termination Payments, as set forth hereinafter.

Because the district court did not specify the value of the assets and liabilities in the decree, it is not clear from the decree that the district court complied with the second and third steps of the three-step process. Under the circumstances, we cannot evaluate whether the equalization provision is proper.

We have treated the State Farm termination payments earlier in this opinion; with respect to the remainder of the marital estate, we reverse the portion of the decree dividing the marital property and remand the matter with directions to the district court to set forth the valuation of the parties' marital assets and marital liabilities and to clarify the basis for an equalization award, if any. Furthermore, based on our determination above that the district court erred when it

assigned a specific value to the termination payments, the value of any termination payments should not be included in the valuation of the marital estate and should not be considered by the district court when ordering an equalization payment, if any.

*Alimony.*

Nanci claims that the district court erred in its award of alimony to her, which provided that Nanci would receive $2,000 per month until Nanci reaches the age of 65, until she begins receiving her percentage of Jay's termination payments, until she remarries or dies, or until further order of the court, whichever occurs first. Nanci argues that Jay might not begin receiving his termination payments until after Nanci reaches the age of 65, which would create a gap between when Nanci stops receiving alimony and when she begins receiving her percentage of the termination payments. For this reason, Nanci asserts that her award of alimony should be modified so that it continues until the termination payments begin or until she dies or remarries. Because we believe that the court did not abuse its discretion, we find no merit to this assignment of error.

[7-10] The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in § 42-365 make it appropriate. *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016). In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Anderson v. Anderson*, 290 Neb. 530, 861 N.W.2d 113 (2015). The primary purpose of alimony is to assist an ex-spouse for a period of time necessary for that individual to secure his or her own means of support. *Id*. The ultimate criterion is one of reasonableness. *Id*.

In her appellate brief, Nanci notes that she is 57 years old and has limited earning power. Jay responds that Nanci will receive alimony of $2,000 per month for 7 years, at which point she will be eligible for Social Security. Considering the circumstances of this case, we determine that the district court did not abuse its discretion. Therefore, we find no merit to this assignment of error.

## CONCLUSION

We determine that the district court did not err when it determined that Jay's termination payments and extended termination payments under his contract with State Farm are marital property. However, we determine that the district court erred when it assigned a specific value to the termination payments. We further determine that the district court erred when it awarded Nanci 50 percent of the termination payments and extended termination payments, and we direct the district court to utilize the formula set forth above to calculate Nanci's percentage of the termination payments and extended termination payments.

We further remand this cause to the district court with directions to clarify its calculation of the marital estate and the equalization payment, if any. We also determine that the district court did not abuse its discretion in its award of alimony.

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

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

# Bryan R. Heckman, appellee, v. Regina M. Marchio, appellant.

894 N.W.2d 296

Filed April 21, 2017. No. S-16-379.

1. **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.
2. **Courts: Jurisdiction: Legislature: Appeal and Error.** In order for the Nebraska Supreme Court to have jurisdiction over an appeal, appellate jurisdiction must be specifically provided by the Legislature.
3. **Appeal and Error.** The right of appeal in Nebraska is purely statutory.
4. ____. Unless a statute provides for an appeal, such right does not exist.
5. **Constitutional Law: Jurisdiction: Appeal and Error.** Except in those cases wherein original jurisdiction is specifically conferred by Neb. Const. art. V, § 2, the Nebraska Supreme Court exercises appellate jurisdiction.
6. **Constitutional Law.** Nebraska's separation of powers clause prohibits the three governmental branches from exercising the duties and prerogatives of another branch.
7. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, the party must be appealing from a final order or a judgment.
8. **Courts: Jurisdiction: Legislature: Statutes: Appeal and Error.** Through the enactment of statutes, the Legislature has prescribed when a court may exercise appellate jurisdiction; the judicial branch may not circumvent such statutory authorization.
9. **Courts: Legislature: Statutes: Time: Appeal and Error.** Just as courts have no power to extend the time set by the Legislature for taking an appeal, courts have no power to allow an appeal where it is not authorized by statute.
10. **Public Policy.** While the doctrine of stare decisis is entitled to great weight, it is grounded in the public policy that the law should be stable, fostering both equality and predictability of treatment.

11. **Appeal and Error.** Remaining true to an intrinsically sounder doctrine better serves the values of stare decisis than following a more recently decided case inconsistent with the decisions that came before it.
12. **Jurisdiction: Final Orders: Case Overruled.** The Nebraska Supreme Court's decision in *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997), and cases relying upon it are overruled to the extent that they authorized appellate jurisdiction in the absence of a judgment or final order and without specific statutory authorization.

Appeal from the District Court for Dodge County: Geoffrey C. Hall, Judge. Appeal dismissed.

Jeremy Jorgenson and David J. Reed, of Jorgenson, Reed & VandenBosch, L.L.C., for appellant.

Julie Fowler and Brendan M. Kelly, of Fowler & Kelly Law, L.L.P., for appellee.

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

Cassel, J.

## INTRODUCTION

This is an appeal from an order disqualifying counsel in a civil case. Twenty years ago, this court "adopt[ed] the rule articulated in [a Massachusetts decision[1]]" to allow for an immediate appeal from a nonfinal order such as this.[2] In doing so, we improperly exceeded our statutory and constitutional authority. Because an appeal from the order at issue is not statutorily authorized, we dismiss the appeal.

## BACKGROUND

Bryan R. Heckman filed a complaint against Regina M. Marchio, seeking to establish paternity, custody, and support of a minor child born to the parties. Sometime thereafter, he moved to disqualify Marchio's attorney. Following a hearing

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[1] See *Maddocks v. Ricker*, 403 Mass. 592, 531 N.E.2d 583 (1988).

[2] *Richardson v. Griffiths*, 251 Neb. 825, 831, 560 N.W.2d 430, 435 (1997).

on the motion, the district court entered an order granting the motion to disqualify Marchio's attorney. Marchio timely filed a motion to reconsider, which the court denied. Marchio filed a purported appeal from that order, and we moved the case to our docket.[3]

## ASSIGNMENTS OF ERROR

Marchio assigns seven errors, all of which relate to the district court's disqualification of her privately retained legal counsel.

## STANDARD OF REVIEW

[1] A jurisdictional issue that does not involve a factual dispute presents a question of law, which an appellate court independently decides.[4]

## ANALYSIS

Marchio asserts that the order of disqualification is appealable under *Richardson v. Griffiths*.[5] As explained below, we exceeded our statutory and constitutional authority in adopting the so-called *Richardson* exception to the final order requirement. In doing so, we improperly circumvented our final order statute[6] and improperly expanded our own jurisdiction.

### Foundation and Constitutional Underpinnings for Appellate Jurisdiction

[2-4] Recently, we stated that in order for this court to have jurisdiction over an appeal, appellate jurisdiction must be specifically provided by the Legislature.[7] This fundamental

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[3] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

[4] *Addy v. Lopez*, 295 Neb. 635, 890 N.W.2d 490 (2017).

[5] *Richardson v. Griffiths, supra* note 2.

[6] See Neb. Rev. Stat. § 25-1902 (Reissue 2016).

[7] See *Huskey v. Huskey*, 289 Neb. 439, 855 N.W.2d 377 (2014).

principle was not new. In 1873, this court stated that "no appeal exists except by authority of statute"[8] and that "appeals do not exist by any right other than by statute."[9] Over and over, we have iterated that the right of appeal in Nebraska is "purely statutory."[10] In other words, unless a statute provides for an appeal, such right does not exist.[11] The right to appeal did not exist at common law.[12]

[5,6] The Nebraska Constitution allocates the regulation of appellate jurisdiction to the Legislature, not to this court. Except in those cases wherein original jurisdiction is specifically conferred by Neb. Const. art. V, § 2, the Nebraska Supreme Court exercises appellate jurisdiction.[13] The Nebraska Constitution expressly provides for "such appellate jurisdiction as may be provided by law."[14] The Nebraska Constitution also divides the powers of the government into

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[8] *The Sioux City and Pacific R. R. v. Washington County, etc.*, 3 Neb. 30, 34 (1873).

[9] *Irwin, et ux. v. Calhoun & Croxton*, 3 Neb. 453, 454 (1873).

[10] See *Huskey v. Huskey, supra* note 7, 289 Neb. at 448, 855 N.W.2d at 385. Accord, *Languis v. De Boer*, 181 Neb. 32, 146 N.W.2d 750 (1966); *Elliott v. City of Auburn*, 172 Neb. 1, 108 N.W.2d 328 (1961); *McDonald v. Rentfrow*, 171 Neb. 479, 106 N.W.2d 682 (1960); *Watkins v. Dodson*, 159 Neb. 745, 68 N.W.2d 508 (1955); *From v. Sutton*, 156 Neb. 411, 56 N.W.2d 441 (1953); *Mid-Continent Airlines, Inc. v. State Board*, 154 Neb. 371, 48 N.W.2d 81 (1951); *Loup River Public Power District v. Platte County*, 135 Neb. 21, 280 N.W. 430 (1938); *Roberts v. City of Mitchell*, 131 Neb. 672, 269 N.W. 515 (1936); *McCague Investment Co. v. Metropolitan Water District*, 101 Neb. 820, 165 N.W. 158 (1917); *Whedon v. Lancaster County*, 76 Neb. 761, 107 N.W. 1092 (1906); *Hacker v. Howe*, 72 Neb. 385, 101 N.W. 255 (1904); *Clarke v. Nebraska Nat. Bank*, 49 Neb. 800, 69 N.W. 104 (1896); *Chicago, B. & Q. R. Co. v. Headrick*, 49 Neb. 286, 68 N.W. 489 (1896).

[11] See *From v. Sutton, supra* note 10.

[12] See, *id.*; *Hanika v. State*, 87 Neb. 845, 128 N.W. 526 (1910); *Wilcox v. Saunders*, 4 Neb. 569 (1876).

[13] *Huskey v. Huskey, supra* note 7.

[14] Neb. Const. art. V, § 2.

three distinct departments—legislative, executive, and judicial.[15] Nebraska's separation of powers clause[16] prohibits the three governmental branches from exercising the duties and prerogatives of another branch.[17] These constitutional provisions prevent courts from inventing rules to enlarge appellate jurisdiction.

We have applied these principles in numerous ways. We have said that an appellate court acquires no jurisdiction unless the appellant has satisfied the statutory requirements for appellate jurisdiction.[18] We have also said that when the Legislature fixes the time for taking an appeal, the courts have no power to extend the time directly or indirectly.[19] Long ago, we explained that the Legislature has general power to fix the time limit for taking an appeal and, having prescribed such time, that the trial court has no power to extend the time directly or indirectly.[20]

[7] Directly to the point, we have said that for an appellate court to acquire jurisdiction of an appeal, the party must be appealing from a final order or a judgment.[21] And we have recited this principle or its equivalent so many times as not to require further citation.

## *Richardson* Exception

In 1997, this court decided *Richardson v. Griffiths*.[22] We were confronted with an issue similar to the issue now before

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[15] See Neb. Const. art. II, § 1.

[16] *Id.*

[17] *Adams v. State*, 293 Neb. 612, 879 N.W.2d 18 (2016).

[18] See *Wright v. Omaha Pub. Sch. Dist.*, 280 Neb. 941, 791 N.W.2d 760 (2010).

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

[20] See *Morrill County v. Bliss*, 125 Neb. 97, 249 N.W. 98 (1933).

[21] See *Nichols v. Nichols*, 288 Neb. 339, 847 N.W.2d 307 (2014).

[22] *Richardson v. Griffiths, supra* note 2.

us. In *Richardson*, the issue was whether a law firm should be disqualified from representing the appellants because of a prior contact between one of the appellees and an attorney with the law firm. We observed that the district court's order disqualifying the law firm was not a final order, but we determined that the order was appealable under an exception to the final order requirement.

We did not, however, provide any statutory authority for the purported exception. Rather, we quoted the holding from a Massachusetts case that "'if the appeal from an order of disqualification involves issues collateral to the basic controversy and if an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, interlocutory review is appropriate.'"[23] Without any analysis as to how that rule fits with our statutory requirement of a final order, we adopted the rule as an exception to the final order requirement. In subsequent cases, we referred to the above rule as the "*Richardson* exception to the final order requirement."[24] We have used our decision in *Richardson* or its progeny on eight occasions (one implicitly) to provide for jurisdiction.[25] On one occasion, we allowed an appeal from an order disqualifying

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[23] *Id.* at 831, 560 N.W.2d at 435, quoting *Maddocks v. Ricker, supra* note 1.

[24] See *Trainum v. Sutherland Assocs.*, 263 Neb. 778, 783, 642 N.W.2d 816, 820 (2002). Accord, *Mutual Group U.S. v. Higgins*, 259 Neb. 616, 611 N.W.2d 404 (2000); *Hawkes v. Lewis*, 255 Neb. 447, 586 N.W.2d 430 (1998). See, also, *State v. Dunlap*, 271 Neb. 314, 710 N.W.2d 873 (2006); *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005); *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004).

[25] See, *Beller v. Crow*, 274 Neb. 603, 742 N.W.2d 230 (2007); *State v. Kawa*, 270 Neb. 992, 708 N.W.2d 662 (2006); *State v. Ehlers*, 262 Neb. 247, 631 N.W.2d 471 (2001); *Mutual Group U.S. v. Higgins, supra* note 24; *Detter v. Schreiber*, 259 Neb. 381, 610 N.W.2d 13 (2000); *Hawkes v. Lewis, supra* note 24; *Bechtold v. Gomez*, 254 Neb. 282, 576 N.W.2d 185 (1998); *Richardson v. Griffiths, supra* note 2.

an attorney under a concept referred to as the "collateral order doctrine."[26] But the U.S. Supreme Court has disallowed interlocutory appeals of orders disqualifying counsel in civil cases and has specifically held that such orders do not fall within the collateral order doctrine applicable in the federal court system.[27] Our *Richardson* decision did not mention the U.S. Supreme Court's decision.

This absence of any statutory basis for the *Richardson* exception did not go unnoticed. One commentator stated:

> An appellate court has only the jurisdiction that the statutes give. The court glossed over that fact in *Richardson* when it recognized an exception to the final judgment rule for which it cited no statutory basis. It is unlikely that the omission of a statutory cite was inadvertent. Section 25-1902 specifies three types of final orders, which implies that there are no others. The court therefore has no statutory basis for recognizing another type of final order.[28]

[8,9] This court should not have adopted the *Richardson* exception to the final order requirement. We used it to provide for appellate jurisdiction where none would otherwise exist. Through the enactment of statutes, the Legislature has prescribed when a court may exercise appellate jurisdiction; the judicial branch may not circumvent such statutory authorization. Just as courts have no power to extend the time set by the Legislature for taking an appeal,[29] courts have no power to allow an appeal when it is not authorized by statute.

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[26] See *Jacob North Printing Co. v. Mosley*, 279 Neb. 585, 779 N.W.2d 596 (2010).

[27] See *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 105 S. Ct. 2757, 86 L. Ed. 2d 340 (1985).

[28] John P. Lenich, *What's So Special About Special Proceedings? Making Sense of Nebraska's Final Order Statute*, 80 Neb. L. Rev. 239, 308 (2001).

[29] See *Fitzgerald v. Fitzgerald, supra* note 19.

The commentator,[30] in a respectful way, exposed our usurpation of legislative authority. He recommended using the language of the collateral order doctrine because "[i]t squares with what the court is doing."[31] And then, recognizing that we had "no statutory basis for recognizing another type of final order"[32] and that our interpretation was "neither supported by the language nor the history of the statute,"[33] he attempted to cover our mistake in the rubric of legislative acquiescence. That gave us too much credit.

Legislative acquiescence does not apply. 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.[34] But in applying the *Richardson* exception, we have never purported to interpret a statute as allowing for an interlocutory appeal. Thus, there has been no interpretation of any statute in which the Legislature could be characterized to have acquiesced. Quite to the contrary, this court admitted that the disqualification order "d[id] not meet any of the definitions of a final order."[35] Nonetheless, without citing any statute, we baldly proclaimed an exception.

Moreover, in analogous circumstances, judges have soundly rejected legislative acquiescence. In *State v. Burlison*,[36] a concurring opinion addressed a dissent's assertion that the Legislature acquiesced in this court's earlier holding (overruled in *Burlison*) that malice was an essential element of second

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[30] See Lenich, *supra* note 28.

[31] *Id.* at 307.

[32] *Id.* at 308.

[33] *Id.*

[34] *Parnell v. Good Samaritan Health Sys.*, 260 Neb. 877, 620 N.W.2d 354 (2000).

[35] *Richardson v. Griffiths, supra* note 2, 251 Neb. at 830, 560 N.W.2d at 434.

[36] *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998) (Wright, J., concurring; Connolly and Gerrard, JJ., join).

degree murder. We observed in *Burlison* that all crimes are statutory in Nebraska.[37] Here, as we have already explained, appellate jurisdiction in Nebraska is purely statutory. The concurrence stated:

> An appellate court is empowered to construe a statute, but it may not assume the role of the Legislature. Therefore, judicial construction is constitutionally permissible, but judicial legislation is not. Insertion of the element of malice into [Neb. Rev. Stat.] § 28-304 [(Reissue 2016)] was not a judicial construction of the legislative intent of the statute, but amounted to judicial legislation, which violated article II, § 1, of the Nebraska Constitution.[38]

Although *Burlison* addressed substantive law and we address procedure, the same principle applies to appellate jurisdiction: An appellate court is empowered to construe a statute governing when an appeal may be taken, but it may not engage in judicial legislation by proclaiming an exception contrary to statute. The *Richardson* exception was not a judicial construction of § 25-1902; instead, adoption of the exception amounted to judicial legislation.

[10,11] Respect for precedent should not prevent us from restoring our adherence to the Nebraska Constitution and statutes. We have said that while the doctrine of stare decisis is entitled to great weight, it is grounded in the public policy that the law should be stable, fostering both equality and predictability of treatment.[39] And we have recognized that overruling precedent is justified when the purpose is to eliminate inconsistency.[40] Thus, we said that remaining true to an intrinsically sounder doctrine better serves the values

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[37] *State v. Burlison, supra* note 36.

[38] *Id.* at 201-02, 583 N.W.2d at 39 (Wright, J., concurring; Connolly and Gerrard, JJ., join).

[39] *State v. Hausmann*, 277 Neb. 819, 765 N.W.2d 219 (2009).

[40] See *id*.

of stare decisis than following a more recently decided case inconsistent with the decisions that came before it.[41] The U.S. Supreme Court has identified a number of relevant factors in deciding whether to adhere to the principle of stare decisis, including workability, the antiquity of the precedent, whether the decision was well reasoned, whether experience has revealed the precedent's shortcomings, and the reliance interests at stake.[42] The Court explained that "reliance interests are important considerations in property and contract cases, where parties may have acted in conformance with existing legal rules in order to conduct transactions."[43] But we see no history showing that people have structured their transactions or behavior in reliance on the *Richardson* exception. Here, fundamental principles compel corrective action. Having recognized, however belatedly, that the *Richardson* exception represents judicial legislation proscribed by the Nebraska Constitution, we cannot allow the doctrine of stare decisis to perpetuate our mistake.

[12] We therefore overrule our decision in *Richardson v. Griffiths*[44] and cases relying upon it[45] to the extent that they authorized appellate jurisdiction in the absence of a judgment or final order and without specific statutory authorization.

Although policy reasons were proffered in support of such an exception, these arguments must be addressed to the Legislature. We acknowledge that two states have

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[41] *Id.*

[42] See *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

[43] *Id.*, 558 U.S. at 365.

[44] *Richardson v. Griffiths, supra* note 2.

[45] See, *Jacob North Printing Co. v. Mosley, supra* note 26 (collateral order doctrine); *Beller v. Crow, supra* note 25; *State v. Kawa, supra* note 25; *State v. Ehlers, supra* note 25; *Mutual Group U.S. v. Higgins, supra* note 24; *Detter v. Schreiber, supra* note 25; *Hawkes v. Lewis, supra* note 24; *Bechtold v. Gomez, supra* note 25. See, also, *McKenzie v. City of Omaha*, 12 Neb. App. 109, 668 N.W.2d 264 (2003).

specifically authorized an interlocutory appeal from an order disqualifying an attorney for any party.[46] But the key policy question is whether a disqualification order can effectively be reviewed following a judgment on the merits. The U.S. Supreme Court decisively concluded that effective review was possible.[47] All that is required is a "willing[ness] when necessary to set aside verdicts—even when they result from lengthy civil proceedings."[48] We rely upon the Legislature, exercising its proper constitutional authority, to determine whether the *Richardson* exception should be placed in our statutory law.

## CONCLUSION

Because this appeal was not taken from a final order and because we overrule our line of decisions purporting to authorize an interlocutory appeal, we dismiss the appeal.

Appeal dismissed.

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[46] See Ark. R. App. P.—Civ. 2(a)(8) (2014), and Ill. S. Ct. R. 306(a)(7) (eff. Mar. 8, 2016).

[47] See *Richardson-Merrell Inc. v. Koller, supra* note 27.

[48] *Id.*, 472 U.S. at 442 (Brennan, J., concurring).




**Nebraska Supreme Court**

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

-- Nebraska Reporter of Decisions

# David A. Oldfield, appellant, v. Nebraska Machinery Company, appellee.

894 N.W.2d 278

Filed April 21, 2017. No. S-16-526.

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 will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
3. **Statutes: Judgments: Appeal and Error.** The interpretation of statutes and regulations presents questions of law. An appellate court independently reviews questions of law decided by a lower court.
4. **Termination of Employment.** Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason.
5. **Summary Judgment.** On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
6. ____. Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
7. **Fair Employment Practices: Discrimination.** The ultimate issue in an age discrimination case is whether age was a determining factor in the employer's decision to take the adverse employment action.

8. **Discrimination: Summary Judgment: Evidence.** To survive summary judgment in a discrimination case, the nonmoving party must do more than simply create a factual dispute as to the issue of pretext; he or she must offer sufficient evidence for a reasonable trier of fact to infer discrimination.
9. **Employer and Employee: Discrimination: Proof.** A plaintiff may show discriminatory animus, among other ways, by showing that the employer (1) failed to follow its own policies, (2) treated similarly situated employees in a disparate manner, or (3) shifted its explanation of the employment decision.
10. **Fair Employment Practices: Civil Rights: Employer and Employee.** An employee is protected by the Nebraska Fair Employment Practice Act from employer retaliation for his or her opposition to an act of the employer only when the employee reasonably and in good faith believes the act to be unlawful. In order for such a belief to be reasonable, the act believed to be unlawful must either in fact be unlawful or at least be of a type that is unlawful.
11. **Termination of Employment: Public Policy: Damages.** Under the public policy exception to the at-will employment doctrine, an employee can claim damages for wrongful discharge when the motivation for the firing contravenes public policy.
12. **Termination of Employment: Public Policy.** The public policy exception to the at-will employment doctrine is restricted to cases when a clear mandate of public policy has been violated, and it should be limited to manageable and clear standards.
13. ____: ____. In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.

Appeal from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Affirmed.

Robert F. Bartle, of Bartle & Geier Law Firm, for appellant.

Margaret C. Hershiser and David A. Yudelson, of Koley Jessen, P.C., L.L.O., for appellee.

Heavican, C.J., Wright, Cassel, Stacy, Kelch, and Funke, JJ.

Kelch, J.

## I. NATURE OF CASE

David A. Oldfield filed a wrongful termination claim against Nebraska Machinery Company (NMC), alleging that his discharge was in violation of Nebraska's Age Discrimination in Employment Act (ADEA),[1] in violation of the whistleblower retaliation provisions of the Nebraska Fair Employment Practice Act (FEPA),[2] and in violation of public policy. Based on the undisputed evidence of Oldfield's performance issues and the limited evidence offered by Oldfield, we affirm the district court's granting of summary judgment in favor of NMC and against Oldfield on all claims.

## II. FACTS

This matter arises from Oldfield's termination from NMC after 38 years of employment. In his amended complaint, Oldfield seeks damages against NMC for wrongful discharge in violation of (1) the ADEA, (2) the FEPA, and (3) public policy.

After filing an answer, NMC moved for summary judgment, and a hearing was set. At the hearing, depositions of Oldfield and Oldfield's superior, Dwight McDermott, were received into evidence, along with the exhibits used in those depositions. After the hearing, the district court granted summary judgment in favor of NMC.

Because summary judgment requires the court to view the facts in the light most favorable to the nonmoving party, we set forth the facts presented by Oldfield in his complaint and deposition first before reviewing those presented by NMC.

### 1. Facts Presented By Oldfield

At all relevant times, Oldfield held an "at-will" position as a heavy equipment service manager at one of NMC's locations

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[1] See Neb. Rev. Stat. §§ 48-1001 to 48-1010 (Reissue 2010).

[2] See Neb. Rev. Stat. §§ 48-1101 to 48-1125 (Reissue 2010 & Cum. Supp. 2016).

in Lincoln, Nebraska. During his deposition, Oldfield admitted to having disagreements with his supervisors and not meeting NMC's expectations in certain respects.

(a) Disagreement About Flat-Rate Pricing

In June 2011, the day before Oldfield was to go on vacation, Oldfield's direct supervisor, Brandon Zobel, called Oldfield into his office to discuss NMC's transition to "flat-rated" pricing, i.e., setting a standard price on doing a certain job. Because Zobel did not have a history in repairs, Zobel asked Oldfield's opinion. Oldfield "tr[ied] to explain to [Zobel] how certain jobs, the way he wanted to do it, couldn't be flat rated." Zobel disagreed, and the discussion became heated. Oldfield then asked Zobel if he should come back after his vacation. Zobel responded, "'That's up to you,'" and Oldfield left.

While Oldfield was on vacation, Kevin Brown, NMC's vice president of services and parts, called Oldfield to make sure he was coming back. Brown told Oldfield that he had been doing a great job and wanted to make sure that Oldfield stayed with NMC.

On June 17, 2011, after Oldfield came back from vacation, he met with Brown to discuss some of the problems that he and Zobel were having together. Then Brown met with Zobel to discuss the problems. Later that day, Zobel arranged a meeting between himself and Oldfield with Brown present. At Oldfield's deposition, Oldfield was given an agenda for that meeting, which reminded him of what was discussed: the issue of the flat-rate jobs, a new process for invoicing work orders, and the hiring of two additional technicians.

They also discussed agenda items, including "Uniform Attire" and "Shop and Office Cleanliness." Oldfield testified that he had problems with NMC's uniform company getting pants that fit him and did not drag on the ground. Although Oldfield had been wearing his uniform shirt, he had not been wearing the uniform pants. Instead, he had been wearing jeans. Another NMC employee had a similar problem finding

a uniform that fit, but McDermott (Zobel's superior) told her not to worry about it. Additionally, the shop that Oldfield managed "wasn't as clean as [Zobel] thought it should be." Brown did not say anything during the meeting.

(b) Shop Cleanliness

In December 2011, Zobel wrote an email to Oldfield and four other employees, asking them to "work hard to get some 'deep cleaning' done over the next couple of weeks by December 31st." Cleanliness was important to NMC because NMC was a dealer of Caterpillar heavy equipment. Caterpillar has a contamination control policy and would inspect NMC to make sure it was compliant. Oldfield testified that he did not think Zobel's email meant that his shop needed to be completely compliant with Caterpillar's audit standards by January 1, 2012.

On January 18, 2012, NMC conducted a surprise mock contamination control audit. Thereafter, Zobel wrote an email to Oldfield, attaching a list of items that came up during the mock audit. The email stated, in relevant part:

> Your department has made some big improvements over the last few weeks with cleaning the shop. I am very happy about that, but I am disappointed that it wasn't done before January 1st, like I had stated several times during the last several months. That being said, let's move forward and get the items on the attached sheet fixed *immediately*.

Three weeks later, Zobel emailed Oldfield, asking, "How are these items coming along?" According to Oldfield, most of the items had been completed at that point, but there were still some items that needed to be done.

(c) Monthly Meetings

In October 2011, Zobel wrote an email to Oldfield and two other employees, requesting that they hold monthly meetings with their respective departments. In February 2012, Zobel emailed Oldfield requesting that Oldfield cover "at least a

handful of items" at the beginning of the next monthly meeting. Zobel also wrote, "I was upset by your comment/attitude about the meetings being a waste of time, 'that you [would] rather have them working.'" After Oldfield received the email, he talked to Zobel and told him that he never said the meetings were a waste of time and that he was "joking" when he said that he would rather have his employees working.

(d) Oldfield's Performance Appraisal

In May 2012, using NMC's performance appraisal form, Zobel assessed Oldfield's performance for 2011 and 2012. The form listed seven different categories: (1) "Managing Others," (2) "Budgetary Controls," (3) "Managing Self," (4) "Organizational Relationships," (5) "Problem Solving," (6) "Performance Standards," and (7) "Safety and Health." Oldfield met or exceeded expectations on 8 of the 10 categories; he was "Below Requirements" on "Managing Self" and "Organizational Relationships." Under each subsection and at the end of the appraisal, there were boxes for Zobel to make comments.

Zobel rated Oldfield as meeting expectations for "Managing Others" and commented, "[Oldfield] is exceptional at getting the most out of his employees. He keeps everybody busy, all of the time. [Oldfield] can do a better job about communicating information to his employees, executing company policies, and promoting teamwork."

Oldfield exceeded expectations for "Budgetary Controls," and Zobel commented, "Historically, [Oldfield] has always been a top performer when it comes to hitting budget and sales numbers. He spends very little and generates a lot of revenue."

Oldfield fell below NMC's requirements for "Managing Self." Zobel commented:

> [Oldfield] does his job well in terms of meeting deadlines / responding to his larger customers. However, it may take several days for him to respond (sometimes no response) to internal emails and/or phone calls. [Oldfield] has been resistant in the past regarding

> priorities and organizational changes. Examples include; [flat-rate] jobs, monthly employee meetings, [shop cleanliness], technician training, service writer, wearing his uniform, etc.

Zobel rated Oldfield as exceeding expectations for "Organizational Relationships" and commented, "[Oldfield] does not always execute directives, regardless of personal likes/dislikes. Examples include (same as above) . . . . It is evident that [Oldfield] dislikes speaking orally in groups and avoids it whenever possible. Small to mid-sized customers are not always responded to in a timely manner." In his deposition, Oldfield disputed that small and midsized customers were not responded to in a timely manner. Oldfield explained that "a lot" of small and midsized customers were very happy with the service, but some were upset about the cost.

Oldfield was rated as exceeding expectations for "Problem Solving." Zobel commented: "[Oldfield] solves many problems each and every week. He has a tremendous amount of experience and job knowledge that helps him solve problems quickly and effectively. An opportunity for [Oldfield] would be to participate more in group discussions and provide solutions along with the issues."

Zobel rated Oldfield as exceeding expectations for "Performance Standards" and commented:

> [Oldfield] does give feedback to his employees, and he has been improving on giving positive feedback along with the negative. I believe that [Oldfield's] company best flat variance numbers as well as being a top producer show that he is able to get the most out of his technicians through daily feedback. My only concern is that he needs to familiarize and train other technicians at key customer sites . . . .

Oldfield met expectations for "Safety and Health," and Zobel commented: "For the most part, work is performed safely. More can be done to enforce safety glasses, smoking areas, and seat-belts. However, the number of injuries for

Lincoln's heavy equipment department have been fewer over the past 6 months, which is a definite improvement."

In a section entitled "Manager's Overall Performance Comments," Zobel wrote:

> There is no denying that [Oldfield] produces strong financial numbers and takes care of his larger customers. He works hard to get the most out of his people and is able to take care of a large volume of work each week. His technical problem-solving skills are top notch. [Oldfield] has a hard time adapting to change and follow-through with directives, regardless of personal preference. More improvement is needed in the area of follow-through with internal and external customers. Employee communication and team building needs to improve as well.

Oldfield agreed that he could improve his communication with internal customers (other NMC departments), but disagreed that he was deficient in communicating with external customers.

Under a section entitled "Did employee meet goals/performance objectives from the previous review period? Why or why not?," Zobel wrote:

> Partially. Financially, [Oldfield] hit it out of the park by finishing $784,348 above budget and $830,347 better than 2010. Last labor to invoice improved dramatically from 13.56 days in May 2011 to as low as 1.64 days in November 2011. This was an impressive improvement. However, [Oldfield] can be very difficult to work with at times due to his resistance to change and slow/non-existent follow-up at times. [Flat-rate] jobs performance in Lincoln for 2011 was the lowest store at 17.07%. This improved later in the year and into 2012, but progress was still limited for much of 2011. Monthly meetings were few, infrequent, and too short. Contamination control was not made a priority for most of the year; progress required several reminders, emails, and nudges from upper management.

Oldfield explained that Lincoln's flat-rate jobs performance was the lowest store out of NMC's three stores because other stores had smaller equipment that they worked with, so it was easier to apply a flat rate to those jobs. Oldfield testified that he looked at each job to see if flat-rate pricing could be done and that he had been trying to do more.

(e) Monski Replaces Zobel

In spring 2012, Zobel accepted another position and NMC hired David Monski to replace him as Oldfield's supervisor. Before Monski arrived, Brown and McDermott invited Oldfield to lunch. According to Oldfield, Brown and McDermott thanked Oldfield for a job he had done and mentioned that Monski was coming to Lincoln. During this meeting, McDermott told Oldfield that if Monski did not work or had problems in Lincoln that they would think that there was a problem with the Lincoln store. Oldfield testified that he did not know what McDermott meant by that. Oldfield testified that he could not recall Brown or McDermott saying anything about how either of them expected Oldfield to get along with Monski.

(f) Failure to Conduct Appraisals

At the beginning of each year, Oldfield and other department managers were to conduct appraisals of subordinate employees and those employees were to conduct self-appraisals. Oldfield testified that most of the years, he completed the appraisals, but that there were some years when not all were completed.

At some point in 2011, McDermott conducted an audit appraisal. After learning the number of incomplete appraisals, McDermott talked to Oldfield outside his office, telling him that the number was unacceptable and that they needed to do better.

In 2012, Monski sent Oldfield several emails about the appraisals. On April 19, Monski emailed Oldfield and another employee, asking, "Do you have your techs self-appraisals

back yet? Or more importantly have you had them complete them yet?" On April 23, Monski emailed Oldfield, asking him if he had received the self-appraisals back. Monski also advised Oldfield that *his* appraisals of the employees were supposed to have been turned in the prior Friday. A few minutes later, Oldfield responded that he was "waiting on 2." On May 15, Monski sent Oldfield an email advising Oldfield that he needed to get his appraisals to Monski before "the 29th" when Monski would be out of the office. Oldfield did not meet the deadline.

Finally, on July 5, 2012, Monski issued Oldfield a written warning for failure to meet the deadline to complete the performance appraisals. This warning was issued after Oldfield had been given three extensions. In the warning, Monski discussed McDermott's audit of Oldfield's performance appraisals and stated that the audit showed that from 2002 to 2011, over 95 percent of Oldfield's subordinates had not received a formal appraisal or other written feedback. Oldfield could not remember the number of appraisals he had not completed, but he thought that 95 percent was too high and that the correct percentage was closer to 50 percent. In the written warning, Oldfield was given a final deadline by which to complete the appraisals so as to avoid "further corrective action, up to and including termination of employment." Oldfield met the final deadline.

Oldfield testified that he had gotten behind on appraisals because the service writer, whose job was to take customer calls and schedule employees for different jobs, did not do a good job and eventually left the position. During the 4 months that the service writer held the position, Oldfield helped him take calls. Oldfield also said that NMC began requiring more online reports in 2010, which took service managers extra time. Oldfield testified that he was not sure if other NMC managers were falling behind on their appraisals, but no other managers had as many subordinates as Oldfield. At that time, Oldfield had approximately 22 to 25 subordinates.

(g) Railroad Service Manager Position

In the last week of September 2012, two NMC superiors approached Oldfield about a railroad service manager position in NMC's railroad division. Although the plan was not ready to be put into effect, Oldfield expressed interest.

(h) September Breakfast Meeting

On September 24, 2012, Monski held a "breakfast gathering" with Oldfield's subordinates; Oldfield was not invited. After the gathering, Oldfield emailed Monski, asking how his subordinates' time for that meeting should be billed. Two minutes after that email was sent, Monski responded, "Just training will work." Oldfield directed his shop clerk to enter the time for his subordinates who had been at the meeting. Oldfield testified that "[o]nce the shop clerk enters [the time,] that [is] the number once and for all." That number "goes into the payroll system, and at the end of the month . . . the payroll checks come out."

On October 3, 2012, Monski sent Oldfield an email stating, in relevant part:

> I need to know why your field guy's [sic] billed more than 45 minutes for the "meeting" (breakfast) last Monday. If they are calling it a meeting[,] I guess that is fine[,] but the "meeting" started at 6:30 and was done at the latest 7:10[,] so I expect an answer for this. I am fine paying them for 45 minutes if you feel they must be paid[,] but no more. Surely not 1.5 hours as some of them have billed[,] which should have been caught by you or [your shop clerk] when it was done. If they had nothing to do I expect it to be charged to idle time or whatever they actually were doing but not classroom as the "meeting" was over.
>
> Just a quick FYI in case it happens again, I have bought breakfast for field guys and even lunch in the field, in every location I have been in just because of the job they do with NMC. That was partially the reason

> behind this[,] not an official meeting, going behind your back, or any other reason other than to answer any questions they may have[,] as they have evidently been voicing questions and opinions to fellow employees who are bringing it to my attention. They all need to understand if they have a problem or question with what I am doing or what is going on[,] they need to come directly to me versus discussing issues with fellow employees or [customers]. This type of behavior cannot and will not be tolerated. I am also still waiting to hear from you which one spoke with [the customer] in regards to this "meeting" which made it come off negative and need to know today.
>
> There are also other entries in the classroom training work order that have 3 hours and some with overtime. Unless driving to and from class there should be no overtime associated with classroom training only an 8 hour day. You need to [e]nsure your techs and [shop clerk] are aware of this as well as monitoring this weekly so it is caught prior to final invoicing.
>
> Thanks

Eleven minutes later, Monski sent Oldfield another email, stating, in relevant part:

> I am still waiting for an answer on the machine which was worked on for H&S Plumbing regarding the good will request.
>
> You state you have no time but then continue to think that by adding another manager to lighten your load is a bad thing. I just do not understand.
>
> You also need to [e]nsure you are staying on top of the steam bay being cleaned up after it is used[,] as well as the shop[,] daily not once a week.

After Oldfield received the email above, he went to talk to Monski in person. Oldfield testified that Monski was upset with Oldfield for paying the employees, because Monski did not consider the breakfast gathering to be a meeting and

thought that the employees should not have been paid. Oldfield admitted that the employees were paid for their time.

Oldfield testified that Monski also let Oldfield's shop clerk know that he was not happy about the employees' being paid for the meeting. According to Oldfield, the shop clerk left her job at NMC because Monski harassed her about this incident.

(i) Failure to Disclose Name of Employee Who Violated NMC Policy

As stated in Monski's email, an employee had spoken with a customer about the September 2012 breakfast meeting, which was against NMC company policy and a terminable offense. Oldfield knew which employee it was, but refused to disclose the employee's identity to Monski, because Oldfield did not want the employee to get fired.

Monski sent the emails above on a Wednesday. On the following Monday, Monski called Oldfield to his office. When Oldfield arrived, McDermott was also there.

McDermott and Monski gave Oldfield a memorandum advising him of the decision to terminate his employment. The memorandum stated, in relevant part:

> Despite receiving several warnings regarding our behavioral expectations, you continue to behave well beneath our established guidelines. More specifically, you continue to behave insubordinately by failing to follow the reasonable requests of your management team and by failing to manage and support the company's direction with your team, clients and coworkers. As stated in the Performance and Conduct Policy found within the NMC Employee Handbook, "Insubordination, such as refusal to do assigned work, inappropriate language or behavior toward a supervisor/manager" can result in corrective action, up to and including termination of employment. Because you have not illustrated the willingness or ability to cure these matters we have made the decision to terminate your employment.

After the memorandum was read through, Oldfield told McDermott that he knew Monski had mentioned that he was getting close to retirement age but that he did not think he was talking this soon. Oldfield testified that neither McDermott nor Monski responded to this comment, and the meeting ended.

#### (j) Monski's Comment About Oldfield's Retiring

Oldfield explained that he made the comment about retirement in response to one comment Monski had made in a meeting approximately 1 month prior. On September 17, 2012, Monski stated that he "'need[ed] to get someone trained to take over for [Oldfield] because one of these days, [Oldfield was] going to want to retire.'"

Oldfield testified that Monski's comment seemed unusual and that it was his experience that having a succession plan within a department was not important to NMC. Oldfield testified that usually, if someone was going to retire from NMC, then the person would tell upper management that they were going to retire and then upper management would decide who was going to take that person's place.

Oldfield admitted that this comment is the sole basis for his age discrimination claim.

### 2. Facts Presented by NMC

After Zobel accepted another position, McDermott and two other NMC employees met with two or three salespeople to discuss matters related to Oldfield. The salespeople expressed concern that Oldfield was not adequately communicating with customers, and Brown and McDermott decided to have a meeting with Oldfield and took him to lunch.

Brown and McDermott talked to Oldfield about the concerns that Zobel had with Oldfield and Oldfield's "attitude of, If it's not my idea, I'm not behind it." According to McDermott, he told Oldfield, "you know, we've had problems with the last branch manager. We're going to bring another guy

in here . . . and if we have the same problems with the new guy, then we know that the problem was not with the previous store manager."

McDermott testified that nothing was put in Oldfield's personnel file about the lunch meeting, because "as long as [Oldfield] had been [at NMC], we wanted to give him every opportunity to change his habits, come around to our way of doing things . . . which was to no avail." McDermott said that Monski also reported problems.

McDermott testified that he was the one who made the decision to fire Oldfield. When asked if he relied upon Monski in making that determination, McDermott responded, "Monski had input, as well as the input that I'd received from . . . Zobel, the input from the meeting with the sales[people]; but, ultimately, the decision to terminate [Oldfield's employment] was mine." However, McDermott also made statements that suggested Monski was also responsible for the decision. For example, when McDermott was asked if a previous safety violation had factored into his decision to terminate Oldfield, McDermott responded, "Not with mine, personally, no." At one point, McDermott also stated that "we made the determination that — I made the determination to terminate" Oldfield's employment.

In response to questions about why Oldfield's employment was terminated, McDermott stated, "It was an accumulation of issues and the fact that it became evident that we were not going to be able to work with . . . Oldfield to get him to the point where we needed him." As reasons for the termination, McDermott cited Oldfield's failure to provide Monski with information, failure to communicate with customers, failure to work with people within his department, failure to train new employees, and failure to keep his shop clean, as well as "his whole attitude of, It's my way, if I don't buy into it, I'm not going to do it."

As an example of failure to train new or student employees, McDermott talked about a new employee who spent months

just washing equipment because, according to Oldfield, "the young kids, they weren't any good."

McDermott also said, "It was a bigger challenge getting the Lincoln location to conform to the [cleanliness] policies on an ongoing basis throughout the year [than] in the other locations," which he attributed to the "fact that . . . Oldfield did not buy into [cleanliness]; so, therefore, it was not important to him, and then it wouldn't be important to his team." Oldfield had told McDermott that cleaning was a waste of time.

McDermott also said that Oldfield was against putting a service writer in the Lincoln location and that he believed the service writer did not succeed because Oldfield did not want him to succeed.

McDermott stated that the "breakfast gathering" issue did not factor into his decision to terminate Oldfield's employment.

When asked how many warnings Oldfield received, McDermott stated that he could not recall the exact number but that there was "a pattern of many of them." He explained, "There would have been warnings like the ones I gave him about [shop cleanliness], the ones . . . Brown and I gave him when we had the [lunch] meeting. [Zobel and Monski] had communicated back and forth with him."

Oldfield was replaced by two employees. McDermott testified that one of them was "probably in his forties" and that the other was in his "late thirties." McDermott was 56 years old at the time of the deposition and still working for NMC.

### 3. Summary Judgment Granted

After a hearing, the district court granted summary judgment in favor of NMC and against Oldfield. The district court determined that, even in the light most favorable to Oldfield, the evidence failed to raise an inference that NMC's proffered reasons for Oldfield's termination of employment were merely a pretext for discrimination or retaliation. The district court also determined that Oldfield's claim of wrongful

termination in violation of public policy was duplicative of his age discrimination and retaliation claims.

## III. ASSIGNMENTS OF ERROR

Oldfield alleges that the district court erred in (1) concluding that Oldfield had not presented sufficient evidence to establish a prima facie case for discrimination and retaliation, (2) concluding that NMC offered legitimate reasons for terminating Oldfield's employment, (3) concluding that Oldfield had not presented sufficient evidence of pretext to counter NMC's legitimate nondiscriminatory reasons for his claims of termination due to both age and retaliation, and (4) not giving Oldfield the benefit of every reasonable inference based on the evidence presented in a summary judgment proceeding.

## IV. STANDARD OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.[3]

[2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[4]

[3] The interpretation of statutes and regulations presents questions of law. We independently review questions of law decided by a lower court.[5]

## V. ANALYSIS

[4] Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may

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[3] *Coffey v. Planet Group*, 287 Neb. 834, 845 N.W.2d 255 (2014).

[4] *Id.*

[5] *Id.*

terminate an at-will employee at any time with or without reason.[6] However, we have recognized a public policy exception to the at-will employment doctrine.[7] As noted above, Oldfield alleged in his amended complaint that NMC's decision to terminate his employment violated the ADEA, the FELA, and public policy. On appeal, he claims that the district court erred in granting summary judgment in favor of NMC.

[5,6] On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.[8] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[9]

We note that both parties, as well as the district court, have analyzed the age discrimination claim and the retaliation claim using the three-part burden-shifting framework from *McDonnell Douglas Corp. v. Green*.[10] The *McDonnell Douglas Corp.* framework is a procedural device of order of proof and production, designed to force an employer to reveal information that is available only to the employer, i.e., any unstated reasons for the adverse employment action, as well as any discretionary factors underlying its decision.[11]

But, although the burden of production shifts between the plaintiff and the employer, the plaintiff retains the ultimate burden of persuasion,[12] and the ultimate question is

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[6] *Id.*

[7] See *id.*

[8] *Melick v. Schmidt*, 251 Neb. 372, 557 N.W.2d 645 (1997).

[9] *Strode v. City of Ashland*, 295 Neb. 44, 886 N.W.2d 293 (2016).

[10] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

[11] *Hartley v. Metropolitan Util. Dist.*, 294 Neb. 870, 885 N.W.2d 675 (2016).

[12] *Id.*

discrimination or retaliation vel non.[13] Thus, in our review of this summary judgment action, we focus on the ultimate question of whether NMC violated the ADEA, the FELA, or public policy and determine whether the moving party, NMC, satisfied its burden to prove that no genuine issue of material fact exists and whether it produced sufficient evidence to demonstrate that NMC is entitled to judgment as a matter of law.[14] In other words, we consider whether NMC satisfied its burden to show that there is no evidence or reasonable inference that NMC violated the ADEA, the FELA, or public policy.

1. ADEA

The ADEA makes it unlawful for an employer to discharge or discriminate against any individual because of such individual's age, unless the reasonable demands of the position require an age distinction.[15] The Nebraska ADEA is patterned after the federal Age Discrimination in Employment Act of 1967,[16] so, in construing the Nebraska ADEA, it is appropriate to look to federal decisions interpreting the federal act.[17]

[7] The ultimate issue in an age discrimination case is whether age was a determining factor in the employer's decision to take the adverse employment action.[18] NMC sought to prove that age was not a determining factor in Oldfield's termination of employment by setting forth evidence of its legitimate and nondiscriminatory reasons for the termination,

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[13] See, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993); *Billingsley v. BFM Liquor Mgmt.*, 264 Neb. 56, 70, 645 N.W.2d 791, 803 (2002) ("[t]he ultimate issue is whether age was a determining factor in the employer's decision" to take adverse employment action).

[14] See *Melick v. Schmidt, supra* note 8.

[15] § 48-1004(1).

[16] See 29 U.S.C. §§ 621 to 634 (2012 & Supp. II 2014).

[17] See *Billingsley v. BFM Liquor Mgmt., supra* note 13.

[18] *Id.*

namely that Oldfield was having performance issues and was not getting along with his supervisor.

The material facts are not in dispute. Although Oldfield's testimony put certain performance issues and behavioral issues in dispute, Oldfield admitted to a plethora of other issues that NMC had with Oldfield. He admitted, among other things, that during the last few years of his employment, he argued with his supervisor about new policies and procedures, he failed to conform with NMC's uniform policy, he failed to make his shop's appearance comply with upper management's expectations, he did not hold monthly meetings as often as instructed, he needed to improve on communicating with internal customers, he did not complete at least 50 percent of performance appraisals for his subordinates from 2002 to 2011, and he refused to comply with his supervisor's direct orders to disclose the name of an employee who had violated company policy.

[8] Oldfield argues that in light of Monski's comment about Oldfield's retirement, NMC's motivation in terminating his employment is still in dispute. However, to survive summary judgment, Oldfield "must do more than simply create a factual dispute as to the issue of pretext; he must offer sufficient evidence for a reasonable trier of fact to infer discrimination."[19] Even viewing the evidence in the light most favorable to Oldfield, we conclude that no reasonable trier of fact could infer that NMC discriminated against him on the basis of his age.

Oldfield admitted in his deposition testimony that the sole basis for his age discrimination claim was a single comment of Monski's that he "'need[ed] to get someone trained to take over for [Oldfield] because one of these days, [Oldfield was] going to want to retire.'" But, one isolated comment about retirement is not enough to demonstrate pretext for purposes

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[19] See *Mathews v. Trilogy Communications, Inc.*, 143 F.3d 1160, 1165 (8th Cir. 1998).

of age discrimination.[20] Although "retirement inquiries can sometimes be so unnecessary and excessive as to constitute evidence of discriminatory harassment,"[21] such was not the case here, where Monski made only a single comment.

[9] Instead, there was simply no evidence of discriminatory animus. A plaintiff may show discriminatory animus by showing that the proffered reason for the adverse employment action was pretext for discrimination.[22] The plaintiff may do so, among other ways, by showing that the employer (1) failed to follow its own policies, (2) treated similarly situated employees in a disparate manner, or (3) shifted its explanation of the employment decision.[23]

Oldfield claims that he showed NMC failed to follow its own policies when it did not formally document all warnings to Oldfield. However, a review of an exhibit which Oldfield agreed was NMC's company manual shows that NMC did not require itself to document every warning. In fact, the manual states:

> [A]ll of [NMC's] employees are considered to be "at-will" and may be terminated at any time, with or without cause or advance notice. As further detailed below, disciplinary action may include any one or combination of the following steps — verbal warning, written warning, suspension with or without pay or termination of employment. Depending on the severity of the problem and the number of occurrences, [NMC] reserves the right to immediately terminate an employee, even upon a first offense.

Next, Oldfield claims that he showed that NMC "treated similarly-situated employees in a disparate manner" by hiring

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[20] See, *Ziegler v. Beverly Enterprises-Minnesota, Inc.*, 133 F.3d 671 (8th Cir. 1998); *Barket v. Nextira One*, 72 Fed. Appx. 508 (8th Cir. 2003).

[21] See *Montgomery v. John Deere & Co.*, 169 F.3d 556, 560 (8th Cir. 1999).

[22] *Hartley v. Metropolitan Util. Dist., supra* note 11.

[23] *Gibson v. American Greetings Corp.*, 670 F.3d 844 (8th Cir. 2012).

"two considerably younger men to assume [Oldfield's] prior position."[24] However, the only evidence of the employees' ages was McDermott's testimony that one was in his "late thirties" and the other was "probably in his forties." Moreover, to be similarly situated, the two employees would have to have performance issues similar to Oldfield. There was no evidence that these employees had performance issues.

Oldfield also claims that he showed pretext because NMC allegedly shifted its explanation for the employment decision. In support of his argument, Oldfield points to McDermott's testimony, which he says "illustrate[s] that there was no specific incident" that led to Oldfield's termination of employment.[25] However, the fact that Oldfield was terminated for "an accumulation of issues," rather than just one, does not mean that NMC has shifted its explanation. Instead, McDermott's testimony was consistent and matches the memorandum that Oldfield received, which explained that the reason he was terminated was because of insubordination and performance issues.

In sum, based on the undisputed evidence of Oldfield's performance issues, we conclude that no reasonable trier of fact could infer from one isolated statement that NMC terminated his employment for discriminatory reasons.

### 2. FEPA

[10] Both federal law and the FEPA make it unlawful for an employer to discriminate against its employee on the basis of the employee's opposition to an unlawful employment practice.[26] We have said that "[a]n employee is protected by FEPA from employer retaliation for his or her opposition to an act of the employer only when the employee reasonably

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[24] Brief for appellant at 8, 16.

[25] *Id.* at 17.

[26] See, 42 U.S.C. § 2000e-3(a) (2012); § 48-1114.

and in good faith believes the act to be unlawful."[27] In order for such a belief to be reasonable, the act believed to be unlawful must either in fact be unlawful or at least be of a type that is unlawful.[28]

After reviewing the pleadings and the evidence presented, we conclude that NMC did not engage in an unlawful practice; that Oldfield could not have reasonably believed that NMC was engaging in an unlawful practice; and that even if Oldfield had established that he reasonably believed the act to be unlawful, he failed to show that his termination was causally connected to his alleged reporting of an unlawful practice.

As noted by the district court, "[t]he crux of Oldfield's claim is that he was terminated after reporting alleged violations of the federal Fair Labor Standards Act with respect to nonpayment of wages to his subordinates for their time spent at a breakfast meeting with NMC manager . . . Monski." However, Oldfield admits that the employees were actually paid for that meeting, so clearly, there is no evidence that NMC engaged in an unlawful practice.

And Oldfield could not have reasonably believed that NMC was engaged in an unlawful practice. After the breakfast meeting, Oldfield sent Monski an email asking how the time should be recorded and Monski responded, "Just training will work." Oldfield then instructed his shop clerk to enter the time for his subordinates. Oldfield admitted that once the shop clerk enters the number of hours for the subordinates into the payroll system, then that is the number of hours for which the subordinates will be paid. Accordingly, the evidence shows that the subordinates were lawfully paid and Oldfield could not have reasonably believed that they were not.

Moreover, the evidence does not reflect a causal connection between Oldfield's alleged reporting of an unlawful

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[27] *Wolfe v. Becton Dickinson & Co.*, 266 Neb. 53, 61, 662 N.W.2d 599, 605 (2003).

[28] *Id.*

practice and his termination of employment. Oldfield alleges that in addition to the evidence of pretext, which we rejected above, his evidence of temporal proximity (approximately 3 weeks) shows that there was a nexus. However, generally, a temporal connection between the protected conduct and the adverse employment action by itself is not enough to present a genuine factual issue on retaliation.[29] This is especially true where, as here, the evidence shows that the employer was concerned about a problem *before* the alleged protected conduct occurred.[30] Here, Oldfield admits that prior to his alleged protected conduct, he had, among other things, argued with his supervisor about new policies and procedures, failed to make his shop's appearance comply with upper management's expectations, failed to hold monthly meetings, failed to sufficiently communicate with internal customers, and failed to complete at least 50 percent of performance appraisals for his subordinates from 2002 to 2011.

In light of this evidence, and the fact that Oldfield's act of insubordination (failing to disclose the name of the employee who violated company policy) was within 2 days of his termination, we conclude that no rational jury could find that Oldfield's termination was a result of retaliation. Therefore, the district court properly granted summary judgment in favor of NMC with respect to the retaliation claim.

### 3. Public Policy

[11-13] Under the public policy exception to the at-will employment doctrine, an employee can claim damages for

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[29] *Hervey v. County of Koochiching*, 527 F.3d 711 (8th Cir. 2008) (quoting *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131 (8th Cir. 1999)).

[30] See *id.* (quoting *Smith v. Allen Health Systems, Inc.*, 302 F.3d 827 (8th Cir. 2002), and citing *Slattery v. Swiss Reinsurance America Corp.*, 248 F.3d 87, 95 (2d Cir. 2001) ("[w]here timing is the only basis for a claim of retaliation, and gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise")).

wrongful discharge when the motivation for the firing contravenes public policy.[31] The public policy exception is restricted to cases when a clear mandate of public policy has been violated, and it should be limited to manageable and clear standards.[32] In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.[33]

In Oldfield's amended complaint, he alleges that his termination of employment violated Nebraska common law and Nebraska public policy "against employers discharging employees from such a tenured position for unjustifiable reasons." But the "unjustifiable reasons" proffered by Oldfield are the same as his statutory reasons, i.e., that his termination of employment was a result of discrimination on the basis of his age and also retaliation for reporting an allegedly unlawful activity. In this respect, Oldfield's claim is duplicative of his ADEA and FELA claims, which we have already addressed and found to be meritless. Therefore, the district court properly granted summary judgment in favor of NMC with respect to Oldfield's public policy claim.

## VI. CONCLUSION

For the foregoing reasons, we conclude that Oldfield's assignments of error are without merit. We therefore affirm the judgment of the district court, granting summary judgment in favor of NMC and against Oldfield.

Affirmed.

Miller-Lerman, J., not participating.

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[31] *Coffey v. Planet Group, supra* note 3.

[32] *Id.*

[33] *Id.*

Nebraska Supreme Court
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# State of Nebraska, appellee, v. Akeem R. Jones, appellant.

894 N.W.2d 303

Filed April 21, 2017. No. S-16-754.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Evidence: Appeal and Error.** An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence; such matters are for the finder of fact.

Appeal from the District Court for Douglas County: Leigh Ann Retelsdorf, Judge. Affirmed.

Jerry M. Hug, of Alan G. Stoler, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Siobhan E. Duffy for appellee.

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

Stacy, J.

Akeem R. Jones was convicted of first degree murder and was sentenced to life imprisonment. This is his direct appeal. His sole assignment of error is that there was insufficient evidence to support the conviction. We affirm.

## FACTS

On March 11, 2009, Gary Holmes was shot and killed inside BJ's, a convenience store near 42d Street and Ames Avenue in Omaha, Nebraska. The shooter was wearing a black, hooded sweatshirt and a ski mask. The shooter did not enter BJ's, but instead opened the front door to the store and fired 15 shots. Nine or ten of them hit Holmes, and several hit and severely injured another customer. The shooting occurred at approximately 2 p.m., and officers arrived at the scene almost immediately. The incident was recorded on surveillance tape and observed by several witnesses.

### Dontia Bullard

After arriving at the scene, police made contact with Dontia Bullard. Bullard lived in an apartment he described as being "about 20 seconds away" from BJ's. Bullard, his girlfriend, and his infant son were getting out of a cab in front of the apartment when he saw two people in a red car parked in a nearby alley. A young man dressed in black got out of the car, cut through the backyard of Bullard's neighbor, and walked toward BJ's. Bullard worked at BJ's and recognized the man as a regular customer he knew as "Grimey." Other witnesses testified that Grimey was Jones' nickname.

Bullard testified that by the time he got to his apartment door, he heard approximately 15 gunshots. He sent his girlfriend and child inside and stayed by the door. From his doorway, he saw Jones come back through the neighbor's yard and return to the red car, carrying a ski mask and a gun. Bullard admitted on cross-examination that he had contact with police within minutes of the shooting and was questioned within hours of the shooting, but did not immediately tell them about what he saw. A few days afterward, however, Bullard contacted police and gave a statement. He explained that initially, he did not want to be involved, but decided to come forward because Holmes had been a friend. He admitted on cross-examination that he had been at BJ's almost every

day since the shooting and had talked about the shooting with people there.

### Tysheonna Anthony

Tysheonna Anthony also testified at trial. On March 11, 2009, she was living in Omaha with Jones' mother and was friends with Jones. On the day of the shooting, Anthony, Jones, Jamie Romaine Pace, and another man were driving around in a tan Cadillac owned by Pace. They stopped at BJ's sometime in the late morning so that Anthony could purchase a cigar, which she intended to use to smoke marijuana. Anthony entered the store while the others remained in the car. As she was leaving the store, Anthony saw two men approaching. One was wearing a black baseball cap with a "P" on it. These men were later identified as Holmes and Rodney Smith. Anthony got back in the car, and the foursome continued driving around.

They returned to BJ's a few hours later so Anthony could purchase another cigar. Again, Anthony entered the store alone, and the others remained in the car. Anthony testified that while she was in the store, Holmes and Smith were "mugging" her, which meant they were "staring [her] down." She thought they were also staring down the others in the car. When Anthony returned to the car, Jones was angry and starting asking about the guy in the "P" hat. Jones then asked if the others wanted to "earn their stripes" by going into the store and shooting the two men.

Anthony testified that none of the other occupants wanted to get involved, so they left BJ's. A few minutes later, however, they met Maxwell Griffey and his girlfriend Syerra Chatmon in an alley near BJ's. Griffey and Chatmon were driving a red Ford Focus. Jones was still angry and "going off," and he got out of the Cadillac and started talking to Griffey. Anthony could not hear the conversation, but she described Jones' demeanor as "pissed," explaining she could "see in his face that he's pretty mad." Anthony saw Jones change clothes with

Griffey in the alley, after which Jones got into the red car with Griffey. Chatmon got out of the red car and into the Cadillac with Anthony and the others, and Jones told Anthony to leave and go to his mother's apartment. Anthony testified she knew Jones had a ski mask and a gun with him, because she had seen them when he was still in the Cadillac.

The Cadillac and its occupants then left the alley, and drove to an apartment complex on 48th Street, where Jones' mother lived. According to Anthony, Griffey and Jones arrived at the apartment approximately 5 minutes later in the red car. At least Jones, Griffey, and Anthony went inside the apartment, and while there, Jones and Anthony went into the bathroom. Jones then told Anthony he had returned to BJ's, opened the front door, and "start[ed] shooting." He described shooting two men, and showed her the 9-mm gun he used. He then took off his clothes, sprayed them with something, lit them on fire, and tossed them out the bathroom window. Anthony testified she did not contact police because Jones told her if the police found out what had happened, he would "know it came from us" and he would "shoot all of us."

Griffey was killed in July 2009. Police contacted Anthony while investigating that homicide, and also asked her about the March 2009 shooting at BJ's. At that time, Anthony told investigators about Jones' involvement. By the time of trial, Anthony was incarcerated and serving a sentence for two felony convictions.

### Jamie Romaine Pace

Pace's trial testimony was similar to Anthony's. However, according to Pace, after the second trip to BJ's, she drove her tan Cadillac directly to the apartment complex on 48th Street, where they were met by the red car occupied by Griffey and Chatmon. Pace also recalled that Anthony got into the red car with Jones and Griffey. Pace thought Jones appeared upset and warned Anthony not to get involved. Pace testified that she randomly encountered Jones at a store sometime

after the shooting and he told her he was worried Anthony would talk.

### Syerra Chatmon

Chatmon also testified. She, like Anthony, recalled the meeting of the two cars occurring in the alley near BJ's. Chatmon stated that she got in the tan car originally occupied by Jones, Anthony, and Pace while Jones got into the red car she had arrived in with Griffey. Chatmon stated the tan car then went to the apartment complex on 48th Street, and Griffey and Jones arrived approximately 20 minutes later.

### Evidence of Fire

A man who lived at the 48th Street apartment complex testified that sometime in March 2009, he noticed a fire near a dumpster and attempted to put it out. The fire consisted of clothes or rags on top of a mattress or box spring. Fire department records show a unit was dispatched to the 48th Street apartment complex at 2:25 p.m. on March 11 and found a smoldering mattress near a dumpster.

### Christopher Coddington

Jones did not testify at trial. The sole witness called on his behalf was Christopher Coddington. Coddington was sitting in the driver's side back seat of a car parked in front of BJ's at the time of the shooting. He testified that the shooter was wearing a black hoodie. Coddington got out of the car and tried to follow the shooter as he or she ran around the outside corner of the store. Coddington thought he saw the shooter running toward 42d Street, in a northwesterly direction. The record indicates that the red car Bullard saw Jones exit and return to was located near 41st Street, east of BJ's.

The jury returned a verdict of guilty, and the district court sentenced Jones to life imprisonment. He filed this timely direct appeal.

## ASSIGNMENT OF ERROR

Jones' sole assignment of error is that there was insufficient evidence to support the verdict.

## STANDARD OF REVIEW

[1] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[1]

## ANALYSIS

A person commits murder in the first degree if he or she kills another purposely and with deliberate and premeditated malice.[2] Jones argues there was insufficient evidence to convict him, because the identity of the shooter was not established beyond a reasonable doubt. Jones does not contest the sufficiency of the evidence related to the other elements of the crime.

Jones argues that although both Bullard and Anthony identified Jones as the shooter, the "bulk"[3] of their testimony was not corroborated. He further asserts that other evidence contradicted the testimony of Bullard and Anthony. In essence, Jones asks this court to reweigh the evidence adduced at trial.

[2] But that is not the role of an appellate court. An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence; such matters are for the finder of fact.[4] The relevant question for an appellate

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[1] *State v. Olbricht*, 294 Neb. 974, 885 N.W.2d 699 (2016).

[2] Neb. Rev. Stat. § 28-303(1) (Reissue 2016).

[3] Brief for appellant at 10.

[4] See *State v. Rocha*, 295 Neb. 716, 890 N.W.2d 178 (2017).

court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[5]

Here, Jones challenges only the sufficiency of the evidence to identify him as the shooter. As such, the question before us is whether, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that Jones was the shooter.[6] We conclude it could.

Anthony testified that Jones was upset prior to the shooting, proposed the shooting, possessed a ski mask and a gun prior to the shooting, and confessed to the shooting after it occurred. Bullard testified that he saw Jones walking toward BJ's and soon thereafter heard gunshots. He then saw Jones returning to the red car carrying a gun and a ski mask. This evidence, if believed by a trier of fact, was sufficient to establish Jones' identity as the shooter beyond a reasonable doubt. Jones' argument to the contrary is without merit.

## CONCLUSION

For the foregoing reasons, we affirm Jones' conviction and sentence.

Affirmed.

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[5] *Id.*; *State v. Olbricht, supra* note 1.

[6] *Id.*

Nebraska Supreme Court
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# County of Douglas, appellant, v. Nebraska Tax Equalization and Review Commission, appellee.

894 N.W.2d 308

Filed April 27, 2017. No. S-16-548.

1. **Taxation: Appeal and Error.** Under Neb. Rev. Stat. § 77-5019(5) (Cum. Supp. 2016), appellate review of a decision by the Tax Equalization and Review Commission on a petition for review is conducted for error on the record of the commission.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Judgments: Evidence: Words and Phrases.** An agency decision is supported by competent evidence, sufficient evidence, or substantial evidence if the agency could reasonably have found the facts as it did on the basis of the testimony and exhibits contained in the record before it.
4. **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. Agency action taken in disregard of the agency's own substantive rules is also arbitrary and capricious.
5. **Appeal and Error.** When reviewing cases for error appearing on the record, an appellate court reviews questions of law de novo.
6. **Pleadings: Judgments: Appeal and Error.** A trial court's decision to grant or deny a motion to reconsider is reviewed for an abuse of discretion.
7. **Pleadings: Judgments: Motions to Vacate: Appeal and Error.** The abuse of discretion standard applies to an appellate court's review of a trial court's grant or denial of a motion to vacate or amend a judgment.

8. **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.
9. **Administrative Law: Judgments.** An administrative agency that is authorized to exercise quasi-judicial power is impliedly authorized to reconsider its own decisions.

Appeal from the Tax Equalization and Review Commission. Affirmed in part, and in part reversed.

Shakil A. Malik, Deputy Douglas County Attorney, for appellant.

Douglas J. Peterson, Attorney General, and L. Jay Bartel for appellee.

Heavican, C.J., Wright, Cassel, Stacy, Kelch, and Funke, JJ.

Wright, J.

## I. NATURE OF CASE

The Tax Equalization and Review Commission (TERC) issued an order to Douglas County to show cause why TERC should not order the adjustment of the valuation of three subclasses of residential real property in Douglas County. After a show cause hearing at which Douglas County appeared, TERC ordered the proposed adjustments. Douglas County filed a motion to reconsider, which TERC overruled. Douglas County petitioned for review with the Nebraska Court of Appeals. It subsequently filed a petition to bypass, which we granted. We affirm in part, and in part reverse.

## II. BACKGROUND

In April 2016, TERC held its statewide equalization hearing. The State of Nebraska's Property Tax Administrator (PTA) (the head of the property assessment division of the Nebraska Department of Revenue[1]) submitted reports for each

[1] Neb. Rev. Stat. § 77-701(1) (Cum. Supp. 2016).

county to TERC. As required by Neb. Rev. Stat. § 77-5027 (Cum. Supp. 2016), the reports analyzed the level and quality of assessment of the classes and subclasses of real property within each Nebraska county and made nonbinding equalization recommendations.

The report for Douglas County analyzed residential real property by dividing it into six valuation area subclasses (areas) based on geography and other common features of each area. The report analyzed the assessment-to-sales ratios within these areas. The assessment-to-sales ratio is the ratio of assessed value to sales price, calculated for every property sold in an arm's-length transaction. These ratios are based on the sales in the state "sales file."[2] The assessment of each class and subclass of most kinds of real property is required by statute to fall within 92 to 100 percent of actual value, as measured by an indicator of "central tendency," such as the median, mean (average), or weighted mean ratio.[3]

Three of the areas in Douglas County had median assessment-to-sales ratios outside the statutory range: "Area 2" had a median of 104.82 percent, "Area 3" had a median of 89.77 percent, and "Area 4" had a median of 90.08 percent. The overall median ratio for residential real property in Douglas County was 92 percent.

The report recommended increasing the valuation of Areas 3 and 4 by 7 percent. It reached this conclusion on the basis of a variety of statistics that showed that the true level of value for both areas was 90 percent of market value, which is below the statutory range.

The report also recommended that no change be made for Area 2 because "[t]he quality statistics . . . suggest [that] values are not uniform and widely vary from the median ratio." The statistics in the PTA's report indicated that there was a high level of dispersion and lack of uniformity in the ratios in

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[2] Neb. Rev. Stat. § 77-1327(3) (Cum. Supp. 2016).

[3] Neb. Rev. Stat. § 77-5023 (Reissue 2009).

Area 2. There was a lack of uniformity between higher- and lower-value properties in the area. The higher-value properties were underassessed, and the lower-value properties were overassessed.

The report indicated that the statistics for Area 2, such as the median, were skewed by a significant number of low-value sales. The median for Area 2 was 104.82 percent. But excluding sales of properties under $15,000, the median ratio of Area 2 was 100.45 percent; excluding sales under $30,000, the median ratio was 96.21 percent. The report concluded, "Considering the ratio study statistics for the strata of sales above $30,000[,] the valuations [of Area 2] are considered acceptable."

TERC issued an order to show cause why it should not increase the valuation of Areas 3 and 4 by 7 percent and decrease that of Area 2 by 8 percent. At the show cause hearing, Chief Field Deputy Jack Baines of the Douglas County assessor's office testified that there was a low-average sales price in Area 2, which, when combined with a small number of higher-price sales, tended to skew the data and skew the median ratio. He explained that with lower value properties, smaller differences between the assessed value and sales price would cause a greater difference in the assessment-to-sales ratio.

As to Areas 3 and 4, Baines believed that the data underlying the statistics in the PTA's report was unreliable and that no changes should be made. Baines was new to his position. He testified that some of the assessment practices and procedures that he observed upon his arrival, such as not validating sales for the state sales file to make sure they qualified as arm's-length transactions, rendered the sales file data unreliable. Because he believed the sales file data was unreliable, he concluded that the statistics calculated from that data were unreliable. He argued that under generally accepted mass appraisal techniques, no changes should be made, because the data was unreliable. Baines stated that the correct course would be to correct the appraisal model and reappraise properties going

forward without making any blanket equalization adjustment. Baines' testimony and the details of the PTA's report are discussed in more detail in our analysis.

The PTA was asked whether any of Baines' testimony affected her recommendations. She stood by her recommendations as contained within the report to increase the valuation of Areas 3 and 4 by 7 percent and that no change be made for Area 2. TERC voted to increase the valuation of Areas 3 and 4 by 7 percent and decrease that of Area 2 by 8 percent.

Prior to the issuance of TERC's written order, Douglas County filed a motion to reconsider and offered as additional evidence an affidavit from Baines. The motion and affidavit explained that Douglas County had compared the sales data submitted to the state by the county in its annual "Assessed Value Update" (AVU). The county discovered that many of the sales that it categorized as nonusable non-arm's-length transactions in the AVU were included in the data for the PTA's report. But the state had not given the county notice that it disagreed with the county's categorization of those sales, as required in regulation. The motion requested that TERC grant a hearing and reconsider and vacate its prior order.

The TERC commissioners voted 2 to 1 to deny the motion to reconsider and on the same day issued a written order adjusting the valuation as it had voted to do at the hearing. Douglas County appeals TERC's order and the denial of its motion to reconsider. We granted Douglas County's petition to bypass the Court of Appeals and moved this case to our docket.

## III. ASSIGNMENTS OF ERROR

Douglas County claims that TERC's decision to decrease the valuation of Area 2 and increase the valuation of Areas 3 and 4 failed to conform with the law, was unsupported by competent evidence, and was arbitrary, capricious, and unreasonable. It also claims that TERC's denial of its motion to reconsider was arbitrary, capricious, and unreasonable and constituted an abuse of discretion.

## IV. STANDARD OF REVIEW

[1-5] Under Neb. Rev. Stat. § 77-5019(5) (Cum. Supp. 2016), appellate review of a decision by TERC on a petition for review is conducted for "error on the record of [TERC]." When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[4] An agency decision is supported by "'competent evidence,'" "'sufficient evidence,'" or "'substantial evidence'" if the agency could reasonably have found the facts as it did on the basis of the testimony and exhibits contained in the record before it.[5] 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.[6] Agency action taken in disregard of the agency's own substantive rules is also arbitrary and capricious.[7] When reviewing cases for error appearing on the record, an appellate court reviews questions of law de novo.[8]

## V. ANALYSIS

### 1. Principles and Explanation of Equalization, Mass Appraisal, and State Sales File

Before reviewing TERC's order decreasing the valuation of Area 2 and increasing the valuation of Areas 3 and 4 and its denial of Douglas County's motion to reconsider, it is necessary to review the background principles and the legal framework of equalization, mass appraisal, and the state sales file.

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[4] *County of Douglas v. Nebraska Tax Equal. & Rev. Comm.*, 262 Neb. 578, 635 N.W.2d 413 (2001).

[5] *Douglas County v. Archie*, 295 Neb. 674, 689-90, 891 N.W.2d 93, 104-05 (2017).

[6] *Douglas County v. Archie, supra* note 5.

[7] *Id.*

[8] See *id.*

### (a) Equalization and Mass Appraisal

The Nebraska Constitution mandates that "[t]axes shall be levied by valuation uniformly and proportionately upon all real property . . . ."[9] To effectuate this mandate, the Constitution establishes TERC, granting it the "power to review and equalize assessments of property for taxation within the state."[10]

TERC is required by statute to "annually equalize the assessed value . . . of all real property as submitted by the county assessors on the abstracts of assessments."[11] In the exercise of this duty, TERC is granted "the power to increase or decrease the value of a class or subclass of real property in any county . . . so that all classes or subclasses of real property in all counties fall within an acceptable range."[12]

To assist TERC in its equalization responsibilities, the PTA is mandated by statute to prepare "reports and opinions" for each county; these reports must "contain statistical and narrative reports informing [TERC] of the level of value and the quality of assessment of the classes and subclasses of real property within the county" and may include nonbinding equalization recommendations.[13]

TERC may equalize classes and subclasses of real property to ensure that they are within an "acceptable range"; an acceptable range of property valuation is defined in statute as "the percentage of variation from a standard for valuation as measured by an established indicator of central tendency of assessment."[14] For residential property, the acceptable range of assessed valuation is 92 to 100 percent of actual value. Whether a class or subclass of property falls within an

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[9] Neb. Const. art. VIII, § 1.

[10] Neb. Const. art. IV, § 28.

[11] Neb. Rev. Stat. § 77-5022 (Cum. Supp. 2016).

[12] § 77-5023(1).

[13] § 77-5027(3).

[14] § 77-5023(2).

"acceptable range" is to be determined by TERC "to a reasonable degree of certainty relying upon generally accepted mass appraisal techniques."[15] Generally accepted mass appraisal techniques include the standards promulgated by the International Association of Assessing Officers (IAAO).[16]

Whether a class or subclass of real property is within an acceptable range is measured by an "Established Indicator of Central Tendency."[17] An indicator of central tendency is "[t]he result of measuring the tendency of most kinds of data to cluster around some typical or central value . . . includ[ing] the mean, median, and mode."[18] An *established* indicator of central tendency of assessment is one that is "utilized in generally accepted professional mass appraisal techniques."[19] Under both TERC's regulations and the IAAO standards, the preferred indicator of central tendency is the median.[20] Thus, TERC prefers that valuation data "'cluster'" around the median.[21]

When studying whether a class or subclass of real property is within the acceptable range of assessed to actual value, actual value (i.e., market value) is often determined by looking to sales data. A "[s]ales ratio study" is one that uses sales data as a proxy for determining market value.[22] The PTA's reports use sales ratio studies to determine the value of residential property.[23]

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[15] § 77-5023(5).

[16] 442 Neb. Admin. Code, ch. 2, § 001.45 (2011).

[17] *Id.*, ch. 9, § 002.08 (2011).

[18] *Id.*, § 002.10.

[19] *Id.*, § 002.08.

[20] *Id.*, § 004 (2011); International Association of Assessing Officers, Standard on Ratio Studies (2013).

[21] *County of Franklin v. Tax Equal. & Rev. Comm., ante* p. 193, 195, 892 N.W.2d 142, 144 (2017). Accord 442 Neb. Admin. Code, ch. 9, §§ 002.10 and 004; Standard on Ratio Studies, *supra* note 20.

[22] 442 Neb. Admin. Code, ch. 9, § 002.19 (2011).

[23] § 77-1327(3).

A primary tool for measuring the ratio of assessment to actual value is the assessment-to-sales ratio.[24] This ratio is calculated by dividing a parcel of property's assessed value by the sales price of that parcel of property. For example, a house with an assessed value of $95,000 that sells for $100,000 would have an assessment-to-sales ratio of 95 percent. Conversely, a house with an assessed value of $100,000 that sells for $95,000 would have an assessment-to-sales ratio of 105.26 percent. Thus, using this ratio and using the median as the indicator of central tendency for a class or subclass of property, the median assessment-to-sales ratio would need to fall between 92 and 100 percent to be within the acceptable range.

The usefulness and accuracy of measures of "central tendency" such as median and mean depend on the "quality" or "reliability" of the assessments.[25] Various tools are also used under professionally accepted mass appraisal methods to review the reliability of the measurements of central tendency.[26] The IAAO Standard on Ratio Studies[27] explains the importance of quality statistics:

> The calculated measures of central tendency are point estimates and provide only an indication, not proof, of whether the level meets the appropriate goal. Confidence intervals and statistical tests should be used to determine whether the appraisal level differs from the established goal in a particular instance.
>
> A decision by an oversight agency to take some action (direct equalization, indirect equalization, reappraisal) can have profound consequences for taxpayers, taxing jurisdictions, and other affected parties. This decision should not be made without a high degree of certainty that the action is warranted.

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[24] 442 Neb. Admin. Code, ch. 9, § 002.02 (2011).

[25] See Standard on Ratio Studies, *supra* note 20 at 33-34.

[26] 442 Neb. Admin. Code, ch. 9, § 002.17 (2011).

[27] Standard on Ratio Studies, *supra* note 20 at 33.

The "Coefficient of Dispersion" (COD) is used to measure the uniformity of assessments.[28] The COD is the average difference between each assessment-to-sales ratio and the median assessment-to-sales ratio. To illustrate: Imagine a dataset with three ratios, 50, 100, and 110 percent. The median ratio would be 100 percent. The respective absolute differences between the ratios and the median ratio (100 percent) would be 50, 0, and 10 percent. These ratios would average to produce a COD of 20 percent. A lower COD indicates a higher level of uniformity of assessment-to-sales ratios, while a higher COD indicates less uniformity. Under TERC regulations and the IAAO standards, the acceptable range of COD for residential property is 15 percent or less[29]; that is, the ratios must be, on average, within 15 percent of the median ratio.

The "Price Related Differential" (PRD) is a measure used "to determine whether properties of differing values are treated uniformly."[30] PRD is calculated by dividing the mean ratio by the weighted mean ratio.[31] Too high or low of a PRD indicates "vertical inequity," either regressivity (underassessed high-value properties and overassessed low-value properties) or progressivity (overassessed high-value properties and underassessed low-value properties). A PRD of under 1 indicates progressivity, while a PRD of over 1 indicates regressivity.[32]

Vertical inequities of the regressive or progressive variety are to be avoided.[33] Under TERC regulations and the IAAO

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[28] 442 Neb. Admin. Code, ch. 9, § 002.04 (2011).

[29] *Id.*, § 005.02 (2011); Standard on Ratio Studies, *supra* note 20 (5 to 15 percent).

[30] 442 Neb. Admin. Code, ch. 9, § 002.15 (2011).

[31] Standard on Ratio Studies, *supra* note 20 (explaining that weighted mean is calculated by dividing total assessed value of all selling properties by total sales value of all selling properties, resulting in ratio that is weighted for relative value of properties). See, also, 350 Neb. Admin. Code, ch. 17, § 002.19 (2013).

[32] *Id.*

[33] Standard on Ratio Studies, *supra* note 20.

standards, the acceptable range for PRD is 0.98 to 1.03 (98 to 103 percent).[34] Under the IAAO standards, "[u]nacceptable vertical inequities should be addressed through reappraisal or other corrective actions,"[35] rather than through blanket equalization changes.

The "confidence interval" measures the precision of the sampling process, while the "confidence level" is the "degree of probability associated with a statistical test or confidence interval."[36] The confidence interval measures how reliably the sold properties represent all of the other properties in the class or subclass.[37] Generally, a larger sample size and greater uniformity of ratios result in a narrower confidence interval.[38] A narrower range of confidence interval indicates a greater reliability of a statistical measure (e.g., the median).[39] For example, Area 3 had a 95-percent median confidence interval of 89.43 to 90.28 percent, meaning that the true median is 95-percent likely to fall within that range. Under the IAAO standards, if any part of the confidence interval overlaps with the acceptable range, equalization is not appropriate.[40] The PTA's reports are required by regulation to include a 95-percent confidence interval for each of the measures of central tendency.[41]

(b) Sales File

The "sales file" is "a data base of sales of real property, including arm's length transactions, in the State of

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[34] 442 Neb. Admin. Code, ch. 9, § 005.03 (2011); Standard on Ratio Studies, *supra* note 20.

[35] Standard on Ratio Studies, *supra* note 20 at 15.

[36] 442 Neb. Admin. Code, ch. 9, §§ 002.06 and 002.07 (2011).

[37] Standard on Ratio Studies, *supra* note 20.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] 350 Neb. Admin. Code, ch. 17, § 004.01C(2)(k) (2013).

Nebraska" and is developed and maintained by the state PTA.[42] All sales in the sales file are deemed to be "arm's length" transactions unless determined otherwise.[43] The sales file data is used by the PTA as the basis for her annual assessment ratio reports.[44]

Nearly every real estate transaction in Nebraska requires the filing of a real estate transfer statement with a county register of deeds.[45] These statements require certain information about the transaction and conveyance, such as the amount of consideration paid.[46] The statements must be sent by the register of deeds to the county assessor.[47]

The county assessors must provide supplemental information for each sale in the form of a sales worksheet.[48] The sales worksheet must indicate whether the sale is qualified as an arm's-length transaction for the sales file, providing an explanation for any sales deemed to be non-arm's-length transactions.[49] The transfer statements and the sales worksheets are sent from the county assessors to the Department of Revenue on a monthly basis.[50]

The assessor's opinion as to whether a sale qualifies as an arm's-length transaction is presumed to be correct.[51] The Department of Revenue's property assessment division may

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[42] *Id.*, ch. 12, § 001.01 (2009).

[43] § 77-1327(2).

[44] § 77-1327(3).

[45] Neb. Rev. Stat. § 76-214 (Cum. Supp. 2014). See, also, § 77-1327(2); 350 Neb. Admin. Code, ch. 12, § 003.01 (2009).

[46] §§ 76-214 and 77-1327.

[47] § 76-214(1).

[48] 350 Neb. Admin. Code, ch. 12, §§ 003.03 and 003.03A (2009). See, also, § 76-214(1).

[49] 350 Neb. Admin. Code, ch. 12, § 003.03C (2009).

[50] § 76-214(1); 350 Neb. Admin. Code, ch. 12, §§ 003.01, 003.03, and 003.03A.

[51] 350 Neb. Admin. Code, ch. 12, § 003.04 (2009).

override a county assessor's determination of whether a sale qualifies as an arm's-length transaction, but must give notice to the assessor of its decision in writing within 7 days.[52] And it may not overturn a county commissioner's determination that a sale qualifies or does not qualify as an arm's length transaction unless it reviews the sale and determines that the assessor is incorrect.[53] The process of disputing sales categorizations between county assessors and the Department of Revenue's property assessment division is set forth in detail in regulation.[54]

On an annual basis, county assessors must provide the Department of Revenue and the PTA an "abstract of the property assessment rolls."[55] According to the regulations, the "County Abstract of Assessment Report" for real property consists of, among other things, the AVU, characterized as "the Report of [the] Current Year's Assessed Value for Properties Listed in the State's Sales File."[56] Generating the AVU, according to the state "Sales File Practice Manual," is "the process of populating current assessed values for the sales already located in the state sales file" for use in the assessment-to-sales ratio for the PTA's report. That is, the AVU provides the state with the assessment information to match the sales information the state already has in its sales file through the real estate transfer statements and sales worksheets.

The sales file is used as the basis for the PTA's comprehensive sales assessment ratio studies.[57] The PTA's sales assessment ratio studies are used in their annual reports and opinions for each county to aid TERC in its equalization duties.[58]

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[52] *Id.*, § 003.04D (2009).

[53] *Id.*

[54] *Id.*, §§ 003.04 to 003.04E (2009).

[55] Neb. Rev. Stat. § 77-1514 (Cum. Supp. 2016).

[56] 350 Neb. Admin. Code, ch. 60, § 002.02A (2009).

[57] § 77-1327(3). See, also, § 77-5027.

[58] § 77-5027.

The reports for each county "contain statistical and narrative reports informing [TERC] of the level of value and the quality of assessment of the classes and subclasses of real property."[59]

### 2. TERC's Equalization Orders

#### (a) Area 2

TERC ordered an 8-percent decrease to the valuation of Area 2. Both the PTA's report and Baines in his testimony at the show cause hearing explained that the lower-value sales were skewing the data and that no change should be ordered for Area 2. TERC nevertheless ordered the decrease. Douglas County argues that this decision was unsupported by competent evidence; was arbitrary, capricious, and unreasonable; and failed to conform to law. We agree.

The PTA's report showed that the median assessment-to-sales ratio for Area 2 was 104.82 percent. But whether a class or subclass of property falls within the acceptable range is to be "determined to a reasonable degree of certainty [by] relying upon generally accepted mass appraisal techniques,"[60] which include the standards of the IAAO.[61] As the IAAO standards explain, measures of central tendency, such as the median, "are point estimates and provide only an indication, not proof, of whether the level meets the appropriate goal."[62] Other statistics and factors must be considered to determine to a reasonable degree of certainty whether the median is a reliable indicator of central tendency.

One of these factors is the COD, which measures the uniformity or dispersion of assessments.[63] The acceptable range

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[59] *Id.*

[60] § 77-5023(5).

[61] 442 Neb. Admin. Code, ch. 2, § 001.45.

[62] Standard on Ratio Studies, *supra* note 20 at 33.

[63] 442 Neb. Admin. Code, ch. 9, § 002.04; Standard on Ratio Studies, *supra* note 20.

of COD under TERC's regulations and the IAAO standards for residential real property is under 15 percent.[64] The COD for Area 2 was 48.43 percent. This means that the average assessment-to-sales ratio of the sold properties is 48 percent above or below the median of 104 percent. While the median is at 104 percent, most properties in Area 2 are significantly above or significantly below this median. TERC's 8-percent adjustment would not solve Area 2's lack of assessment uniformity, but would only shift the problem. The proper method for solving such problems of dispersion is "model recalibration and/or reappraisal,"[65] not blanket equalization orders.

The "acceptable range" of valuation must be determined by an established "indicator of central tendency,"[66] which is defined as "[t]he result of measuring the tendency of most kinds of data to cluster around some typical or central value."[67] If the assessment-to-sales ratios in a class or subclass of property suffer from such a lack of uniformity that the ratios do not "cluster around some typical or central value," then there is no "central tendency" to measure.[68] With a COD in Area 2 of 48.43 percent, the data unquestionably does not cluster around the median. Reappraisal, not equalization, is the proper remedy for such a lack of uniformity.[69]

Not only does Area 2 suffer from a lack of overall uniformity of assessments, but there is a lack of uniformity between higher-value and lower-value properties, referred to as "regressive vertical inequity." The PRD measures the uniformity of assessment between higher- and lower-value properties. The acceptable range of PRD under TERC's regulations

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[64] 442 Neb. Admin. Code, ch. 9, § 005.02; Standard on Ratio Studies, *supra* note 20.

[65] Standard on Ratio Studies, *supra* note 20 at 18.

[66] § 77-5023.

[67] 442 Neb. Admin. Code, ch. 9, § 002.10.

[68] See, generally, *id.*

[69] See Standard on Ratio Studies, *supra* note 20.

and the IAAO standards for residential real property is 0.98 to 1.03 (98 to 103 percent). The PRD for Area 2 is 1.22 (122 percent). What this statistic shows is that lower-value properties in Area 2 are significantly overassessed while higher-value properties are significantly underassessed. But like overall uniformity problems, vertical inequities are not solved by equalization orders, but, rather, "should be addressed through reappraisal or other corrective actions."[70]

The COD and the PRD show that there are significant problems with the assessments in Area 2, but not problems that would be solved through the 8-percent decrease TERC ordered. Prior to the decrease, the median ratio for all sales of $15,000 and over was 100.45 percent (which would round to 100 percent and be within the acceptable range) and the median ratio for all sales of $30,000 and over was 96.21 percent (right in the middle of the acceptable range). The decrease would leave the median ratio for all sales of $15,000 and over at 92.41 percent (at the bottom of the acceptable range) and the median ratio for all sales of $30,000 and over at 88.51 percent (well below the acceptable range). The decrease would only reduce the median for sales under $30,000 from 149 to 137 percent. Sales of $15,000 and over represent 554 of the 632 sales (87 percent) in the study for Area 2, while sales of $30,000 and over represent 393 of 632 sales (62 percent).

This data shows not only that the lower-price sales, as Baines and the PTA explained, were skewing the data, but also that an across-the-board equalization order would not solve the valuation problems in Area 2. The decrease would leave a large percentage of mid- to higher-value properties under the acceptable range, while making only a small dent in the level of overassessment of lower-value properties. It would leave the median ratio of all properties sold for *over* $30,000—representing 62 percent of all the properties sold—below the statutory range at 88.51 percent; the median ratio for properties sold for

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[70] *Id.* at 29.

*under* $30,000 would still be well over the statutory range at 137 percent. The problems in Area 2 with a lack of uniformity and regressive vertical inequity would not be solved by the decrease ordered by TERC. As the IAAO standards explain:

> States . . . that employ direct equalization techniques should understand that such *equalization is not a substitute for appraisal or reappraisal*. . . . [E]qualization cannot improve uniformity between properties within a given [class or subclass of property]. For this reason, reappraisal orders should be considered as the primary corrective tool for uniformity problems . . . .[71]

Before voting to decrease the valuation of Area 2, and in the course of questioning Baines, Commissioner Robert Hotz discussed his concern about how lower-value properties in the area were significantly overassessed, while mid- to higher-value properties were correctly or underassessed. He explained his reasoning for voting for the decrease:

> I don't think [TERC] has the authority to [adjust only lower-value properties]. And so, to some degree, we look at this — and we've read the correlation section and we hear the [PTA's] recommendation that we not do an adjustment on this. I'm hearing you say the same thing. And I'm looking at statistics that tell me these low-dollar properties are over-assessed. *It's got to be fixed.* And I don't think I have the authority to do it unless I take the higher-dollar properties, *they get to kind of ride on the coattails of that adjustment, and then be under-assessed —*
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> . . . .
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> . . . I don't want that result either. Right now, the low-dollar properties are carrying the freight and they shouldn't be. Now, it's really hard to assess low-dollar properties for the reasons that you've explained. I kind of understand that.

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[71] Standard on Ratio Studies, *supra* note 20 at 21-22 (emphasis supplied).

(Emphasis supplied.) Hotz went on to say to Baines, "It's a little frustrating to see what appears to be a significant area of your county where it appears to be over-assessed." He explained that he thought ordering the decrease would be "the lesser of two evils" because there were more lower-value properties than higher-value properties in the area, even though it would put the higher-value properties out of the acceptable range.

Hotz' and TERC's desire to remedy the problems in Area 2 is understandable. But across-the-board equalization orders are not a cure-all for every valuation ailment. The proper remedy for the lack of uniformity is reappraisal. Equalization is a blunt tool and cannot cure uniformity problems. TERC need not choose "the lesser of two evils"; its equalization tool is capable of solving only one "evil": assessment levels that are out of range as determined to a reasonable degree of certainty by a reliable indicator of central tendency. Fixing the uniformity problems is a task belonging to Douglas County. Baines testified that he was working on resolving the problems in Area 2 (and across Douglas County) by doing things such as developing an entirely new valuation model that would bring the median ratio in Area 2 down to 97 percent and redrawing the borders between valuation areas to more accurately reflect market areas. These narrowly tailored approaches are a more proper approach for resolving the valuation uniformity problems in Area 2.

Given the fact that neither the PTA nor Douglas County presented evidence that would support TERC's decision to decrease the valuations of Area 2, we cannot conclude that TERC's decision was supported by competent evidence. As such, its order decreasing the valuation of Area 2 by 8 percent was therefore arbitrary, capricious, and unreasonable.

(b) Areas 3 and 4

TERC ordered a 7-percent increase to the valuation of Areas 3 and 4. Douglas County argues that this order was

unsupported by competent evidence; was arbitrary, capricious, and unreasonable; and failed to conform to law. We disagree.

The PTA's report shows that the median assessment-to-sales ratios for Areas 3 and 4 were 89.77 and 90.08 percent, respectively, falling outside the statutory range of 92 to 100 percent. But unlike in Area 2, the quality statistics show that the median is a reliable indicator of central tendency.

The COD for Areas 3 and 4 was 15.27 and 12.49 percent. These are within or at the top of the acceptable range for the COD, which shows that Areas 3 and 4 are reasonably uniform. The PRD for Areas 3 and 4 was 1.0571 (105.71 percent) and 1.0347 (103.47 percent), at or slightly above the top of the acceptable range of 0.98 to 1.03. While this shows some minor regressive vertical inequity, it is minimal—standing in stark contrast to the 1.22 (122 percent) PRD in Area 2.

Moreover, the median confidence interval for Areas 3 and 4 shows that the median ratios for these areas are accurate indicators of central tendency. The median 95-percent confidence interval for Area 3 is 89.43 to 90.28 percent. The median 95-percent confidence interval for Area 4 is 89.73 to 90.5 percent. Both of these ranges are entirely outside the acceptable range of 92 to 100 percent. Moreover, these ranges are very narrow, less than 1 percent, indicating a high degree of sample reliability. That is, the median assessment-to-sales ratio is likely to be a very reliable indicator of the ratio of assessed to actual value of other properties in those areas.

There is very little in the PTA's data that would show that the median ratios of Areas 3 and 4, which are below the acceptable range, are not accurate and reliable indicators of central tendency. Instead, Douglas County relies heavily on the testimony of Baines before TERC in the show cause hearing that alleged that the sales data itself was unreliable.

Baines had been in the position of chief field deputy in the Douglas County register of deeds and assessor's office since April 2015. Prior to taking that position, he worked as an appraiser for 28 years in Kansas, including in the Kansas

City area. When he began working as chief field deputy, Baines noticed problems with the existing appraisal practices in Douglas County. He stated that he "immediately started uncovering inconsistencies." He realized that his staff was mostly not verifying sales to determine if they were qualified arm's-length transactions usable in the PTA's sales ratio study. Baines noticed that his predecessor had not completed any "scope of work" documents outlining how the assessments had been done each year. Vacant lots were "grossly undervalued" in some areas and "grossly overvalued" in others. Baines worked with the Department of Revenue's property assessment division to implement sales verification training for his staff. He also sent out surveys to attempt to verify 2013 and 2014 sales that were significantly out of range.

Baines said that after implementing changes in Douglas County's assessing practices, he was surprised when he received the 2016 data from the state; many of the statistics had changed significantly. He said, "[T]here has to be something drastically changing there to make that happen" and suspected that the change in the statistics after he arrived may have been the result of prior "sales chasing," which is the improper practice of "using the sale of a property to trigger a reappraisal of that property at or near the selling price."[72] Sales chasing makes a sales ratio study unreliable because the assessed values of sold properties are no longer representative of the assessed values of all the other properties in the study area.[73] Baines explained that if sales chasing had occurred, that meant that "the data that was submitted to [the Department of Revenue's property assessment division] was manipulated to the point where it was in range [which] told me I couldn't rely on those sales to value other properties."

Baines' primary reason why he believed no changes should be made by TERC to the valuation of Areas 3 and 4 was

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[72] *Id*. at 43.

[73] See Standard on Ratio Studies, *supra* note 20.

that the sales data underlying the PTA's statistics was unreliable. Because the underlying data was unreliable, Baines said, according to generally accepted standards of mass appraisal, no changes should be made.

While Baines' testimony raises some questions about the reliability of the data due to the practices of the Douglas County assessor's office prior to his arrival, we do not find that TERC's decision to order a 7-percent increase to the valuation of Areas 3 and 4 was unsupported by competent evidence or was arbitrary, capricious, and unreasonable. Baines testified about problems he observed in Douglas County's assessment practices, such as not verifying sales. But his testimony that there may have been sales chasing was simply offered as a possible explanation for the surprising changes he observed in the data from 2015 to 2016. While this explanation could be correct, TERC was not unreasonable in failing to credit this explanation and nonetheless relying on the statistics based on the sales file data. Providing a few examples of improper procedures or practices does not establish beyond dispute that the sales file was unreliable. Our standard of review is a deferential one. It is not our task to determine de novo whether the sales file data was so unreliable that no changes should be made, but, rather, our task is to determine whether TERC acted unreasonably in reaching its conclusion. We believe that TERC did not act unreasonably here. Its decision was supported by the evidence provided by the PTA. TERC's decision to order a 7-percent increase in valuation for Areas 3 and 4 was supported by competent evidence and was not arbitrary, capricious, and unreasonable.

### 3. Motion to Reconsider

After TERC voted to order the valuation adjustments to Areas 2 through 4, but before it issued its written order, Douglas County submitted a motion to reconsider, requesting a hearing and that TERC thereafter reconsider and vacate its prior order. Included with the motion was an affidavit by

Baines alleging that the PTA improperly included sales in her report that Douglas County has designated as non-arm's-length transactions, without notifying the county as required by regulation. TERC voted 2-to-1 to deny the motion to reconsider. Douglas County argues that this was an abuse of discretion. We disagree.

(a) Standard of Review

[6,7] We have yet to address the applicable standard of review for a motion to reconsider in the administrative law context. A trial court's decision to grant or deny a motion to reconsider is reviewed for an abuse of discretion.[74] Similarly, the abuse of discretion standard applies to our review of a trial court's grant or denial of a motion to vacate or amend a judgment.[75]

[8] We conclude that the abuse of discretion standard should also apply to our review of the grant or denial of a motion to reconsider by an administrative body. 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.[76]

(b) Procedure

First, TERC argues, citing cases from other jurisdictions,[77] that it is improper to use a motion to reconsider to raise evidence that could have been raised in the earlier proceeding. It also cites Nebraska case law in which we have held that granting a motion for new trial on the basis of newly discovered

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[74] *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005); *Frerichs v. Nebraska Harvestore Sys.*, 226 Neb. 220, 410 N.W.2d 487 (1987); *Gutchewsky v. Ready Mixed Concrete Co.*, 219 Neb. 803, 366 N.W.2d 751 (1985). See *Ryder v. Ryder*, 290 Neb. 648, 861 N.W.2d 449 (2015).

[75] See *Ryder v. Ryder, supra* note 74.

[76] *State v. Cerritos-Valdez*, 295 Neb. 563, 889 N.W.2d 605 (2017).

[77] *J.P. v. Smith*, 444 N.J. Super. 507, 134 A.3d 977 (2016); *Cho v. State*, 115 Haw. 373, 168 P.3d 17 (2007).

evidence is not proper when the evidence could have been discovered before trial with diligent inquiry.[78]

But we have not previously considered whether new evidence, or evidence available at the time of the prior proceeding, may be now presented as the basis for a motion to reconsider. In both the civil and the criminal context, the grounds upon which *a motion for new trial* may be granted are limited by statute and include newly discovered evidence.[79] But there is no statute or court rule that limits a motion for reconsideration to newly discovered evidence. And in other contexts, we have distinguished a motion for reconsideration from a motion for new trial.[80]

[9] We have held that an administrative agency that is authorized to exercise quasi-judicial power is impliedly authorized to reconsider its own decisions.[81] TERC's regulations allow it to reconsider any order it has issued during its statewide equalization proceedings.[82]

We have explained that a motion for reconsideration is nothing more than an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment.[83] In some contexts, a motion for reconsideration may also be treated as a motion to alter or amend a judgment for purposes of terminating the appeal period under Neb. Rev. Stat. § 25-1329 (Reissue 2016).[84]

As to a motion to reconsider, it appears to be an open question whether an administrative agency or commission acting

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[78] See *Maddox v. First Westroads Bank*, 199 Neb. 81, 256 N.W.2d 647 (1977).

[79] See Neb. Rev. Stat. §§ 25-1142 and 29-2101 (Reissue 2016).

[80] *Kinsey v. Colfer, Lyons*, 258 Neb. 832, 606 N.W.2d 78 (2000).

[81] *City of Lincoln v. Twin Platte NRD*, 250 Neb. 452, 551 N.W.2d 6 (1996); *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994).

[82] 442 Neb. Admin. Code, ch. 9, § 009.07 (2011).

[83] *Kinsey v. Colfer, Lyons, supra* note 80.

[84] *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002).

in an adjudicatory capacity can consider additional evidence that does not constitute newly discovered evidence. But we need not decide that issue here, because we conclude that even if the evidence presented by Douglas County could be considered, TERC did not abuse its discretion in denying the motion.

### 4. Douglas County's Motion and Affidavit

Douglas County's motion and affidavit question whether the state improperly included non-arm's-length transactions in its sales file and the PTA's report. The county based its allegations on a comparison between the county's AVU and the state sales file. It alleges that sales which it categorized as non-arm's-length transactions, thus not usable in a sales ratio study, were included in the PTA's assessment ratio study.

The county argues that this violates TERC's regulations. Those regulations require county assessors, when sending a sales worksheet to the state, to "indicate numerically on the sales worksheet their opinion as to whether the sale is qualified or non-qualified for inclusion in the sales file as an arm's length transaction."[85] The Department of Revenue's property assessment division may verify a county assessor's categorization of a sale, but when doing so, "the assessor's opinion with respect to the inclusion, exclusion or adjustment of a sale shall be presumed correct."[86] The property assessment division may override a county assessor's categorization of a sale in some circumstances if it does not agree with it, but if it does so, it "shall, within seven (7) days of such determination, notify the county assessor in writing that the sale will not be included in or excluded from the sales file."[87] The property assessment division did not provide Douglas County

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[85] 350 Neb. Admin. Code, ch. 12, § 003.03C.

[86] *Id.*, § 003.04.

[87] *Id.*, § 003.04D.

notice of its intent to recategorize and include in the sales file and the PTA's report the sales that the county had categorized as sales nonusable in the AVU. Therefore, Douglas County argues, the PTA improperly included the sales in her study and TERC should have granted the motion to dismiss and vacate its ordered changes that were based on the PTA's report data.

But as TERC points out, the AVU is not the vehicle by which county assessors inform the state about a sale's usability in the sales file. Rather, the AVU is the vehicle by which assessors provide assessment information to match the sales that are already in the state sales file. The information about whether a transaction qualifies as an arm's-length transaction usable in a ratio study is sent from the county assessor to the state in the sales worksheet for each sale, filed on a monthly basis.[88] The AVU is merely the vehicle for conveying the assessment information to match those sales, sent on an annual basis.[89]

Critically, Douglas County has not alleged that the categorization of sales used in the PTA's report differs from that of the sales data sent to the state by Douglas County in the sales worksheets. If there is, in fact, a difference between the categorization of sales in the AVU and that of sales in the PTA's report, it is not clear whether the difference results from a discrepancy between the categorizations of sales in the county's sales worksheets and the PTA's report or from a discrepancy between the county's sales worksheets and the county's AVU.

Douglas County's motion and affidavit fail to allege that the PTA improperly included sales that the county designated *in the sales worksheets* as nonusable. The purpose of the AVU is to send assessment information to match the sales information (including categorization as to usability) already in the sales file. Douglas County's allegations are insufficient to

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[88] *Id.*, §§ 003.01, 003.03, 003.03A, and 003.03C.

[89] *Id.*, ch. 60, § 002.02A. See, also, § 77-1514(1).

establish that the PTA improperly included non-arm's-length sales in her report.

In its motion to reconsider and affidavit, Douglas County also alleges that the PTA included sales in the wrong valuation area in her sales ratio study. Specifically, it alleges that the PTA included 327 sales from Area 6 in Area 3 and included 526 sales from Area 3 in Area 4. As in the alleged inclusion of non-arm's-length sales, Douglas County contends that this renders the data underlying the PTA's report unreliable and an insufficient basis upon which to rely to order equalization changes.

But these allegations could have been raised before TERC at the show cause hearing. Douglas County had the ability to access the state sales file at any time.[90] We have declined to conclude that Douglas County is procedurally barred from presenting previously available evidence in support of its motion to reconsider. But the fact remains that it could have presented such evidence at the show cause hearing. This fact supports our determination that TERC did not abuse its discretion by denying the motion. After the PTA produced her report for Douglas County on April 8, 2016, that recommended that the value of Areas 3 and 4 be increased, the county had ample time to compare the sales file relied upon by the PTA with its own sales information and present any discrepancies it found to TERC at the show cause hearing on April 27. Instead, Douglas County filed its motion to reconsider and its affidavit in support on May 4.

Not only did Douglas County unnecessarily delay the presentation of these alleged discrepancies to TERC until after the show cause hearing, but the allegations provide no information as to the impact of the alleged errors. The motion and affidavit provide no information that would establish the impact of the allegation that sales from other areas were improperly included in Areas 3 and 4. There was no evidence showing

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[90] See, 350 Neb. Admin. Code, ch. 12, §§ 001.02 and 003.08 (2009).

the sales that were alleged to have been improperly included affected whether the ratios in Areas 3 and 4 fell within the acceptable range. The allegations do not state whether these sales would have increased or decreased the median ratio in those areas or would have made no difference at all. Thus, TERC was presented with allegations, but not proof of Douglas County's assertions.

While Douglas County's allegations raised questions whether there were problems with the sales information relied upon by the PTA in producing the report for Douglas County, these allegations did not provide any answers. Douglas County could have raised these allegations at the show cause hearing, and offered the evidence in support, but it failed to do so. TERC did not abuse its discretion when it denied Douglas County's motion to reconsider, and we affirm.

## VI. CONCLUSION

TERC's order to decrease the valuation of Area 2 by 8 percent was not supported by competent evidence and was arbitrary, capricious, and unreasonable. TERC's order to increase the valuation of Areas 3 and 4 was supported by competent evidence and was not arbitrary, capricious, and unreasonable. TERC did not abuse its discretion in denying Douglas County's motion to reconsider its order. We reverse TERC's order as to Area 2 and affirm in all other respects.

Affirmed in part, and in part reversed.

Miller-Lerman, J., not participating.

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

# In re Estate of Dorothy Pluhacek, also known as Mary Pluhacek, also known as Sr. M. Dorothy de N.D., deceased. Margaret Hickey, appellant, v. Estate of Dorothy Pluhacek, also known as Mary Pluhacek, also known as Sr. M. Dorothy de N.D., deceased, appellee.

894 N.W.2d 325

Filed April 27, 2017. No. S-16-654.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Decedents' Estates: Judgments: Appeal and Error.** When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below.
3. **Decedents' Estates: Wills: Intent: Proof.** A document purporting to be a will, which is otherwise sufficient, will satisfy the "writing" requirement of Neb. Rev. Stat. § 30-2327 (Reissue 2016), whether it is completely handwritten; partly written in ink and partly in pencil; partly typewritten and partly printed; partly printed, partly typewritten, and partly written; or on a printed form, as well as other combinations of these forms and comparable permanent techniques of writing which substantively evidence testamentary intent.

Appeal from the County Court for Douglas County: Thomas K. Harmon, Judge. Reversed and remanded for further proceedings.

Shane J. Placek, of Sidner Law, for appellant.

No appearance for appellee.

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

Miller-Lerman, J.

## NATURE OF CASE

Margaret Hickey, the current Provincial Superioress of the Omaha province of the Notre Dame Sisters, appeals the decision of the Douglas County Court which denied formal probate of a document that Hickey purported to be the valid will of Dorothy Pluhacek, also known as Mary Pluhacek, also known as Sr. M. Dorothy de N.D. The court concluded that the document was not a valid will under Neb. Rev. Stat. § 30-2327 (Reissue 2016) because portions of the document were handwritten and further concluded that the document was not admissible as a holographic will under Neb. Rev. Stat. § 30-2328 (Reissue 2016). Because we conclude that the document is a properly executed will under § 30-2327, we reverse the order of the county court and remand the cause for formal probate.

## STATEMENT OF FACTS

Pluhacek died on July 1, 2015, at 100 years of age. Thereafter, Hickey filed an application for informal probate of the will and informal appointment of a personal representative in the Douglas County Court. Hickey sought appointment as personal representative on the basis that she was the current Provincial Superioress of the Omaha province of the Notre Dame Sisters, and the document she submitted for probate named the holder of that title as executor.

The document Hickey purported to be Pluhacek's will accompanied the application. The document contained certain preprinted terms, typewritten material, and blanks that were completed in handwriting. The content of the document is set forth below. The portions that were handwritten in the document are indicated by italics below. The portion that is underlined below was not underlined in the document but was in a

different typeset than the preprinted portions of the document. The document stated as follows:

LAST WILL AND TESTAMENT

IN THE NAME OF GOD. AMEN.

I, *Mary T. Pluhacek* otherwise known as *Sr. M. Dorothy de N.D.*, being of legal age, of sound mind and memory, do hereby make, publish, and declare this to be my last will and testament.

FIRST: I give, devise, and bequeath to *School Sisters de N.D., Inc. at Omaha, Nebraska* all property, real, personal, and mixed, which I now possess or which I may hereafter acquire.

This Will and Testament may not be changed without the permission of the Superior General.

SECOND: I hereby nominate and appoint *Provincial Superioress of the School Sisters de N.D., Inc.* as the executor of this will, without bond or inventory.

The document was signed and witnessed as follows:

IN WITNESS WHEREOF I have hereunto set my hand this *22nd* day of *July* 19*36*.

(Signature) *Mary T. Pluhacek*

Signed, published, and declared by the above named *Mary T. Pluhacek* otherwise known as *Sr. M. Dorothy de N.D.*, as *her* last will and testament, in the presence of us, who in *her* presence and at *her* request, and in the presence of each other, have hereunto subscribed our names as witnesses the day and year above written.

Immediately below this quoted text were two signatures denominated as witnesses. The signatures indicated that both witnesses were also Notre Dame Sisters.

The county court sua sponte entered an order denying informal probate of the document. The court noted, inter alia, that "[t]he signature of [Pluhacek] was affixed to the document which was subscribed by the testator and published as her Last Will and Testament in the presence of two (2) attesting

witnesses." The court then quoted § 30-2327, which is titled "Execution" and provides:

> Except as provided for holographic wills, writings within section 30-2338, and wills within section 30-2331, every will is required to be in writing signed by the testator or in the testator's name by some other individual in the testator's presence and by his direction, and is required to be signed by at least two individuals each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.

The court also quoted § 30-2328, which is titled "Holographic will" and provides:

> An instrument which purports to be testamentary in nature but does not comply with section 30-2327 is valid as a holographic will, whether or not witnessed, if the signature, the material provisions, and an indication of the date of signing are in the handwriting of the testator and, in the absence of such indication of date, if such instrument is the only such instrument or contains no inconsistency with any like instrument or if such date is determinable from the contents of such instrument, from extrinsic circumstances, or from any other evidence.

The county court determined that "[t]he document that [Pluhacek] signed does not qualify as a Will because the material provisions are in the handwriting of the testator." Pursuing this reasoning, the court then stated that as a prerequisite to probate, it would be necessary to determine whether the document was admissible as a holographic will. The court further stated that such determination could not be made in an informal proceeding and instead that a formal proceeding would be required to determine whether Pluhacek had left a valid holographic will. Based on the foregoing, the court denied admission of the document for informal probate.

Hickey filed a notice of appeal of the county court's order denying informal probate. In case No. A-16-112, in a minute

entry dated March 1, 2016, the Nebraska Court of Appeals determined that the county court's order denying informal probate was not a final, appealable order and dismissed the appeal for lack of jurisdiction.

Hickey then filed an amended petition for formal probate, determination of heirs, and appointment of personal representative in the county court. Hickey again offered the document as Pluhacek's validly executed will and nominated herself to be personal representative pursuant to the terms of the purported will.

After a trial, the county court entered an order on June 7, 2016, in which it denied formal probate of the document. The court repeated its earlier reasoning to the effect that because the material provisions were handwritten, the document was not "in writing" for purposes of § 30-2327. Because the court viewed the document as inadmissible as a will under § 30-2327, the court needed to determine whether the document was admissible as a holographic will. The court noted there was "no witness opinion provided that verifies that the holographic instrument is in [Pluhacek's] handwriting, i.e., no evidence was adduced by any witness who was familiar with [Pluhacek's] handwriting." The court stated that its conclusion that because Hickey had not established that the document was in Pluhacek's handwriting, the document was not admissible as a holographic will.

In its order, the county court continued that, assuming arguendo that the handwriting could be established to be that of Pluhacek, the court would consider other issues regarding the validity of the document. In that respect, the court noted that the document "obviously was an undated pre-printed form . . . with handwritten insertions." The court therefore described the document as "not a true holographic will but is rather a 'hybrid' holographic will." The court cited precedent of this court to the effect that in order for a holographic will to be valid, the material provisions must be in the handwriting of the decedent and that such handwritten portions

must clearly express testamentary intent without reference to preprinted portions of a form. Although the county court was not explicit, its discussion of this issue and its ultimate conclusions indicate that the court believed the document to be a holographic will but that the handwritten portions of the document standing alone were not sufficient to express testamentary intent. We believe the county court was mistakenly echoing *In re Estate of Foxley*, 254 Neb. 204, 575 N.W.2d 150 (1998), which examined a handwritten codicil.

The county court also considered an argument that the document was a validly executed will under Neb. Rev. Stat. § 30-2331 (Reissue 2016), which provides:

> A written will is valid if executed in compliance with section 30-2327 or 30-2328 or if its execution complies with the law at the time of execution of the place where the will is executed or of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national.

The court noted that the face of the document indicated that it was signed in 1936. The court stated that its review of statutes and law indicated that holographic wills were not recognized in 1936 and that "[i]n fact, holographic wills were not recognized as a matter of law until Nebraska adopted the Uniform Probate Code . . . in 1974." The court concluded that because the document was a holographic will which form was not recognized in 1936, any argument based on § 30-2331 would be without merit.

Based on its analysis summarized above, the court denied formal probate of the document and found that Pluhacek had died intestate. Hickey appeals.

## ASSIGNMENTS OF ERROR

Hickey claims, restated, that the document was a properly executed will under § 30-2327 and that the county court erred when it examined and determined that the document was a holographic will which failed to meet the terms of the

holographic will statute, § 30-2328, and further erred when it denied formal probate.

## STANDARDS OF REVIEW

[1,2] An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Balvin*, 295 Neb. 346, 888 N.W.2d 499 (2016). When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below. *Id*.

## ANALYSIS

The county court concluded that Pluhacek's will, dated July 22, 1936, was not valid and denied Hickey's petition for formal probate. Hickey claims primarily that the county court erred when it did not conclude that the document was a properly executed will under § 30-2327 and therefore erroneously denied formal probate. We agree with Hickey's arguments and reverse the county court's order which denied formal probate.

We have quoted § 30-2327, entitled "Execution," above. When the requirements of § 30-2327 are met, the will is validly executed. The requirements of § 30-2327 are satisfied if a will is (1) in writing, (2) signed by the testator, and (3) signed by at least two individuals, each of whom witnessed either the signing or the testator's acknowledgment of the signing of the will. See *In re Estate of Flider*, 213 Neb. 153, 328 N.W.2d 197 (1982). See, also, *Cummings v. Curtiss*, 219 Neb. 106, 361 N.W.2d 508 (1985) (stating two witnesses are required under § 30-2327). Pluhacek's will, as tendered by Hickey, meets these requirements.

The holographic will statute, § 30-2328, is an exception to the generally controlling "execution" statute, § 30-2327. But where the will meets the requirements of § 30-2327, further examination of validity under other theories is not necessary. In this case, there is no meaningful dispute in the record

that Pluhacek's will was signed by her and witnessed by two other individuals. And contrary to the county court's view of § 30-2327, under our independent review of § 30-2327, we conclude as a matter of law that the will, albeit partly printed, partly typed, and partly handwritten, was "in writing" for purposes of § 30-2327. See *In re Estate of Balvin, supra* (reciting our standard of review).

Reading the county court's order as a whole, we believe the county court's fundamental misunderstanding was its belief that, due to substantial portions of the will being in handwriting, the document was not "in writing" for statutory purposes of § 30-2327. This misunderstanding led to the county court's unnecessary examination of the document as a possible holographic will.

For purposes of complying with a statutory requirement such as contained in § 30-2327 that a will be "in writing," it is generally agreed that a document partly typed or printed and completed in handwriting meets the writing requirement. See 95 C.J.S. *Wills* § 204 (2011). The cases have long been to this effect. E.g., *Stuck v. Howard*, 213 Ala. 184, 104 So. 500 (1925), *overruled in part, Reynolds v. Massey*, 219 Ala. 265, 122 So. 29 (1929). Interpreting a statutory provision similar to § 30-2327, another court stated that the statutory word "written," "is broad enough to include a typewritten will with a portion . . . in longhand." *Succession of Bellanca v. Schiro*, 517 So. 2d 1235 (La. App. 1987).

[3] We agree with the reasoning of the foregoing and other authorities and conclude that a document purporting to be a will, which is otherwise sufficient, will satisfy the "in writing" requirement of § 30-2327, whether it is completely handwritten; "partly written in ink and partly in pencil[;] partly typewritten and partly printed[;] partly printed, [partly typewritten,] and partly written[;] or on a printed form," see 95 C.J.S., *supra*, § 204 at 201, as well as other combinations of these forms and comparable permanent techniques of writing which substantively evidence testamentary intent.

In this case, the document tendered by Hickey was "in writing," signed by Pluhacek and witnessed by two individuals; thus, the will was properly executed and satisfied § 30-2327. On this record, the will was validly executed under § 30-2327, and the county court erred when it denied formal probate based on its erroneous reasoning.

## CONCLUSION

For the reasons explained above, we conclude, as a matter of law, that the will was a validly executed will under § 30-2327. The county court erred when it denied formal probate. Accordingly, we reverse, and remand with instructions to the county court to admit the will to formal probate and formally grant other appropriate relief in accordance with the will.

Reversed and remanded for
further proceedings.

Nebraska Supreme Court
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-- Nebraska Reporter of Decisions

# State of Nebraska, appellee, v. Eddie H. Dehning, appellant.

894 N.W.2d 331

Filed April 27, 2017. No. S-16-761.

1. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Sentences.** When imposing a sentence, the sentencing court should customarily consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the violence involved in the commission of the offense. However, the sentencing court is not limited to any mathematically applied set of factors.
5. ____. 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 Deuel County: Derek C. Weimer, Judge. Affirmed.

Steven E. Elmshaeuser for appellant.

Douglas J. Peterson, Attorney General, and Joe Meyer for appellee.

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

Miller-Lerman, J.

## NATURE OF CASE

Eddie H. Dehning, the appellant, was charged with exploitation of a vulnerable adult and theft by unlawful taking. After a trial, the jury found Dehning guilty on both counts. The district court sentenced Dehning to imprisonment of 60 to 60 months for the conviction of exploitation of a vulnerable adult and imprisonment of 5 to 10 years for the theft conviction, with the sentences to run consecutively. The sentences were also ordered to be served consecutively to Dehning's sentences resulting from a separate criminal case. Dehning appeals. We affirm.

## STATEMENT OF FACTS

On April 2, 2015, Dehning was charged by information with two counts: Count I was exploitation of a vulnerable adult, a Class IIIA felony, and count II was theft by unlawful taking, a Class III felony. The information alleged that from approximately January 1, 2011, to December 31, 2013, Dehning had exploited a vulnerable adult, specifically his mother, Cora Bell Dehning (Cora Bell), and that he had stolen property from Cora Bell having an aggregate value of more than $1,500.

Dehning pled not guilty to the charges, and a jury trial was held on April 25 and 26, 2016. The State called 10 witnesses, including bank employees, members of Dehning and Cora Bell's family, a physician's assistant, the former

sheriff who investigated the case, and Julie Collins, Dehning's ex-girlfriend. Dehning testified in his own behalf.

The evidence adduced at trial generally showed that Cora Bell and her husband had two children: Dehning and his sister. After Cora Bell's husband retired in the early to mid-1980's, they moved to Sidney, Nebraska. Cora Bell's husband died in 1988, and after his death, Cora Bell continued to live independently in Sidney.

Dehning became Cora Bell's power of attorney in February 2011. In June 2011, Cora Bell moved from Sidney to Big Springs, Nebraska, which was closer to where Dehning lived. After Cora Bell was found at her home unconscious in December 2012, she was moved to an assisted living facility in February 2013. Later in 2013, Cora Bell was facing eviction from the assisted living facility, and in November 2013, Marvin Remington, Cora Bell's younger brother, and James Fraker, Cora Bell's nephew, became Cora Bell's powers of attorney.

Many of the witnesses testified regarding the mental state of Cora Bell. Remington testified that in 2007, Cora Bell "started having a little bit of [a] mind problem like she wasn't really thinking clearly like she always did before." He testified that in 2009, he noticed that Cora Bell would mix up her medications or forget to take them. James Fraker testified that in 2009 or 2010, he started to notice that Cora Bell was displaying signs of dementia. James Fraker stated that Cora Bell was repeating herself frequently and that by 2011, she was becoming forgetful and having a hard time carrying on a normal conversation. The former sheriff of Deuel County testified that he was informed by Dehning; James Fraker; and James Fraker's wife, Paula Fraker, that Cora Bell was suffering from dementia.

Collins also testified regarding Cora Bell's mental state. Collins testified that Cora Bell moved from Sidney to Big Springs so Dehning and Collins could check on her more easily. Collins stated that she would go to Cora Bell's house

frequently to make sure Cora Bell took her medication. Collins testified that she was concerned about Cora Bell's eating habits because she was losing a lot of weight and that she noticed "a decrease of her personal hygiene." Collins further stated that starting in 2011, Cora Bell would forget the names of Collins' children.

A physician's assistant, Lisa Regier, testified that she had treated Cora Bell from October 2011 through June 2012. In October 2011, after Regier learned that Cora Bell would sometimes forget to take her medication, Regier ordered an MRI. On November 21, after receiving the results of the MRI, Regier informed Cora Bell that she had what appeared to be Alzheimer's disease. Regier gave Cora Bell a "Mini-Mental Status Exam" on December 23, and based on the results of that examination, Regier determined that Cora Bell had mild or moderate Alzheimer's disease. Regier prescribed two medications to Cora Bell to slow the progression of the disease. On June 1, 2012, Regier met with Cora Bell again, and Regier testified that at that point, "it was obvious that the Alzheimer's disease was [a]ffecting [Cora Bell's] memory" and that it was "difficult for her to manage independently at that time." Regier testified that although June 1 was the first time she really noted that it was difficult for Cora Bell to function independently, she had concerns about Cora Bell's ability to care for herself beginning in November 2011.

With respect to Cora Bell's financial situation, the evidence adduced at trial showed that in 2013, other members of Cora Bell's family became aware that she was facing eviction from her assisted living facility, and as a result, they became involved in Cora Bell's financial affairs. As noted above, in November 2013, Remington and James Fraker became Cora Bell's powers of attorney. At trial, the State offered and the court received the bank records for two of Cora Bell's accounts and two of Dehning's accounts.

After Remington and James Fraker became Cora Bell's powers of attorney, they began examining Cora Bell's bank

records for the time that Dehning had been her power of attorney. Remington testified that in examining the bank records, he noticed a debit card was frequently used, but that Cora Bell "hardly ever used a debit card." Remington further stated that Dehning had

> opened a bank account at [a bank] in Big Springs for her and he was always transferring money around but he might take $2,500 out of [a] bank in Sidney . . . and he'd move it to Big Springs but when he put the money in the bank in Big Springs it would be usually [$]2,000 deposited and [$]500 missing.

Remington further testified that Dehning had rented out Cora Bell's house located in Sidney but that very little of the rent money was deposited into Cora Bell's bank accounts.

James Fraker testified that after becoming power of attorney along with Remington, they both noticed that Cora Bell had very little money in her bank accounts. James Fraker testified that after further investigation, "it was kind of evident that [Dehning] had been taking some of [Cora Bell's] money and spending it." Similar to Remington's testimony, James Fraker testified that Dehning would transfer money between Cora Bell's bank account in Sidney and her account in Big Springs and that

> during the transfer he would take cash out, like I say if he took $1,500 out of [the] bank in Sidney and transfer [sic] it over to the bank in Big Springs maybe [$]1,200 or $1,100 would show up and the rest would be taken out. You could see on the deposit slip there would always be a deduction out for cash.

James Fraker further testified that Cora Bell's debit card was used and automated teller machine withdrawals occurred in areas of Nebraska to which Cora Bell would not have traveled.

Paula Fraker testified that she examined Cora Bell's bank accounts along with Remington and James Fraker. She testified that she prepared spreadsheets regarding Cora Bell's

finances to show the investigators involved in this case. Paula Fraker testified that in examining Cora Bell's bank accounts, she made the following observations: Dehning would pay his utility bill from Cora Bell's account, the first time there was use of a debit card from Cora Bell's account was after Dehning became power of attorney, there was an instance when $1,500 went missing from Cora Bell's bank accounts, the $700 monthly rent check for Cora Bell's house in Sidney was being deposited into Dehning's account, and many other transactions that Paula Fraker found suspicious, including a check made out to the "Keith Co. Treasurer" for $609.12 when Cora Bell did not own any property in Keith County, Nebraska.

Numerous voluminous bank records from two of Cora Bell's accounts and two of Dehning's accounts were received in evidence. These formed part of the basis on which the State relied to prove the amount of the theft alleged in count II.

Collins also testified regarding Cora Bell's finances. She stated that after receiving the rent for Cora Bell's house in Sidney, Dehning would deposit the money into his bank account. Collins further testified that Dehning once purchased a shed to be used at his house and that he paid for it with a check drawn on Cora Bell's bank account. Collins also testified that Dehning purchased many guns and electronics in 2012 and 2013.

After the State concluded the presentation of its case in chief, Dehning moved for a "directed verdict." The district court overruled Dehning's motion.

Dehning testified in his own behalf. Dehning generally testified that he had Cora Bell's permission and consent for all of the financial transactions that were being questioned. He testified: "I had permission to do anything I wanted to do." Dehning also testified that Cora Bell was present with him for many of the automated teller machine withdrawals that were at issue.

As a specific example of Cora Bell's permission and to rebut Collins' testimony, Dehning testified that he had Cora

Bell's permission to install the shed that he used at his house. In this regard, Dehning testified that Cora Bell initially stated she wanted a shed to store equipment that would not fit in her garage, so he ordered a shed. Dehning stated on direct testimony that after he explained to Cora Bell that a spruce tree, an oak tree, and a fence would need to be removed to install the shed, Cora Bell said to Dehning, "you're not cutting up those trees for a storage shed. And I already ordered the storage she[d]. . . . Well, take it to your house because it's not coming here if we've got to tear the hell out of everything."

Regarding his defense that he had Cora Bell's consent, Dehning testified that Cora Bell had specifically told him that "any of her money was [Dehning's] money." He also testified that Cora Bell did not have a good relationship with her daughter, and Dehning stated that Cora Bell told him: "[Y]ou don't be leaving money in the bank, you keep that money moving so your sister don't get it. It's your money."

After the trial concluded, the jury returned a verdict of guilty on both counts, with the theft valued at $32,447.28.

A sentencing hearing was held on July 11, 2016. The district court sentenced Dehning to imprisonment of 60 to 60 months for the conviction of exploitation of a vulnerable adult and to imprisonment of 5 to 10 years for the theft conviction, with the sentences to run consecutively. The sentences were also ordered to be served consecutively to Dehning's previous sentences resulting from a separate criminal case in Keith County. Dehning was not given credit for time served, because he was in prison on the separate previous criminal case.

Dehning appeals.

## ASSIGNMENTS OF ERROR

Dehning claims that his convictions should be reversed because there was insufficient evidence to prove he was guilty beyond a reasonable doubt and the district court erred by imposing excessive sentences.

## STANDARDS OF REVIEW

[1] In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. McCurry, ante* p. 40, 891 N.W.2d 663 (2017).

[2,3] We will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Draper*, 295 Neb. 88, 886 N.W.2d 266 (2016). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.*

## ANALYSIS

### *The Evidence Was Sufficient: Exploitation of a Vulnerable Adult.*

Dehning contends that the evidence failed to show that Cora Bell was a "vulnerable adult" and that therefore, his conviction of count I, exploitation of a vulnerable adult, should be vacated. We do not agree.

Dehning was convicted under Neb. Rev. Stat. § 28-386 (Cum. Supp. 2012), which states in subsection (1):

> A person commits knowing and intentional abuse, neglect, or exploitation of a vulnerable adult or senior adult if he or she through a knowing and intentional act causes or permits a vulnerable adult or senior adult to be:
>
> (a) Physically injured;
>
> (b) Unreasonably confined;

(c) Sexually abused;
(d) Exploited;
(e) Cruelly punished;
(f) Neglected; or
(g) Sexually exploited.

Neb. Rev. Stat. § 28-371 (Reissue 2008) defines a "[v]ulnerable adult" as "any person eighteen years of age or older who has a substantial mental or functional impairment or for whom a guardian or conservator has been appointed under the Nebraska Probate Code." "Substantial mental impairment" is defined as "a substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, or ability to live independently or provide self-care as revealed by observation, diagnosis, investigation, or evaluation." Neb. Rev. Stat. § 28-369 (Reissue 2016).

Dehning focuses on the timeframe alleged in the information, January 1, 2011, to December 31, 2013. He essentially asserts that because Cora Bell lived independently until December 2012, she was not vulnerable for at least some of the time period charged.

In an appeal of a criminal conviction, we review the evidence in a light most favorable to the prosecution. See *State v. McCurry, supra*. There was testimonial evidence that Cora Bell had "mind problem[s]" and difficulty taking medication in 2007, that she suffered from confusion in 2009, and that Dehning was made Cora Bell's power of attorney in February 2011 because of her impairment. Regier diagnosed Cora Bell with Alzheimer's disease in December 2011.

Taken together, the evidence shows that Cora Bell was not merely experiencing undifferentiated aging. See *State v. Rakosnik*, 22 Neb. App. 194, 849 N.W.2d 538 (2014) (affirming convictions where evidence established elements of exploitation of vulnerable adult). Compare *State v. Stubbs*, 252 Neb. 420, 562 N.W.2d 547 (1997) (reversing conviction where evidence showed natural aging). Consistent with § 28-369 quoted above, proof that an individual suffers "[s]ubstantial

mental impairment" can consist of observations of the adult's behavior, and we do not read the statute to require expert opinion. In this case, numerous witnesses testified as to their observations of Cora Bell's mental impairment. A rational trier of fact could have found beyond a reasonable doubt that Cora Bell's condition met the criteria of "vulnerable adult" under the statute, and thus, the elements of the crime during the period alleged were established. See *State v. McCurry, ante* p. 40, 891 N.W.2d 663 (2017). We reject Dehning's assignment of error.

*The Evidence Was Sufficient: Theft by Unlawful Taking.*

Dehning contends that because he testified that Cora Bell gave him consent for the challenged transactions, the prosecution failed to establish the elements of the crime of theft by unlawful taking beyond a reasonable doubt. Dehning's argument rests on our acceptance that Dehning's testimony was credible, but this argument contradicts our standard of review. In reviewing a sufficiency of the evidence claim, we do not pass on the credibility of witnesses—that is for the trier of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. McCurry, supra*. We reject Dehning's argument.

Dehning was convicted of count II, violating Neb. Rev. Stat. § 28-511(2) (Reissue 2016), which states: "A person is guilty of theft if he or she transfers immovable property of another or any interest therein with the intent to benefit himself or herself or another not entitled thereto." The theory of Dehning's defense and his argument on appeal are that because he offered evidence as quoted above in our "Statement of Facts" to the effect that Cora Bell had given him consent to use her property, he did not have the requisite intent to benefit himself without entitlement.

This court has stated that consent is a valid defense to theft by taking under the related subsection, § 28-511(1), regarding movable property, and we logically recognize consent as a defense under § 28-511(2) at issue in this case. See *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994), *overruled on other grounds, State v. Stolen*, 276 Neb. 548, 755 N.W.2d 596 (2008). However, although Dehning claimed in his testimony that Cora Bell consented to the challenged transctions, the jury as trier of fact was free to find Dehning's testimony incredible and reject Dehning's defense where the prosecution by its evidence carried its burden of proving the elements of theft by unlawful taking under § 28-511(2) beyond a reasonable doubt. The record demonstrates that the prosecution met its burden.

As recited in our "Statement of Facts," not repeated here, there was legally sufficient evidence to support this conviction. Such evidence included that the rental income from Cora Bell's house in Sidney was rarely deposited to her accounts, Dehning made transfers between accounts but withdrew cash in the exchange, and Dehning used Cora Bell's money to buy items for his benefit, including guns and computers. The trier of fact could reasonably conclude that such takings were done with intent to benefit Dehning without Cora Bell's consent. And a defendant can be guilty of theft by unlawful taking, even if the defendant holds power of attorney. See *State v. Rakosnik*, 22 Neb. App. 194, 849 N.W.2d 538 (2014). We reject this assignment of error.

*The Sentences Were Not Excessive.*

Dehning claims that the district court erred in imposing excessive sentences and failing to sentence him to probation. We find no merit to this assignment of error.

[4,5] We have stated that when imposing a sentence, the sentencing court should customarily consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record

of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the violence involved in the commission of the offense. However, the sentencing court is not limited to any mathematically applied set of factors. *State v. Artis, ante* p. 172, 893 N.W.2d 421 (2017). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.*

Dehning claims that his prior criminal history is minimal and that probation would be a more appropriate sentence, because it would permit Dehning to regain employment and pay restitution to Cora Bell. He was sentenced to 60 to 60 months in prison for count I, exploitation of a vulnerable adult, and 5 to 10 years in prison for count II, theft by unlawful taking. Dehning does not assert that the sentences exceed the statutory limitations. We determine that the court did not abuse its discretion in sentencing Dehning as it did.

We have reviewed the explanations given by the sentencing court and find them to be consistent with controlling statutes and not an abuse of discretion. In denying probation, the court stated at the sentencing hearing that

> a lesser sentence than imprisonment would depreciate from the seriousness of your offense or promote a disrespect for the law. . . . [T]here is a need for . . . correctional service or an institutionalization . . . and the . . . court finds that there is a substantial risk that you would engage in additional criminal conduct if you were placed on a period of probation.

With respect to Dehning's demeanor and the nature of the offenses, the court stated that

> I was present for the entirety of your trial . . . . I listened to the evidence, I listened to your testimony at the time of the trial and the jury reached a verdict that they reached. The issue among others for me in this particular case is what I think is the callousness with which you spent the

> resources that your mother and your father had worked hard their entire lives to generate . . . I found your testimony at the time of the trial to be completely incredible which means that I didn't believe it.

The record includes a presentence investigation report and an update thereto. These show that Dehning's prior criminal history includes the following: a conviction of terroristic threats in 1980 with 3 years' probation; a conviction for disturbing the peace in 1986; a conviction for cruelly mistreating an animal in 2004; a speeding ticket in 2004; and convictions in Keith County in 2014 for second degree assault, third degree domestic assault, tampering with a witness, and violation of a protection order, for which Dehning was sentenced to prison.

Given the facts and the court's proper considerations, the court did not abuse its discretion when it imposed the sentences recited above. We find no merit to this assignment of error.

## CONCLUSION

Dehning was convicted of exploitation of a vulnerable adult and theft by unlawful taking. The evidence was sufficient, and we affirm these convictions. The court's sentences were not an abuse of discretion. We affirm the convictions and sentences.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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# State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Dustin A. Garrison, respondent.

894 N.W.2d 339

Filed April 27, 2017. No. S-16-803.

Original action. Judgment of suspension.

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

Per Curiam.

## INTRODUCTION

This case is before the court on the conditional admission filed by Dustin A. Garrison, respondent, on December 27, 2016. The court accepts respondent's conditional admission and orders that respondent be suspended from the practice of law for a period of 90 days followed by 1 year's monitored probation upon reinstatement.

## FACTS

Respondent was admitted to the practice of law in the State of Nebraska on April 15, 2008. At all relevant times, he was engaged in the private practice of law in Beatrice, Nebraska.

On August 24, 2016, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent. The formal charges consist of one count against respondent. With respect to the one count, the formal charges state that in August 2008, a client was injured by a vehicle that was

being driven by Devin Witt and that was registered in Texas to "SERCO, Inc." A police report was issued, which listed addresses for both Witt and SERCO in Borger, Texas.

The client initially retained a different attorney to represent him in a claim for damages against Witt and SERCO in Texas. In July 2009, that attorney was suspended from the practice of law, and his partner, respondent, began representing the client. No engagement contract was signed between the client and respondent.

On February 18, 2010, respondent sent a letter to "Serco, Inc.," in Reston, Virginia, to make a claim for damages suffered by the client in the August 2008 accident. On February 19, Serco in Virginia sent a letter to respondent stating that it had never employed Witt and that it did not own any vehicles that were in Nebraska or that were involved in an accident in August 2008.

On May 21, 2012, respondent filed a complaint on behalf of the client against "Serco, Inc.," a New Jersey corporation, and Witt, individually and as an employee of Serco in New Jersey. It was alleged in the complaint that Serco in New Jersey had a registered agent in Lincoln, Nebraska. Serco in New Jersey was served via U.S. mail through its registered agent in Lincoln, and Witt was served via U.S. mail at his address in Borger. A summons was served via certified mail to Serco in New Jersey, in care of its registered agent in Lincoln.

On October 7, 2013, the trial court entered an order of summary judgment against Serco in New Jersey in the amount of $210,216.36. In March 2014, respondent initiated garnishment proceedings on Serco's account at a Pennsylvania bank.

In April 2014, Serco in New Jersey filed a motion to vacate the default judgment and a motion for temporary injunction, in which it stated that it was unrelated to the entity doing business as "SERCO in Borger, Texas," which had been identified in the August 2008 police report. Serco in New Jersey further stated in its motions that it had never employed Witt.

On April 24, the trial court entered an order in which it denied the motions.

Between December 2010 and April 2015, the client and respondent communicated via Facebook messages. Throughout the pendency of the case, the client asked numerous questions regarding the progress of the case and asked for explanations regarding the lawsuit. According to the formal charges,

> [r]espondent responded with statements such as "relax", "I will take care of it", "I will explain later", "we are fine", "we won", "Be happy. We are in the driver's seat", "I'm busy right now", "u realize we sued the wrong company right? We got the money from a company that had it. The correct company would never have had this type of money to pay our judgment", "this is complicated", "we've been busting our asses getting ready for this hearing", "I can't explain the whole process", and claimed they will have to write a book to explain it all to him.

The formal charges state that respondent failed to adequately answer the client's questions and adequately explain what was happening regarding the status of the client's lawsuit.

In April 2014, respondent discussed his fee amount with the client via Facebook messages. Respondent informed the client that his usual fee was 33 to 40 percent, but that he would accept 33 percent from the client's award.

Serco in New Jersey appealed the trial court's decision denying its motion to vacate the default judgment. On June 12, 2015, this court filed an opinion in which we reversed the judgment of the trial court and remanded the cause with directions to the district court to vacate the default judgment entered against Serco in New Jersey. See *Carrel v. Serco Inc.*, 291 Neb. 61, 864 N.W.2d 236 (2015).

In July 2015, Serco in New Jersey filed a motion for summary judgment and served respondent at his office address. On July 16, new counsel entered an appearance on behalf of

the client, and on July 28, respondent filed a motion to withdraw as counsel.

On July 31, 2015, a first amended complaint was filed against "SERCO, INC.," in Texas and Witt, individually and as an employee of SERCO in Texas. The client's new counsel perfected the service of SERCO in Texas and Witt at the addresses provided in the police report of the August 2008 incident. On December 2, the action against SERCO in Texas was dismissed with prejudice and the action against Witt was dismissed.

The formal charges allege that by his actions, respondent violated his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 2012), and Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (competence), 3-501.3 (diligence), 3-501.4(a) and (b) (communications), 3-501.5(b) and (c) (fees), and 3-508.4(a) (misconduct).

On December 27, 2016, respondent filed a conditional admission pursuant to Neb. Ct. R. § 3-313 of the disciplinary rules, in which he conditionally admitted that he violated his oath of office as an attorney and professional conduct rules §§ 3-501.1, 3-501.3, 3-501.4(a) and (b), 3-501.5(b) and (c), and 3-508.4(a). Respondent also acknowledged in his conditional admission that he had previously received two private reprimands. In the conditional admission, respondent knowingly does not challenge or contest the truth of the matters conditionally admitted and waives all proceedings against him in connection with the formal charges in exchange for a 90-day suspension followed by 1 year's monitored probation. Upon reinstatement, if accepted, the monitoring shall be by an attorney licensed to practice law in the State of Nebraska and who shall be approved by the Counsel for Discipline. Respondent shall submit a monitoring plan with his application for reinstatement which shall include, but not be limited to the following: During the first 6 months of probation, respondent will meet with and provide the monitor a weekly list of cases for which respondent is currently responsible,

which list shall include the following: The date the attorney-client relationship began; the general type of case; the date of last contact with the client; the last type and date of work completed on the file (pleading, correspondence, document preparation, discovery, court hearing); the next type of work and date that work should be completed on the case; any applicable statutes of limitations and their dates; and the financial terms of the relationship (hourly, contingency, et cetera). After the first 6 months through the end of probation, respondent shall meet with the monitor on a monthly basis and provide the monitor with a list containing the same information set forth above. Respondent shall work with the monitor to develop and implement appropriate office procedures to ensure that the clients' interests are protected. Respondent shall reconcile his trust account within 10 working days of receipt of the monthly bank statement and provide the monitor a copy within 5 working days. Respondent shall submit a quarterly compliance record to the Counsel for Discipline demonstrating that respondent is adhering to the foregoing terms of probation. The quarterly report shall include a certification by the monitor that the monitor has reviewed the report and that respondent continues to abide by the terms of probation. If at any time the monitor believes respondent has violated the professional conduct rules or has failed to comply with the terms of probation, the monitor shall report the same to the Counsel for Discipline. Finally, respondent shall pay all the costs in this case, including the fees and expenses of the monitor, if any.

The proposed conditional admission included a declaration by the Counsel for Discipline, stating that respondent's proposed discipline is appropriate.

## ANALYSIS

Section 3-313, which is a component of our rules governing procedures regarding attorney discipline, provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to § 3-313, and given the conditional admission, we find that respondent knowingly does not challenge or contest the matters conditionally admitted. We further determine that by his conduct, respondent violated conduct rules §§ 3-501.1, 3-501.3, 3-501.4(a) and (b), 3-501.5(b) and (c), and 3-508.4(a), and his oath of office as an attorney licensed to practice law in the State of Nebraska. Respondent has waived all additional proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

## CONCLUSION

Respondent is suspended from the practice of law for a period of 90 days, effective immediately, after which period respondent may apply for reinstatement to the bar. Should respondent apply for reinstatement, his reinstatement shall be conditioned upon respondent's being on probation for a period of 1 year, including monitoring, following reinstatement,

subject to the terms agreed to by respondent in the conditional admission and outlined above. Acceptance of an application for reinstatement is conditioned on the application's being accompanied by a proposed monitored probation plan, the terms of which are consistent with this opinion. Respondent shall comply with Neb. Ct. R. § 3-316 (rev. 2014), and upon failure to do so, respondent shall be subject to punishment for contempt of this court. Respondent is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of suspension.

Nebraska Supreme Court
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# Kevin M. Winder, appellant, v. Union Pacific Railroad Company, a Delaware corporation, appellee.

894 N.W.2d 343

Filed May 5, 2017. No. S-15-1100.

1. **Federal Acts: Railroads: Claims: Courts.** In disposing of a claim controlled by the Federal Employers' Liability Act, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but substantive issues concerning a claim under the act are determined by the provisions of the act and interpretive decisions of the federal courts construing the act.
2. **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.
3. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
4. **Federal Acts: Railroads: Liability.** Under 49 U.S.C. § 20302(a)(1)(B) (2012) of the federal Safety Appliance Acts, a railroad carrier may use a vehicle, including a railcar, only if it is equipped with efficient handbrakes.
5. **Federal Acts: Railroads: Negligence: Proof.** Under 49 U.S.C. § 20302(a)(1)(B) (2012) of the federal Safety Appliance Acts, there are two ways an employee may show the inefficiency of handbrakes: (1) Evidence may be adduced to establish some particular defect in the handbrake or (2) inefficiency may be established by showing the

handbrake failed to function, when operated with due care, in the normal, natural, and usual manner.

6. **Federal Acts: Railroads: Negligence: Words and Phrases.** For purposes of 49 U.S.C. § 20302(a)(1)(B) (2012) of the federal Safety Appliance Acts, "efficient" means adequate in performance and producing properly a desired effect. "Inefficient" means not producing or not capable of producing the desired effect and thus incapable, incompetent, or inadequate.
7. **Federal Acts: Railroads: Negligence.** When there is conflicting evidence regarding whether a handbrake failed to function, when operated with due care, in the normal, natural, and usual manner, the question of inefficiency under 49 U.S.C. § 20302(a)(1)(B) (2012) of the federal Safety Appliance Acts is one for the jury.

Appeal from the District Court for Douglas County: Kimberly Miller Pankonin and Peter C. Bataillon, Judges. Affirmed.

William Kvas and Richard L. Carlson, of Hunegs, LeNeave & Kvas, P.A., and Jayson D. Nelson for appellant.

Anne Marie O'Brien and Daniel J. Hassing, of Lamson, Dugan & Murray, L.L.P., and Andrew Reinhart for appellee.

Heavican, C.J., Wright, Cassel, Stacy, Kelch, and Funke, JJ.

Stacy, J.

Kevin M. Winder filed an action for damages against his employer, Union Pacific Railroad Company (UP), alleging he injured his back while turning a wheel to release the handbrake on a railcar. Winder asserted claims under the Federal Employers' Liability Act (FELA)[1] and the federal Safety Appliance Acts (FSAA).[2] The jury returned a general verdict in favor of UP, and Winder appeals. We affirm.

[1] 45 U.S.C. §§ 51 to 60 (2012).

[2] 49 U.S.C. §§ 20301 to 20306 (2012).

## FACTS

On October 28, 2012, Winder was working as a conductor for UP in North Platte, Nebraska. Part of his job was to manually release the handbrakes on railcars. Handbrakes are used to secure railcars to the track when a train is not in motion. The handbrake is manually applied by using a brake wheel and turning it clockwise. The handbrake is manually released one of two ways: by either turning the brake wheel counterclockwise or using a quick-release lever. Not all handbrakes have quick-release levers, but the ones Winder was releasing did. Winder testified he was trained "to first try the quick release lever [and] [i]f that does not work, then you turn the wheel."

Winder successfully released the handbrake on the first railcar. When he attempted to use the quick-release lever on the next railcar, the lever pulled easily but the brake did not release. Winder then began turning the wheel in a counterclockwise direction to release the brake. According to Winder, as he did so, he suddenly felt a sharp pain in his back and stopped working.

Winder immediately notified UP of his injury, and he sought medical attention. He received significant treatment, including surgery, and was unable to return to work at UP.

Winder eventually brought this action against UP, alleging claims under FELA and FSAA. FSAA does not by its terms confer a right of action on injured parties, but if a plaintiff proves a violation of FSAA, he or she may recover under FELA without further proof of negligence by the railroad.[3] "In short, [FSAA] provide[s] the basis for the claim, and . . . FELA provides the remedy."[4] As will be explained in more detail later, FSAA requires that railroads may use a vehicle,

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[3] See *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949).

[4] *Beissel v. Pittsburgh and Lake Erie R. Co.*, 801 F.2d 143, 145 (3d Cir. 1986).

including a railcar, only if it is equipped with "efficient hand brakes."[5] Winder alleged UP violated this provision of FSAA, because the quick-release lever on the handbrake was inefficient.

The case was tried to a jury. At the close of the evidence, Winder moved for a directed verdict in his favor on the question of whether UP violated FSAA. The district court overruled the motion, and the jury returned a general verdict in favor of UP. Winder filed this timely appeal, which we moved to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[6]

## ASSIGNMENT OF ERROR

Winder's sole assignment of error is that the court erred in failing to direct a verdict in his favor on the FSAA claim.

## STANDARD OF REVIEW

[1] In disposing of a claim controlled by FELA, a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the act, but substantive issues concerning a claim under FELA are determined by the provisions of the act and interpretive decisions of the federal courts construing FELA.[7]

[2,3] 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.[8] A directed

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[5] 49 U.S.C. § 20302(a)(1)(B).

[6] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

[7] *Ballard v. Union Pacific RR. Co.*, 279 Neb. 638, 781 N.W.2d 47 (2010).

[8] *Wulf v. Kunnath*, 285 Neb. 472, 827 N.W.2d 248 (2013).

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.[9]

## ANALYSIS

[4] The relevant portion of FSAA provides that railroad carriers may use a vehicle, including a railcar, only if it is "equipped with . . . efficient hand brakes."[10] The U.S. Supreme Court has interpreted this provision to impose "an absolute and unqualified prohibition against [a railroad's] using or permitting to be used, on its line, any car not equipped with 'efficient hand brakes.'"[11]

[5,6] In *Myers v. Reading Co.*,[12] the U.S. Supreme Court analyzed FSAA's efficient handbrake requirement. *Myers* held there are two ways an employee may show the inefficiency of handbrakes: (1) Evidence may be adduced to establish some particular defect in the handbrake or (2) inefficiency may be established by showing the handbrake failed to function, when operated with due care, in the normal, natural, and usual manner.[13] *Myers* established that "'[e]fficient means adequate in performance; producing properly a desired effect. Inefficient means not producing or not capable of producing the desired effect; incapable; incompetent; inadequate.'"[14]

Winder makes no claim in this appeal that the handbrake had any particular defect. Instead, he points to undisputed evidence that when he pulled the quick-release lever, it failed to release the handbrake. He argues this evidence was

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[9] *Id.*

[10] 49 U.S.C. § 20302(a)(1)(B).

[11] *Myers v. Reading Co.*, 331 U.S. 477, 482, 67 S. Ct. 1334, 91 L. Ed. 1615 (1947).

[12] *Myers v. Reading Co., supra* note 11.

[13] *Id.*

[14] *Id.*, 331 U.S. at 483.

sufficient as a matter of law to prove the handbrake failed to function in the normal, natural, and usual manner.

No party disputes that when Winder pulled the quick-release lever it failed to release the brake, requiring him to use the wheel to release the brake. The question is whether this evidence entitled Winder to a directed verdict that as a matter of law, the handbrake failed to function, when operated with due care, in the normal, natural, and usual manner. On this record, we find no error in denying the motion for directed verdict.

[7] Case law from other jurisdictions demonstrates that when there is conflicting evidence regarding whether a handbrake failed to function in the normal, natural, and usual manner, the question of inefficiency is one for the jury. In *Strickland v. Norfolk Southern Ry. Co.*,[15] a railroad worker attempted to release a handbrake by using the quick-release lever. The quick-release lever did not release the brake, which the record showed was not "'an out-of-the-blue thing.'"[16] The worker then attempted to release the handbrake using the brake wheel, which would not turn. He injured himself attempting to exert more pressure on the wheel. The district court granted summary judgment in favor of the railroad, in effect finding the handbrake was not inefficient as a matter of law. The 11th Circuit reversed, finding the worker's testimony about the level of force exerted in turning the wheel created a fact issue for the jury to resolve in determining whether the handbrake was inefficient.

An unpublished opinion from the U.S. District Court for the District of Nebraska also illustrates that when there is conflicting evidence on whether a handbrake failed to function normally, the question of inefficiency cannot be decided as a matter of law. In *Chapp v. Burlington Northern Santa Fe R.*

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[15] *Strickland v. Norfolk Southern Ry. Co.*, 692 F.3d 1151 (11th Cir. 2012).

[16] *Id.* at 1155.

*Co.*,[17] a railroad worker attempted to release a handbrake by pulling the quick-release lever. When the quick-release lever failed, he attempted to release the brake by turning the wheel and alleged he was injured while doing so. The worker moved for summary judgment on his FSAA claim, arguing, among other things, that the handbrake was inefficient as a matter of law. The court denied the motion, reasoning there was conflicting evidence on whether the handbrake failed to function in the normal, natural, and usual manner, and inefficiency could not be determined as a matter of law.[18]

Here, there was conflicting evidence at trial regarding whether it was common or usual for a quick-release lever to fail to release a handbrake. Winder testified that in his work as a conductor, he recalled only two occasions when the quick-release lever failed to release the handbrake. And an expert witness called on Winder's behalf testified that if a quick-release lever failed to work, the handbrake operation was inefficient. But a UP trainman testified that quick-release levers fail to release the handbrake "on a fairly regular basis," and he opined they worked about "half the time." He testified it was very common and usual in the industry for the quick-release levers not to work. Another witness, a UP supervisor, testified that quick-release levers failed to work "quite a bit." And a railroad consultant hired by UP testified

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[17] *Chapp v. Burlington Northern Santa Fe R. Co.*, No. 4:04CV3021, 2005 WL 1331157 (D. Neb. June 2, 2005) (unpublished memorandum and order).

[18] *Id.* See, also, *Rogers v. Norfolk Southern Ry. Co.*, No. 3:13 cv 798, 2015 WL 4191147 (N.D. Ohio July 10, 2015) (unpublished opinion) (conflicting evidence on why handbrake failed to release and whether it failed to function in normal, natural, and usual manner presented questions for trier of fact and prevented summary judgment); *Ditton v. BNSF Ry. Co.*, No. CV 12-6932 JGB (JCGx), 2013 WL 2241766 (C.D. Cal. May 21, 2013) (unpublished opinion) (conflicting evidence on failure of quick-release lever to release and evidence that handbrakes commonly become stuck presented factual questions for jury under FSAA).

it was "not at all uncommon" for the quick-release lever not to work.

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.[19] Here, there was conflicting evidence on whether the handbrake failed to function in the normal, natural, and usual manner, and the district court properly denied the motion for directed verdict and submitted that issue to the jury.

## CONCLUSION

We find no merit to Winder's assignment of error and affirm the judgment of the district court.

Affirmed.

Miller-Lerman, J., not participating.

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[19] *Wulf v. Kunnath, supra* note 8.

Nebraska Supreme Court
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# In re Robert L. McDowell Revocable Trust. Jane O. Hornung, appellee and cross-appellee, v. Sandra K. Stockall, Trustee of the Betty Jane McDowell Revocable Trust and individually, appellant, and Roger R. Stockall, Trustee of the Robert L. McDowell Revocable Trust, appellee and cross-appellant.

894 N.W.2d 810

Filed May 5, 2017. No. S-16-071.

1. **Trusts.** The interpretation of the words of a trust is a question of law.
2. **Trusts: Equity: Appeal and Error.** Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record; but where an equity question is presented, appellate review of that issue is de novo on the record.
3. **Decedents' Estates.** In Nebraska, powers of appointment are construed according to the principles of the common law.
4. **Decedents' Estates: Intent.** In the construction of powers of appointment, the cardinal principle is that the intention of the donor is controlling.
5. ____: ____. The donee of a power of appointment must keep within its terms, and where the donor prescribes the method of its execution, that method must be strictly followed, so far at least as may be necessary to give effect to the donor's intent and design.
6. **Decedents' Estates.** Where there is a prohibition, limitation, or restriction in a power of appointment, such provision will control and the donee will not be permitted to disregard the same.
7. ____. A power of appointment is considered special or limited when the donee's appointment is limited to a group which is not unreasonably large and which does not include the donee.

8. **Trusts: Intent.** Rules of construction for interpreting a trust are applied when the language of the trust is not clear; but if the language clearly expresses the settlor's intent, the rules do not apply.
9. **Appeal and Error.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
10. **Trusts: Words and Phrases.** A breach of trust includes every omission or commission which violates in any manner the obligation of carrying out a trust according to its terms.
11. **Trusts.** Every violation by a trustee of a duty required of it by law, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust.
12. ____. According to Neb. Rev. Stat. § 30-3890 (Reissue 2016), a violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.

Appeal from the County Court for Custer County: Tami K. Schendt, Judge. Affirmed as modified.

John M. Lingelbach, James Tews, and Minja Herian, of Koley Jessen, P.C., L.L.O., for appellant.

Brian S. Koerwitz and Kent E. Endacott, of Endacott, Peetz & Timmer, P.C., L.L.O., and Heidi Hornung-Scherr, of Scudder Law Firm, P.C., L.L.O., for appellee Jane O. Hornung.

Richard A. DeWitt and David J. Skalka, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., for appellee Roger R. Stockall.

Heavican, C.J., Wright, Cassel, Stacy, Kelch, and Funke, JJ.

Stacy, J.

This is a dispute between the adult children of Robert L. McDowell and Betty Jane McDowell, both deceased. The issue presented is whether Betty validly exercised a limited power of appointment given to her by Robert's trust when she appointed the assets in Robert's trust to her own revocable trust. The

county court found Betty's appointment was ineffective and ordered that the assets be recovered and distributed through Robert's trust. We affirm as modified.

## I. FACTS

Robert and Betty were the owners of McDowell Cattle Company, which consists of farmland and pasture near Arnold, Nebraska. Robert and Betty each owned 270 shares of the company.

In 2001, Robert and Betty drafted wills and revocable trusts with nearly identical language. Robert's trust provided in relevant part:

> From and after my death all principal of the trust not allocated to the said Trust shall be administered and distributed as Trust "A" as follows:
>
> . . . .
>
> (d) Upon the death of my wife in the event my wife shall survive me, the then principal of Trust "A" shall be distributed to or held in trust for the benefit of such one or more of my issue, the spouses of any such issue, and tax-exempt charitable organizations, in such shares and proportions and subject to such powers, terms and conditions, as my wife shall appoint by will and any principal of Trust "A" not appointed effectively by my wife shall continue to be administered as Trust "A" pursuant to the following provisions of this instrument.

Robert died before Betty. After his death, Betty executed a new will. In this will, she provided:

> I hereby exercise any power of appointment given to me under the . . . Robert L. McDowell Revocable Trust . . . (including Trust "A" . . .), and direct that all such property over which I have a power of appointment, together with all of my property, whether real or personal, is hereby devised to the Trustee or Trustees of the [Betty Jane McDowell Revocable Trust], to be administered by the Trustee as part of the property of said . . . Trust,

> and to be held or distributed according to the terms thereof . . . .

Robert and Betty had two children who survived them: Jane O. Hornung and Sandra K. Stockall. Pursuant to the terms of Betty's will, both Robert's 270 shares of McDowell Cattle Company—from his "Trust 'A'" (Trust A)—and Betty's 270 shares passed through Betty's trust to Stockall. Hornung received nothing under the terms of Betty's trust, but was a potential beneficiary under Robert's trust.

After at least some of Robert's assets from Trust A were distributed through Betty's trust, Hornung filed suit in the county court for Custer County requesting instructions and a declaration of rights of the beneficiaries of Robert's trust, pursuant to Neb. Rev. Stat. § 30-3812 (Reissue 2016). Hornung alleged that "[t]he power of appointment exercised under Betty's Will is invalid and ineffective as the Betty Jane McDowell Revocable Trust is not a person or beneficiary to which the assets of Trust A could be transferred." Hornung alleged that the assets of Trust A should instead be distributed pursuant to the terms of Robert's trust, which provided that any residue was to be distributed in equal shares to Hornung and Stockall. Hornung's petition "request[ed] that the Court instruct the Trustee of [Robert's trust] to recover, preserve, and distribute the principal of Trust A accordingly and . . . issue a preliminary order estopping the transfer of any assets of Trust A."

Stockall, in her capacity as the trustee of Betty's trust and in her individual capacity, counterclaimed in the county court action. Her counterclaim also sought instructions and a declaration of rights of the beneficiaries under Robert's trust. Stockall denied that the power of appointment exercised by Betty was invalid. Stockall's counterclaim requested that the court enter an order (1) finding that Betty's exercise of the power of appointment was valid and enforceable, (2) approving the actions taken by the trustee of Robert's trust in "distributing the remaining principal of [Trust A] to the Trustee of

Betty's Trust in accordance with Betty's exercise of the power of appointment," and (3) requiring the trustee of Robert's Trust "to promptly distribute the remainder of the principal of [Trust A] in accordance with Betty's exercise of the power of appointment . . . to the Trustee of Betty's Trust . . . ." Our record reflects that notice of the action and the counterclaim was provided to the trustees of both Robert's trust and Betty's trust and to all potential beneficiaries of either trust.

A bench trial was held. Hornung, Stockall, and the trustee of Robert's trust participated. The court determined Betty's exercise of the power of appointment was ineffective because it exceeded the scope of the limited power granted in Robert's trust, in that it commingled the Trust A assets with Betty's trust assets and thus benefited Betty, her estate, and creditors of her estate so that it was not limited to one of the three classes of beneficiaries Robert designated. The court ordered the trustee of Robert's trust to recover all assets of Trust A and to distribute them in accordance with the terms of Robert's trust.

Stockall appealed, and the trustee of Robert's trust (who is also Stockall's husband) filed a cross-appeal. We granted Stockall's petition to bypass the Nebraska Court of Appeals and moved this appeal to our docket.

## II. ASSIGNMENTS OF ERROR

Stockall assigns, restated, that the county court erred in (1) finding Betty's exercise of the power of appointment granted to her by Robert's trust was ineffective; (2) finding Betty exceeded the power granted to her by Robert's trust; (3) finding merged assets (assets appointed from Robert's trust and assets that originally constituted Betty's trust) were used to pay taxes and creditors of Betty's estate; (4) finding Betty benefited herself, her estate, her creditors, and the creditors of her estate by merging the Trust A assets with her trust; (5) finding Neb. Rev. Stat. § 30-3850(a)(3) (Reissue 2016) would allow Betty's creditors to reach the assets Betty appointed from Robert's

trust to her trust; (6) finding Betty's appointment of the Trust A assets to her trust caused those assets to be taxable as part of Betty's gross estate; and (7) finding Betty did not designate a permissible appointee in her will and instead opted to appoint the Trust A property to her trust.

The trustee of Robert's trust assigns on cross-appeal, restated, that the county court (1) erred in ordering him as trustee to recover all Trust A assets and then distribute them under Robert's trust and (2) lacked subject matter jurisdiction to determine that Betty's exercise of the power of appointment was invalid or to hold that transfers from Robert's and Betty's trusts were void.

## III. STANDARD OF REVIEW

[1,2] The interpretation of the words of a trust is a question of law.[1] Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record; but where an equity question is presented, appellate review of that issue is de novo on the record.[2]

## IV. ANALYSIS

### 1. Appointment Was ineffective

Stockall argues the county court erred in finding Betty's exercise of the power of appointment was ineffective. We find no error on this issue.

[3-6] In Nebraska, powers of appointment are construed according to the principles of the common law.[3] In the construction of powers of appointment, the cardinal principle is that the intention of the donor is controlling.[4] The donee of a

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[1] *In re Family Trust Created Under Akerlund Trust*, 280 Neb. 89, 784 N.W.2d 110 (2010).

[2] *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 794 N.W.2d 700 (2011).

[3] *Applegate v. Brown*, 168 Neb. 190, 95 N.W.2d 341 (1959).

[4] *Id.*

power of appointment must keep within its terms, and where the donor prescribes the method of its execution, that method must be strictly followed, so far at least as may be necessary to give effect to the donor's intent and design.[5] Where there is a prohibition, limitation, or restriction, such provision will control and the donee will not be permitted to disregard the same.[6]

[7] Here, Robert's trust gave Betty the power to "appoint by will" the Trust A property to "be distributed to or held in trust for the benefit of such one or more of my issue, the spouses of any such issue, and tax-exempt charitable organizations." The parties agree this power of appointment was a special or limited power of appointment. A power of appointment is considered special or limited when the donee's appointment is limited to a group which is not unreasonably large and which does not include the donee.[7] Here, Robert made it clear the permissible group included only tax-exempt charitable institutions, Robert's issue, and spouses of his issue.

To determine whether Betty effectively exercised this limited power of appointment, we look to the provisions of Betty's will, which provided:

> [A]ll such property over which I have a power of appointment, together with all of my property, whether real or personal, is hereby devised to the Trustee [of Betty's revocable trust], to be administered by the Trustee as part of the property of said . . . Trust, and to be held or distributed according to the terms thereof.

Notably, the beneficiaries of Betty's trust were Stockall and several of Robert's grandchildren. Betty's trust thus ultimately distributed all her property and all the property from Robert's Trust A to Robert's issue.

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[5] *Id.*

[6] *Id.*

[7] *In re Estate of Muchemore*, 252 Neb. 119, 560 N.W.2d 477 (1997), *disapproved on other grounds, In re Estate of Nelson*, 253 Neb. 414, 571 N.W.2d 269 (1997).

The question presented is whether Betty's limited power of appointment was effectively exercised when she devised Trust A assets to her personal trust in this manner. Stockall argues the appointment was effective because, after passing through Betty's trust, the Trust A property eventually was distributed to Robert's issue, a permissible group identified in Robert's trust. Hornung argues that the appointment was not effective, because Betty's trust is not in the permissible group under Robert's trust, so the unqualified appointment to her trust was ineffective even if the property eventually was distributed to those in the permitted group under Robert's trust.

This court has not previously considered the effectiveness of exercising a limited appointment under such circumstances. We find guidance in cases from other jurisdictions which have addressed similar circumstances.

In *BMO Harris Bank N.A. v. Towers*,[8] parents created two trusts granting their son a limited power to appoint assets of the parents' trusts to certain beneficiaries. The son's will devised all of his estate to his trust, thus commingling the assets he received from the parents' trusts with his own trust assets. The court determined this was an ineffective exercise of the power of appointment, because the son exercised the power of appointment in favor of himself and he was not a permissible beneficiary under the parents' limited power of appointment. The court reasoned that no language in the son's trust segregated the assets of his parents' trusts from the assets of his trust and consequently, the son's creditors could have used the commingled assets to satisfy the son's debts.

The case of *In re Estate of Reisman*[9] is also instructive. There, a wife's trust granted her husband a limited power of appointment and designated her children and any descendants of her children as the permissible beneficiaries of the

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[8] *BMO Harris Bank N.A. v. Towers*, 2015 IL App (1st) 133351, 43 N.E.3d 1131, 398 Ill. Dec. 221 (2015).

[9] *In re Estate of Reisman*, 266 Mich. App. 522, 702 N.W.2d 658 (2005).

assets. The husband's will appointed the assets to his trust. Importantly, however, the trust contained language expressly stating that the assets appointed to his trust via the limited power of appointment were not an asset of his estate. The court held that this express language differentiating the assets rendered the appointment effective, because the assets never could have benefited the husband, his estate, or his creditors.

Betty's will attempted to exercise her power of appointment by devising all of the Trust A assets to her own trust. But her trust was not in the permissible group, and her trust contained no language separating the Trust A assets from the remainder of her trust assets. To the contrary, Betty's will provided that the Trust A assets were devised to her trust "to be administered by the Trustee as part of the property of [the trust]." By devising the Trust A assets to her trust without expressly providing that the Trust A assets were not to be commingled with her other assets, Betty improperly exercised the power of appointment for her benefit. Merger of the Trust A assets with Betty's assets resulted in nondesignated objects (Betty, her estate, her creditors, and creditors of her estate) potentially benefiting from the power of appointment, and rendered her appointment ineffective.[10] After reviewing the record, we find no error in the county court's determination that Betty's exercise of the power of appointment was ineffective.

### 2. Doctrines of Selective Allocation and Substantial Compliance Do Not Save Invalid Appointment

Stockall argues that even though Betty's will devised Trust A assets to her own trust, the county court should have applied the doctrines of selective allocation and/or substantial compliance to find Betty's exercise of the power of appointment was

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[10] See, *BMO Harris Bank N.A., supra* note 8; *In re Estate of Reisman, supra* note 9.

effective. This court has never applied either doctrine in a case such as this.

(a) Selective Allocation

The doctrine of selective allocation is generally recognized by both the Restatement (Second) of Property and the Restatement (Third) of Property.[11] According to the Restatement (Third), "If the donee of a power of appointment exercises the power in a document that also disposes of owned property, the owned and appointive property are deemed to be allocated in the manner that best carries out the donee's intent."[12] Stockall urges us to apply this doctrine, through which she asserts we can assume that only those assets in Betty's trust that she owned during her lifetime were used to pay the expenses of administering her final affairs and the claims of any of her creditors. Stockall contends that such a construction of Betty's trust would render Betty's power of appointment effective.

Stockall argues that applying selective allocation is particularly apt in this case, because distribution via Betty's trust ultimately resulted in the property's being distributed to Robert's issue and Robert's issue was one of the groups designated to receive his Trust A assets. Stockall also argues that even though Betty's will appointed Trust A assets to Betty's own trust, neither Betty, her estate, her creditors, nor any creditors of Betty's estate actually benefited from the invalid appointment, because the assets of Betty's trust, independent of the Trust A assets, were more than sufficient to cover Betty's debts and expenses.

Although the doctrine of selective allocation is recognized in the Restatements, the doctrine has not been recognized or

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[11] 3 Restatement (Third) of Property: Wills and Other Donative Transfers § 19.19 (2011); Restatement (Second) of Property: Donative Transfers § 22.1 (1986).

[12] 3 Restatement (Third), *supra* note 11 at 335.

adopted in any of our prior jurisprudence. Nor is it a doctrine that is commonly applied by other jurisdictions. Our research reveals that historically, only a few states (Massachusetts, Pennsylvania, and New York) have judicially recognized the doctrine.[13] We have found no reported case applying the doctrine in the past 40 years, and the parties direct us to none.

Our research suggests that legislatures in several states have recognized the doctrine by adopting all or provisions of the Uniform Powers of Appointment Act.[14] That act addresses selective allocation by stating, "If a powerholder exercises a power of appointment in a disposition that also disposes of property the powerholder owns, the owned property and the appointive property must be allocated in the permissible manner that best carries out the powerholder's intent."[15] To date, the Nebraska Legislature has not adopted the Uniform Powers of Appointment Act.

[8] More important, the doctrine of selective allocation is a rule of construction.[16] Rules of construction for interpreting a trust are applied when the language of the trust is not clear; but if the language clearly expresses the settlor's intent, the rules do not apply.[17] We see no reason to resort to a rule of construction when the terms of both Robert's trust and Betty's will and trust are clear and unambiguous. Indeed, the county

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[13] See Joel E. Hoffman, *Powers of Appointment and Selective Allocation*, 46 Cornell L. Rev. 416 (1961).

[14] See, Unif. Powers of Appointment Act, 7C U.L.A. 394 (Supp. 2016); Colo. Rev. Stat. Ann. § 15-2.5-308 (West Cum. Supp. 2016); Mo. Ann. Stat. § 456.1050 (West Cum. Supp. 2017); N.M. Stat. Ann. § 46-11-308 (Cum. Supp. 2016); N.C. Gen. Stat. § 31D-3-308 (2015); Va. Code Ann. § 64.2-2720 (Cum. Supp. 2016).

[15] Unif. Powers of Appointment Act, *supra* note 14, § 308, 7C U.L.A. at 418.

[16] See 2 Restatement (Third) of Property: Wills and Other Donative Transfers § 11.3 (2003) and 3 Restatement (Third), *supra* note 11, ch. 19, Part E, Introductory Note.

[17] *In re Wendland-Reiner Trust*, 267 Neb. 696, 677 N.W.2d 117 (2004).

court made an express finding to this effect, and no party challenges that finding on appeal. On this record, we decline Stockall's invitation to judicially adopt the doctrine of selective allocation.

(b) Substantial Compliance

Both the Restatement (Second) and the Restatement (Third) recognize the rule of substantial compliance.[18] According to the Restatement (Third):

> Substantial compliance with formal requirements of an appointment imposed by the donor, including a requirement that the instrument of exercise make reference or specific reference to the power, is sufficient if (i) the donee knew of and intended to exercise the power, and (ii) the donee's manner of attempted exercise did not impair a material purpose of the donor in imposing the requirement.[19]

Stockall urges us to apply the rule of substantial compliance in order to find Betty's exercise of the power of appointment was effective. She argues that this rule should be applied, because "Robert's goal of allowing Betty to control disposition of [his Trust A assets] at her death in favor of Robert's issue was accomplished."[20]

The doctrine of substantial compliance can apply when the person exercising the power of appointment fails to comply with all the formal requirements imposed by the donor on the appointment.[21] Formal requirements relate to the manner of the appointment, not its substance.[22] They include such

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[18] 3 Restatement (Third), *supra* note 11, § 19.10; Restatement (Second), *supra* note 11, § 18.3.

[19] 3 Restatement (Third), *supra* note 11, § 19.10 at 280.

[20] Brief for appellant at 32.

[21] 3 Restatement (Third), *supra* note 11, § 19.10.

[22] See *id.*, comment *b*.

things as a specific reference to the power of appointment in the document attempting to assert it or a requirement that the appointment be made by deed under seal.[23] Here, Betty's attempted exercise of the power of appointment did not fail to comply with any formal requirement imposed by Robert's trust. Instead, it substantively failed because by merging the Trust A assets with her own trust assets, Betty attempted to exercise the power of appointment in favor of one who was not in the permissible group. The doctrine of substantial compliance is not applicable to this factual circumstance.

Moreover, this court has long recognized that "'[w]here the creator of a power defines the method of its execution, that method must be strictly followed, so far, at least, as may be necessary to give effect to his intent and design. This rule is fundamental.'"[24] The rule of substantial compliance presents an "ends justify the means" approach that is at odds with this court's established jurisprudence. The county court correctly refused to apply the rule of substantial compliance in this case, and Stockall's argument to the contrary is without merit.

### 3. Duty of Robert's Trustee

In his cross-appeal, the trustee of Robert's trust argues the county court erred in ordering him to recover the Trust A assets and distribute them in accordance with Robert's trust. He argues that because the court made an express finding that he did not breach Robert's trust when he transferred Trust A property to Betty's trust, the court had no authority to utilize the remedies for breach of trust available under Neb. Rev. Stat. § 30-3890 (Reissue 2016). Thus, the trustee of Robert's

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[23] *Id.*, comments *c.* and *d.*

[24] *Massey v. Guaranty Trust Co.*, 142 Neb. 237, 242, 5 N.W.2d 279, 282 (1942), quoting *Arlington State Bank v. Paulsen*, 57 Neb. 717, 78 N.W. 303 (1899).

trust argues, the court had no power to void the act of the trustee in transferring Trust A property to Betty's trust, or to compel the trustee to recover the Trust A property and distribute it in accordance with Robert's trust.

[9] It is true that the county court order includes a finding that Robert's trustee "acted appropriately, reasonably, and in good faith under the circumstances, and he did not commit a breach of trust in executing his duties as Trustee of Robert's Trust." No party challenges this factual finding. However, upon our review of the record, we find the court committed plain error in making this finding, because it cannot be reconciled with the finding that Betty's appointment of Trust A property to her own trust was ineffective. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.[25] An appellate court may, at its option, notice plain error.[26]

[10,11] As we previously explained, Betty's exercise of the power of appointment was ineffective on its face, because it violated the limited power of appointment granted her by Robert's trust. A breach of trust includes every omission or commission which violates in any manner the obligation of carrying out a trust according to its terms.[27] Every violation by a trustee of a duty required of it by law, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust.[28] When the trustee of Robert's trust transferred Trust A assets to

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[25] *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012); *Cesar C. v. Alicia L.*, 281 Neb. 979, 800 N.W.2d 249 (2011).

[26] *United States Cold Storage v. City of La Vista*, 285 Neb. 579, 831 N.W.2d 23 (2013); *Folgers Architects v. Kerns*, 262 Neb. 530, 633 N.W.2d 114 (2001).

[27] *In re Estate of Linch*, 136 Neb. 705, 287 N.W. 88 (1939); *In re Louise V. Steinhoefel Trust*, 22 Neb. App. 293, 854 N.W.2d 792 (2014).

[28] *Johnson v. Richards*, 155 Neb. 552, 52 N.W.2d 737 (1952).

Betty's trust pursuant to an ineffectively exercised power of appointment, he committed a breach of trust.[29]

[12] According to § 30-3890, a violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust. And to "remedy a breach of trust that has occurred or may occur," the court may, among other things, "compel the trustee to perform the trustee's duties,"[30] "compel the trustee to redress a breach of trust by . . . restoring property,"[31] or "void an act of the trustee, impose a . . . constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds."[32] Additionally, the court has authority to "order any other appropriate relief."[33]

Here, after determining that Betty's exercise of the power of appointment was ineffective and void, the county court ordered:

> [The] successor trustee to the Robert McDowell Trust, is hereby instructed to recover all assets, income, and principal properly attributable to [Trust A] since Robert['s] death (including as it relates to [Trust A's] ownership interest in McDowell Cattle Company), preserve such assets, income, and principal, and distribute such assets, income, and principal in accordance with Article Fourth, Paragraph (e)(2) of Robert's Trust. The Court shall retain jurisdiction to ensure that the trustee of Robert's Trust carries out this Order.

Because the trustee of Robert's trust breached the trust when he distributed the Trust A assets pursuant to an invalid exercise of appointment, the county court had available all the

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[29] See, also, 3 Restatement (Third), *supra* note 11, § 19.17(a) at 329 ("[a] fiduciary who transfers property pursuant to a direct appointment to an impermissible appointee commits a breach of trust").

[30] § 30-3890(b)(1).

[31] § 30-3890(b)(3).

[32] § 30-3890(b)(9).

[33] § 30-3890(b)(10).

remedies for breach of trust under § 30-3890(b). And the remedies ordered by the county court were among those permitted by statute. To the extent the trustee of Robert's trust argues otherwise, his cross-appeal is without merit.

## V. CONCLUSION

For the foregoing reasons, we modify the decision of the county court to the extent it failed to find that the trustee of Robert's trust breached the trust, but we otherwise affirm the decision of the county court.

Affirmed as modified.

Miller-Lerman, J., not participating.

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

# State of Nebraska ex rel. Les W. Veskrna, M.D., appellee and cross-appellant, v. Corey R. Steel, State Court Administrator, appellant and cross-appellee.

894 N.W.2d 788

Filed May 5, 2017. No. S-16-118.

1. **Mandamus: Words and Phrases.** Mandamus is a law action, and it is an extraordinary remedy, not a writ of right.
2. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict, and an appellate court will not disturb those findings unless they are clearly erroneous.
3. **Mandamus.** Whether to grant a writ of mandamus is within the trial court's discretion.
4. **Courts: Constitutional Law: Judgments: Appeal and Error.** Regarding the judicial deliberative process privilege, an appellate court reviews de novo a district court's conclusions of law and reviews for clear error the district court's findings of fact.
5. **Constitutional Law: Records.** The public records statutes do not trump the constitutional imperative that one branch of government may not unduly interfere with the ability of another branch to perform its essential functions.
6. **Constitutional Law.** The powers of the three departments of government are derived from express grants in the Constitution and from the inherent right to accomplish all objects naturally within the orbit of each department, not expressly limited by the existence of a similar power elsewhere or express limitations in the Constitution.
7. **Courts: Constitutional Law.** By creating and regulating Judicial Branch Education, the Nebraska Supreme Court exercises a power constitutionally committed to it.
8. **Legislature: Constitutional Law: Statutes: Public Policy.** The Legislature exercises a power constitutionally committed to it by enacting statutes to declare what is the law and public policy.

9. **Legislature: Statutes: Intent: Records.** In enacting the public records statutes, the Legislature has determined that the welfare of the people is best served through liberal public disclosure of the records of the three branches of government.
10. **Constitutional Law.** The constitutional principle of separation of powers demands that in the course of any overlapping exercise of the three branches' powers, no branch may significantly impair the ability of any other in its performance of its essential functions.
11. ____. An analysis of the overlapping exercise of constitutionally delegated powers focuses on the extent to which one branch is prevented from accomplishing its constitutionally assigned functions, balanced against the other branch's need to promote the objectives within its constitutional authority.
12. **Constitutional Law: Courts: Legislature: Statutes.** It is for the judiciary to say when the Legislature has gone beyond its constitutional powers by enacting a law that invades the province of the judiciary.
13. **Constitutional Law: Records.** The extent that legislatively mandated disclosure of another branch's records impairs that branch's constitutionally assigned functions depends on both the importance of the underlying activity and the consequences to that activity of disclosing the particular records requested.
14. **Constitutional Law: Judges.** The proper constitutional balance requires a narrowly tailored, albeit absolute, judicial deliberations privilege.
15. **Constitutional Law: Courts: Judges: Records.** Whether preservation of the essential functions of the judicial branch requires the confidentiality of Judicial Branch Education records is to be determined on a case-by-case basis in accordance with existing rules promulgated by the Nebraska Supreme Court, the judicial deliberations privilege, and state constitutional principles respecting the proper balance between the coordinate branches.

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

Douglas J. Peterson, Attorney General, David A. Lopez, L. Jay Bartel, and Leslie S. Donley for appellant.

L. Steven Grasz and Kamron T. Hasan, of Husch Blackwell, L.L.P., for appellee.

Shawn D. Renner, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., and Eugene Volokh, of Scott & Cyan

Banister Amicus Brief Clinic, UCLA School of Law, for amicus curiae Media of Nebraska, Inc.

Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ., and Riedmann, Judge.

Per Curiam.

## I. NATURE OF CASE

Corey R. Steel, the State Court Administrator, appeals from a writ of mandamus ordering the disclosure, pursuant to Nebraska's public records statutes, of Judicial Branch Education (JBE) records.[1] Steel argues that the unwritten policy of the JBE advisory committee (Committee) is that all JBE records are confidential and that such policy falls under the exception to the "public records" definition, which is allowed "when any other statute expressly provides that particular information or records shall not be made public."[2] Alternatively, Steel relies on the concepts of separation of powers and the judicial deliberative privilege. He asserts that it is for the Committee, not the Legislature, to determine what JBE records are appropriate for public disclosure and that the judiciary's essential functions require the confidentiality of JBE records. We affirm.

## II. BACKGROUND

### 1. Complaint

Les W. Veskrna filed a complaint for a writ of mandamus requiring Steel, in his capacity as State Court Administrator, to provide copies or allow inspection of continuing education records for the court since July 1, 2012, pertaining to child custody and parenting time. Veskrna alleged that such records are not protected by any privilege derived from the court's inherent powers or otherwise shielded by virtue of any other inherent constitutional power of the judicial branch and that

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[1] See Neb. Rev. Stat. § 84-712.03(1)(a) (Reissue 2014).

[2] Neb. Rev. Stat. § 84-712.01(1) (Reissue 2014).

public access to JBE records does not infringe on any power essential to the existence, dignity, and functions of the court.

### 2. Request and Response

Attached to the complaint was Veskrna's email to Steel requesting:

> all records in any form, including PowerPoint presentations, handouts, notes, video and audio recordings, correspondence, memoranda, email and other communications, regarding judicial education programs since July 1, 2012 on child custody and parenting time. This request includes records, including email and other communications, regarding the selection of presenters, how those presenters were selected, contracts with presenters and other outside parties, and all training materials.

Veskrna also attached the email response from Steel denying the request:

> The Nebraska Supreme Court established [JBE] and adopted rules governing such education, Neb. Ct. R. §§ 1-501 et seq., pursuant to its administrative, supervisory and inherent authority over the state's judicial system. See, Nebraska Constitution, Article V, § 1. Internal court records pertaining to the JBE system are under the exclusive control of the judiciary. As the Nebraska Attorney General has recognized, in Neb. Op. Atty. Gen. No. 04030, every court has power over its own records and files; even if the Nebraska Public Records Act applies to certain judicial records, "the courts may possibly take the position that any obligation which they have to produce records . . . under the [Act] is subject to their supervisory power over their own records and files."
>
> Judicial education was instituted by the Supreme Court to protect the integrity of the judicial system for the benefit of the general public. Neb. Ct. R. § 1-501 expresses that intent: "It is essential to the public that judges . . . continue their education in order to maintain and increase

> their professional competence, to fulfill their obligations under the Nebraska Revised Code of Judicial Conduct, and to ensure the delivery of quality judicial services to the people of the State of Nebraska."
>
> Additionally, judicial education is closely intertwined with the deliberative and decision-making process employed by a judge in fulfilling his or her duty to independently decide legal cases. The independence of the judiciary, which is crucial to maintaining the public's trust, is strengthened by the protection of deliberations between judges and those who assist the judge in the analysis of legal issues, including staff and educators who enhance a judge's knowledge base. For these reasons, administrative records associated with judicial branch education are not public records subject to release under the Nebraska Public Record[s] Act.

### 3. Steel's Answer to Complaint

In his answer to Veskrna's complaint, Steel denied that the "Nebraska Public Records Act" was "'on its face'" applicable to the judicial branch. Steel also denied Veskrna's allegation that JBE records are not protected by any privilege derived from the court's inherent powers or otherwise shielded by virtue of any other inherent constitutional power of the judicial branch. He denied the allegation that public access to JBE records does not infringe on any power essential to the existence, dignity, and functions of the court. Steel asserted that records pertaining to judicial education were not "'public records'" as defined by § 84-712.01. Steel generally alleged that Veskrna did not have a clear right to receive records pertaining to judicial education and that Steel had no corresponding clear duty to produce such records.

### 4. Summary Judgment

Veskrna and Steel filed cross-motions for summary judgment. At the hearing on the motions, Veskrna clarified that he did not request records of the judges' attendance at the JBE

programs, nor their ratings of the presenters. Veskrna wished to have access only to what seminars were presented, who the presenters were, and what materials were presented.

(a) Veskrna's Arguments

Veskrna asserted that the requested JBE records fell under "public records" as defined by the public records statutes and that no statutory exception applied. Section 84-712.01(1) defines public records in part:

> Except when any other statute expressly provides that particular information or records shall not be made public, public records shall include all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing.

Veskrna pointed out that the public records statutes facially apply to the judicial branch and that these statutes have been recognized as applicable to the judicial branch in Nebraska case law.

Veskrna asserted that the JBE records requested were not privileged under the deliberative process privilege but did concede that the judiciary can withhold documents under the deliberative process privilege. He asserted that although this court has inherent powers under article V, § 1, of the Nebraska Constitution, including the inherent power to restrict public access to certain records, records which are administrative in nature cannot be withheld. Veskrna argued that while "chambers records" and "case records" might traditionally be protected from access, "administrative records" are not.[3] And, Veskrna asserted that allowing public access to JBE records does not unduly encroach upon the judiciary's core functions, noting that mandatory judicial education was

[3] Brief for appellee at 36.

only recently adopted in 2004. Finally, Veskrna argued that the open courts provision of the Nebraska Bill of Rights supported disclosure.

(b) Steel's Arguments

Steel argued that the Committee's informal policy and practice that all JBE records be kept confidential falls under the exception of § 84-712.01(1). Steel argued that JBE records fell under the exception to the definition of public records, because such confidentiality is "authorized" by Neb. Rev. Stat. § 24-205.01 (Reissue 2016) and Neb. Ct. R. § 1-512(A) (rev. 2013).

Section 24-205.01(2)(a) states that the Committee may "[d]evelop for review by the Supreme Court standards and rules and regulations addressing such issues as the criteria for mandatory education for judges, criteria for approval of qualified activities, reporting requirements, sanctions for noncompliance, exemptions, and confidentiality of records." Steel contends the language "confidentiality of records" is an express recognition by the Legislature that this court may deem JBE records confidential. Section 24-205.01(2)(b) states that the Committee may "[d]evelop for review by the Supreme Court standards and policies for education and training of all nonjudge judicial branch employees, including criteria for approval of qualified activities, reporting requirements, sanctions for noncompliance, and exemptions."

Section 1-512(A) states that the advisory committee shall have authority to "[d]evelop and review standards and administrative rules addressing such issues as the criteria for mandatory education for judges, criteria for approval of qualified activities, reporting requirements, sanctions for noncompliance, exemptions, and confidentiality of records for approval of the Court and incorporation into this rule." Steel did not claim that the Committee had, in fact, developed such rules. And Steel acknowledged that our court has not yet adopted rules governing the confidentiality of JBE records.

Steel also argued that given separation of powers principles, the Legislature cannot intrude upon the Nebraska Supreme Court's express and inherent powers that are being exercised in its control over public access to JBE records. In this regard, Steel cited to article II, § 1, and article V, § 1, of the Nebraska Constitution. Neb. Const. art. II, § 1(1), states:

> 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.

Neb. Const. art. V, § 1, provides:

> The judicial power of the state shall be vested in a Supreme Court, an appellate court, district courts, county courts, in and for each county, with one or more judges for each county or with one judge for two or more counties, as the Legislature shall provide, and such other courts inferior to the Supreme Court as may be created by law. In accordance with rules established by the Supreme Court and not in conflict with other provisions of this Constitution and laws governing such matters, general administrative authority over all courts in this state shall be vested in the Supreme Court and shall be exercised by the Chief Justice. The Chief Justice shall be the executive head of the courts and may appoint an administrative director thereof.

Steel maintained that the Nebraska Supreme Court has inherent powers to determine its eternal essential operations without interference and that this inherent power includes rulemaking relative to its essential functions, which Steel asserted necessarily includes the power to limit public access to those records. Steel asserted that the express administrative power and inherent judicial power to establish JBE made the public records statutes inapplicable to JBE records.

Steel also asserted that the JBE records were protected by the judicial deliberative process privilege. Although Steel recognized that this privilege is generally associated with judicial deliberations in a particular case, Steel contended that it should extend to JBE records, because judicial education is closely intertwined with the deliberative and decisionmaking process by a judge. Steel asserted that judicial independence "is strengthened by the protection of deliberations between judges and those who assist the judge in the analysis of legal issues, including staff and educators who enhance the judge's knowledge base."

(c) Evidence Submitted

Veskrna submitted in support of his motion for summary judgment the correspondence attached to his complaint and described above, which was admitted without objection. Steel submitted in support of his cross-motion for summary judgment two affidavits, one from Carole McMahon-Boies, who is the administrator of the JBE, and one from himself.

Veskrna objected to the affidavits. Veskrna asserted that the exhibits supported new theories that were not disclosed in Steel's initial denial letter, which exhibits Veskrna claimed were a violation of Neb. Rev. Stat. § 84-712.04(1)(a) (Reissue 2014). In addition, Veskrna objected on the grounds of foundation, hearsay, and relevance, and because they contained legal conclusions and arguments. With the exception of two sentences in McMahon-Boies' affidavit and one sentence and one paragraph in Steel's affidavit, the court overruled Veskrna's objections to the affidavits.

*(i) Affidavit of McMahon-Boies*

As admitted into evidence, McMahon-Boies averred that "[i]t is the longstanding position and policy of the Committee that [JBE] records are not public records and shall, at all times, be kept confidential." McMahon-Boies further stated that attendance at educational sessions for judges is "tightly screened" and that "[n]o outside people are allowed to attend."

Access to the educational materials is likewise "tightly controlled." McMahon-Boies opined that "[j]udges exhibit a different demeanor when individuals other than judges, staff or educators participate in the educational sessions," explaining that "[j]udges are less likely to ask questions or provide commentary when they cannot be assured of complete confidentiality."

In paragraph 12 of her affidavit, McMahon-Boies expressed her belief that "the [JBE] materials at issue here are closely tied to the deliberative process that forms the basis of judicial decisions" and that "[d]isclosing the type of education provided, educators' identities, methodologies and underlying philosophies, and the specific scenarios presented and analyzed during judicial educational sessions, could provide third parties access to the inner workings of a judge's thought processes in deciding particular cases."

Finally, McMahon-Boies opined that "[r]equiring the release of the requested records would undermine the ability of the Nebraska Supreme Court to educate its judges, which in the end benefits no one."

*(ii) Affidavit of Steel*

Steel stated that "[i]t is the longstanding position and policy of the Committee that [JBE] records are not public records and shall, at all times, be kept confidential."

(d) Court's Order on Summary Judgment

As an initial matter, the court rejected Veskrna's suggestion that Steel had failed to raise the issue that the JBE records were not public records under § 84-712.01. It found that such issue was affirmatively presented in Steel's letter denying Veskrna access to the records. The court recognized that Neb. Const. art. V, § 1, provides that the Nebraska Supreme Court is vested with general administrative authority over all courts in this state and that the Nebraska Supreme Court has inherent power to establish and administer JBE, as a matter

naturally within its orbit. However, the district court noted that Nebraska case law has recognized the applicability of the public records laws to the judicial branch.[4] The court reasoned that it does not always violate separation of powers principles for the Legislature to determine what judicial records are subject to public disclosure. It also concluded that the judicial deliberative process privilege is a recognized privilege applicable to this case.

In considering the JBE records at issue, the court concluded that it could not grant summary judgment to either party, because the ultimate determination depended on a closer examination of each document. The court found it "significant" that our court has not adopted any rule concerning the confidentiality of JBE records. The district court concluded that a "tacit understanding between [Steel] and [McMahon-Boies] is not enough to allow this Court to find that all of the records requested are confidential and beyond access by the public due solely to the Court's inherent authority."

With respect to this court's authority to withhold documents based upon the deliberative privilege, the district court concluded that any records falling under such privilege could not be compelled into disclosure by the public disclosure laws. But the court could not say that all the requested documents fell under such privilege without examining them. Application of the judicial deliberative privilege required a fact-specific inquiry.

### (e) Court's Order on Writ of Mandamus

After examining the 12 records given to the court for in camera review, the court determined that all but one part of one document was a public record subject to disclosure under § 84-712.01. Relying upon and applying the deliberative

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[4] See, *State ex rel. Unger v. State*, 293 Neb. 549, 878 N.W.2d 540 (2016); *State v. Ellsworth*, 61 Neb. 444, 85 N.W. 439 (1901); *State, ex rel. Griggs, v. Meeker*, 19 Neb. 106, 26 N.W. 620 (1886).

process privilege, the court concluded that an email communication from a judge to McMahon-Boies, which the court described as "commenting on a substantive area of the law" over which "the judge . . . routinely makes decisions," was privileged under the deliberative process privilege. The court ordered release of the records after a redaction of that email. However, the court ordered that all the documents—found in exhibit 4—be sealed pending review on appeal of the district court's determination. This court has unsealed the documents and has reviewed the same in camera for purposes of deciding the merits of the case.

Exhibit 4 consists of the following documents: the agenda of the 2012 fall judges meeting; a parenting plan document which identifies the objectives of the presentation; an outline of the presentation regarding parenting time; state statutes relating to the Parenting Act; emails between McMahon-Boies and a presenter concerning logistics and the presentation; an email from a district judge which was redacted; an email regarding the fall seminar for 2014 and the speaker for the fall conference; an email with a computer presentation, slides, and handouts of the presenter at the fall conference for 2014; an email regarding travel expense information; an email with a fall confirmation agenda; and past conference communications between the presenter and McMahon-Boies.

## III. ASSIGNMENTS OF ERROR

Steel assigns, summarized and restated, that the district court erred in (1) denying Steel's motion for summary judgment and issuing the writ of mandamus requested by Veskrna's complaint, (2) concluding the JBE records constitute public records as defined by § 84-712.01(1), (3) concluding the JBE records requested by Veskrna are not facially protected from disclosure under the judicial deliberative process privilege, and (4) awarding attorney fees and costs.

Veskrna cross-appealed from the court's failure to sustain his objection to the entirety of paragraph 12 of McMahon-Boies'

affidavit. He did not cross-appeal the court's ruling that the judicial deliberative process privilege applied to one document that the court redacted.

## IV. STANDARD OF REVIEW

[1-3] Mandamus is a law action, and it is an extraordinary remedy, not a writ of right.[5] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict, and we will not disturb those findings unless they are clearly erroneous.[6] Whether to grant a writ of mandamus is within the trial court's discretion.[7]

[4] Regarding the judicial deliberative process privilege, an appellate court reviews de novo a district court's conclusions of law and reviews for clear error the district court's findings of fact.[8]

## V. ANALYSIS

A person denied access to a public record may file for speedy relief by a writ of mandamus under § 84-712.03.[9] A party seeking a writ of mandamus under § 84-712.03 has the burden to satisfy three elements: (1) The requesting party is a citizen of the state or other person interested in the examination of the public records, (2) the document sought is a public record as defined by § 84-712.01, and (3) the requesting party has been denied access to the public record as guaranteed by Neb. Rev. Stat. § 84-712 (Reissue 2014).[10] If the requesting party satisfies its prima facie claim for release of public

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[5] *State ex rel. Unger v. State, supra* note 4.

[6] See *Steckelberg v. Nebraska State Patrol*, 294 Neb. 842, 885 N.W.2d 44 (2016).

[7] *State ex rel. Unger v. State, supra* note 4.

[8] See, *Moye, O'Brien, etc. v. National R.R. Passenger*, 376 F.3d 1270 (11th Cir. 2004); *Freudenthal v. Cheyenne Newspapers, Inc.*, 233 P.3d 933 (Wyo. 2010).

[9] *State ex rel. Unger v. State, supra* note 4.

[10] *Id.*

records, the public body opposing disclosure must show by clear and convincing evidence that the document sought is exempt from disclosure.

Section 84-712.01(1) broadly defines public records as including all records and documents of or belonging to any branch "[e]xcept when any other statute expressly provides that particular information or records shall not be made public . . . ." Twenty statutory exemptions to disclosure are enumerated in Neb. Rev. Stat. § 84-712.05 (Cum. Supp. 2016), and an exemption for certain records of the federal government is described in Neb. Rev. Stat. § 84-712.08 (Reissue 2014).

Steel asserts that none of the JBE records requested by Veskrna under § 84-712.03 were public records as defined by § 84-712.01, because another statute expressly provides that particular information or records shall not be made public. He does not claim that the JBE records fall under an exemption set forth by § 84-712.05 or § 84-712.08, but relies on § 24-205.01 and an unwritten Committee policy.

Steel alternatively challenges, under separation of powers, the constitutionality of the Legislature's ability to determine that JBE records are public, when the Committee has determined that they are not. He argues that the inherent authority of the court and the integrity of the judiciary require that all JBE records be confidential.

Veskrna cross-appeals. Veskrna does not challenge the court's rulings recognizing the judicial deliberative process privilege or its determination to redact the email from the records, but asserts that the court erred in entering into evidence paragraph 12 of McMahon-Boies' affidavit.

As will be explained in further detail below, we affirm the judgment of the district court. As a matter of statutory interpretation, we reject Steel's argument that exhibit 4 is excluded from the statutory definition of public records. A statute authorizing the Committee to develop for our review rules addressing the confidentiality of JBE records is not in itself a "statute expressly provid[ing] that particular information or

records shall not be made public."[11] The Committee has not yet developed for our review such rules, and we have not actually adopted any rule relating to the confidentiality of JBE records. As concerns the constitutionality of the application of the public records statutes to exhibit 4, we find that its disclosure does not unduly interfere with any essential function of the judicial branch.

### 1. Public Records as Defined by § 84-712.01

We first analyze Steel's argument that as a matter of statutory interpretation, exhibit 4 is not a public record under § 84-712.01(1). Section 84-712.01(1) states that "[e]xcept when any other statute expressly provides that particular information or records shall not be made public, public records shall include all records and documents . . . of or belonging to . . . any . . . branch . . . ." The parties do not contest or question whether the records contained in exhibit 4 are "of or belonging to" this branch. The only issue presented is whether there is a "statute expressly provid[ing] that [JBE] records shall not be made public."

Section 24-205.01(2) states that the Committee "may . . . [d]evelop for review by the Supreme Court standards and policies . . ." for education and training of all judges and nonjudge judicial branch employees and, as to education for judges, develop for review by this court standards and rules and regulations addressing the "confidentiality of records." Court rule § 1-512(A) similarly provides that the Committee has the authority to develop for approval of this court rules relating to the confidentiality of records.

Steel argues that in light of § 24-205.01, the Committee's unwritten policy of keeping all JBE records confidential qualifies under the exception set forth in § 84-712.01(1) to the definition of public records. We disagree. A statute

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[11] See § 84-712.01(1).

acknowledging our power to adopt rules pertaining to the confidentiality of JBE records does not, standing alone, "expressly provide[]," under § 84-712.01(1) that JBE records shall not be made public.

Rather, § 24-205.01(2)(a) is a legislative recognition that this court has the authority to establish the confidentiality of such records and it leaves to the Committee the task of implementing any adopted rules regarding the confidentiality of JBE records.

An unwritten policy of the Committee to consider JBE records as confidential is not sufficient to establish the confidentiality of such records for purposes of the public records laws. There is a statute that contemplates promulgation by this court of rules regarding the confidentiality of JBE records, but no such rules have yet been adopted.

We expressly point out that this opinion does not limit the ability of this court to adopt in the future rules expressly regulating the confidentiality of JBE materials.

### 2. Separation of Powers

[5] We turn next to Steel's argument that it would violate separation of powers principles to accede to any statutory scheme that mandates the disclosure of our JBE records. We agree that whether or not we have adopted any court rules concerning the confidentiality of our JBE records, the public records statutes do not trump the constitutional imperative that one branch of government may not unduly interfere with the ability of another branch to perform its essential functions. We simply find no undue interference in disclosing the records at issue.

The question presented by Steel is whether the application of the public records statutes to the JBE records contained in exhibit 4 violates the separation of powers of the three branches of government as set forth in the Nebraska Constitution. In answering this question, we focus on the judicial deliberations privilege and on generally applicable separation of powers

principles as they pertain to the overlapping exercise of two branches' proper functions. We are not here presented with any other privilege; nor are we presented with a question of the improper delegation of a power solely vested in another branch.[12] We make no comment in this opinion on legal questions not presented that might be raised in an appropriate case concerning the application of the public records statutes to other records.

[6] The powers of the three departments of government are derived from express grants in the Constitution and from the inherent right to accomplish all objects naturally within the orbit of each department, not expressly limited by the existence of a similar power elsewhere or express limitations in the Constitution.[13] Deciding whether the Nebraska Constitution has committed a matter to another governmental branch, or whether the branch has exceeded its authority, is a "delicate exercise in constitutional interpretation."[14]

[7] By creating and regulating JBE, we are exercising a power constitutionally committed to us. Part of that exercise necessarily includes managing JBE records. Neb. Const. art. V, § 1, gives to the judiciary the general administrative authority over all courts in this state. Other state courts have recognized the responsibility of the judiciary to "manage its own house"[15] and have stated that it is the province of the judiciary to decide whether special training for a particular area of the law is appropriate.[16] This court has previously recognized the inherent judicial power to do whatever is reasonably necessary

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[12] See *In re Petition of Nebraska Community Corr. Council*, 274 Neb. 225, 738 N.W.2d 850 (2007); *Board of Regents v. Exon*, 199 Neb. 146, 256 N.W.2d 330 (1977).

[13] See *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994).

[14] *Adams v. State*, 293 Neb. 612, 617, 879 N.W.2d 18, 22 (2016).

[15] *Attorney General v. Waldron*, 289 Md. 683, 695, 426 A.2d 929, 936 (1981).

[16] *Fiedler v. Wisconsin Senate*, 155 Wis. 2d 94, 454 N.W.2d 770 (1990).

for the proper administration of justice, including supervisory power over the courts.[17]

[8,9] However, the Legislature exercises a power constitutionally committed to it by enacting statutes to declare what is the law and public policy.[18] In enacting the public records statutes, the Legislature has determined that the welfare of the people is best served through liberal public disclosure of the records of the three branches of government. Such expressed policy in favor of public disclosure of governmental records has been in effect since our State's founding.[19]

[10] The three branches sometimes overlap in the exercise of their constitutionally delegated powers. This overlap may sometimes result in the three departments having a limited partial agency in or control over the acts of each other.[20] But the constitutional principle of separation of powers demands that in the course of any overlapping exercise of the three branches' powers, no branch may significantly impair the ability of any other in its performance of its essential functions.[21]

[11] An analysis of the overlapping exercise of constitutionally delegated powers focuses on the extent to which one branch is prevented from accomplishing its constitutionally assigned functions, balanced against the other branch's need to promote the objectives within its constitutional

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[17] See *In re Petition of Nebraska Community Corr. Council, supra* note 12.

[18] *Stewart v. Bennett*, 273 Neb. 17, 727 N.W.2d 424 (2007).

[19] See Rev. Stat. ch. 44, § 1, p. 297 (1866).

[20] See *Mistretta v. United States*, 488 U.S. 361, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989).

[21] See, *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 135 S. Ct. 1932, 191 L. Ed. 2d 911 (2015); *Cactus Wren v. Dept. of Bldg. & Fire Safety*, 177 Ariz. 559, 869 P.2d 1212 (Ariz. App. 1993); *Brierton v. Department of Motor Vehicles*, 140 Cal. App. 4th 427, 44 Cal. Rptr. 3d 480 (2006); *State v. Speedis*, 350 Or. 424, 256 P.3d 1061 (2011); *State ex rel. Met. Pub. Defender v. Courtney*, 335 Or. 236, 64 P.3d 1138 (2003); *Brady v. Dean*, 173 Vt. 542, 790 A.2d 428 (2001).

authority.[22] Other states, in determining the proper balance between the coordinate branches, have held that the court should consider the following factors: (1) the essential nature of the power being exercised, (2) the degree of control by one department over another, (3) the objective sought to be attained by that branch's exercise of power, and (4) the practical result of the blending of powers as shown by actual experience over a period of time.[23]

[12] It is for the judiciary to say when the Legislature has gone beyond its constitutional powers by enacting a law that invades the province of the judiciary.[24] But the judiciary should "'"proceed cautiously"' in relying on 'inherent authority'" and must give "'due consideration for equally important executive and legislative functions.'"[25] Determining the constitutional limits of the Legislature's plenary lawmaking authority in the context of the separation of powers between the judicial function and power and the legislative one is a difficult endeavor that must proceed on a case-by-case basis.[26]

Under different facts concerning the overlapping powers of the Legislature and judiciary, we have found a balance that allows each branch to accomplish its essential functions without usurping the other. For instance, we have held that the legislative branch has the right to prescribe the admissibility of certain categories of evidence in a court of law, but

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[22] See *Nixon v. Administrator of General Services*, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977).

[23] 16 C.J.S. *Constitutional Law* § 279 (2015). See, also, e.g., *J.W. Hancock Enterprises v. Ariz. St. Reg.*, 142 Ariz. 400, 690 P.2d 119 (Ariz. App. 1984); *State, ex rel., v. Bennett*, 219 Kan. 285, 547 P.2d 786 (1976).

[24] *U'Ren v. Bagley*, 118 Or. 77, 245 P. 1074 (1926).

[25] *State v. M.D.T.*, 831 N.W.2d 276, 282 (Minn. 2013).

[26] See *Slack Nsg. Home, Inc. v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995), *disapproved on other grounds, Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007). See, also, e.g., *State v. Stratton*, 220 Neb. 854, 374 N.W.2d 31 (1985).

that it is solely a judicial function to determine whether the evidence is of probative value and determine the weight, if any, to be given such evidence.[27] And we have held that the Legislature, in the interest of protecting the public through the proper exercise of its police power, can pass laws prescribing the minimum requirements for admission to the bar, but it cannot interfere with the power of this court to establish by rule higher qualifications for admission of applicants as deemed necessary for the proper administration of our judicial functions.[28]

Steel argues that judicial education is "'essential'" to the integrity of our judicial system and that therefore, the absolute confidentiality of all JBE records is likewise necessarily essential to the integrity of our judicial system. We have already explained that judicial education is an important judicial function deriving from the Nebraska Constitution.

But it does not necessarily follow that all records created in the course of judicial education must be confidential to preserve this important function. We observe that we have in the past applied public records statutes to records created in the course of essential judicial acts, implicitly drawing a distinction between the importance of the underlying activity and the importance of keeping the records created during that activity confidential. As an example, in *State v. Ellsworth*,[29] we held that a writ of mandamus should have been granted compelling a judge to disclose the docket entry of his judgment.

If each branch of government could shield its records simply by appealing to the fact that they were created in the

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[27] See, *In re Interest of Constance G.*, 254 Neb. 96, 575 N.W.2d 133 (1998); *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987), *overruled on other grounds, State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000); *State v. Bjornsen*, 201 Neb. 709, 271 N.W.2d 839 (1978).

[28] See *State, ex rel. Ralston, v. Turner*, 141 Neb. 556, 4 N.W.2d 302 (1942).

[29] *State v. Ellsworth, supra* note 4. See, also, *State ex rel. Unger v. State, supra* note 4; *State, ex rel. Griggs, v. Meeker, supra* note 4.

course of any number of essential branch functions, the protections of the public interest embodied in the public records statutes would be a nullity. This would upset the proper balance between the three branches of government. We note with approval that the U.S. Supreme Court has rejected overly broad claims of executive privilege to shield records from similar public disclosure laws.[30] In *United States v. Nixon*,[31] the Court held that a broad, absolute privilege based on the executive branch's "undifferentiated claim of public interest in the confidentiality of such conversations" would "gravely impair the role of the courts."

We also note with approval that the Court in *Nixon* observed, "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."[32] We have always supported transparency and the search for the truth.[33] Generally speaking, the legislative and judicial branches are not at cross-purposes in supporting access to public records. We have, under common-law principles, supported public access to judicial records and documents, although we have also recognized that no right of public access is absolute.[34]

[13] We conclude that the extent that legislatively mandated disclosure of another branch's records impairs that branch's constitutionally assigned functions depends on both the importance of the underlying activity and the consequences to that activity of disclosing the particular records requested. There

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[30] See, e.g., *Nixon v. Administrator of General Services, supra* note 22.

[31] *United States v. Nixon*, 418 U.S. 683, 706, 707, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974).

[32] *Id.*, 418 U.S. at 710.

[33] See, *State v. Cribbs*, 237 Neb. 947, 469 N.W.2d 108 (1991); *State v. Ross*, 186 Neb. 280, 183 N.W.2d 229 (1971).

[34] See *State v. Cribbs, supra* note 33. See, also, *United States v. Nixon, supra* note 31.

must be a consideration of the practical result of disclosure rather than simply the general importance of the forum in which the records were created.

While we agree with Steel that separation of powers would be violated by legislatively mandated disclosure of documents falling under the judicial deliberations privilege, we find the privilege inapplicable to the documents contained in exhibit 4. The judicial deliberations privilege is a privilege that "protects the deliberative processes of a judge from intrusion."[35] The privilege has never before been formally adopted by our court, but has unquestionably firm roots in our nation's history.[36]

The judicial deliberations privilege implicates separation of powers because an examination of a judge's mental processes would be "destructive of judicial responsibility."[37] Indeed, Veskrna does not contest that any document falling under the judicial deliberations privilege would be constitutionally protected from a legislative mandate that it be disclosed.

"Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."[38] Without such candor in our deliberative process, we cannot perform our essential function of deciding the cases before us.

But, similar to the executive privilege demarcated in *United States v. Nixon*, the confines of the judicial deliberations

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[35] Charles W. Sorenson, Jr., *Adopting the Judicial Deliberations Privilege: Making Explicit What Has Been Implicit*, 95 (No. 4) Mass. L. Rev. 243, 243 (2014).

[36] See, Robert S. Catz & Jill J. Lange, *Judicial Privilege*, 22 Ga. L. Rev. 89 (1987); Charles W. Sorenson, Jr., *Are Law Clerks Fair Game? Invading Judicial Confidentiality*, 43 Val. U. L. Rev. 1 (2008).

[37] *United States v. Morgan*, 313 U.S. 409, 422, 61 S. Ct. 999, 85 L. Ed. 1429 (1941).

[38] *United States v. Nixon, supra* note 31, 418 U.S. at 705.

privilege must not be so broad that it upsets the balance of a workable government comprised of overlapping powers.[39]

[14] We find that the proper constitutional balance requires a narrowly tailored, albeit absolute, judicial deliberations privilege. The description of this privilege in *In re Enforcement of Subpoena*[40] is most apt, and we hereby adopt it. The privilege

> covers a judge's mental impressions and thought processes in reaching a judicial decision, whether harbored internally or memorialized in other nonpublic materials. The privilege also protects confidential communications among judges and between judges and court staff made in the course of and related to their deliberative processes in particular cases.[41]

From our examination of the records in this case, we conclude they do not fall under the judicial deliberations privilege just described. Fundamentally, the records do not relate to particular cases under deliberation.

Finding that the judicial deliberations privilege does not apply to the documents contained in exhibit 4 does not end our separation of powers analysis. As we have explained, the ultimate inquiry when faced with the overlapping exercise of constitutionally delegated powers is the extent to which one branch is prevented from accomplishing its constitutionally assigned functions, balanced against the other branch's need to promote the objectives within its constitutional authority.

[15] We do not hold that the judicial deliberations privilege is either the floor or the ceiling of separation of powers conflicts between the judiciary and the Legislature as relate to the public records statutes. Neither do we accept any clear demarcation in a separation of powers analysis between "chambers

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[39] *United States v. Nixon, supra* note 31.

[40] *In re Enforcement of Subpoena*, 463 Mass. 162, 972 N.E.2d 1022 (2012).

[41] *Id.* at 174, 972 N.E.2d at 1033.

records" and "administrative records" independent of the content of those records.[42] Whether preservation of the essential functions of the judicial branch requires the confidentiality of JBE records is to be determined on a case-by-case basis in accordance with existing rules promulgated by this court, the judicial deliberations privilege, and state constitutional principles respecting the proper balance between the coordinate branches.

Examining the documents contained in exhibit 4, we can find through their disclosure no meaningful impairment of our constitutionally assigned functions. The JBE materials contained in exhibit 4 have an exceedingly tenuous connection to any judge's mental processes. Veskrna did not ask to know which judges attended the JBE sessions at issue. He did not ask for any information concerning questions or comments made by the attending judges.

The presenters' identities and the content of their presentations, alone, does not reveal the attending judges' mental processes any more than an examination into the classes that the judges took in law school. Thus, disclosing the JBE records in this case does not create a meaningful risk of tempering the candor essential to the judicial decisionmaking process. Steel presents no other argument that disclosure of these records unduly interferes with our essential functions, and we can find none.

Having found no unacceptable intrusion into our judicial branch activities through the disclosure of exhibit 4, we affirm the judgment of the lower court, including its decision to redact a judge's internal email. The ruling redacting the email was not assigned as error in Veskrna's cross-appeal. Having affirmed the writ, we need not address Veskrna's cross-appeal concerning the admissibility of paragraph 12 of McMahon-Boies' affidavit.

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[42] See brief for appellee at 36.

This court makes no statement about the confidentiality of other JBE records in light of our constitutionally delegated powers or the adoption of an official court rule. And we do not make any statement related to questions concerning JBE records not properly preserved and presented in this appeal. Our holding in this case does not limit the power of this court under article II, § 1, and article V, § 1, of the Nebraska Constitution to regulate the confidentiality of JBE materials, and it does not, in particular, limit that power to the confines of the judicial deliberative privilege.

## VI. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court granting Veskrna access to the records found in exhibit 4, with the specified email redacted, and its order awarding costs and attorney fees.

Affirmed.

Heavican, C.J., not participating.

Nebraska Supreme Court
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State of Nebraska, appellee, v.
Tareik Q. Artis, appellant.
894 N.W.2d 349

Filed May 5, 2017. No. S-16-464.

SUPPLEMENTAL OPINION

Appeal from the District Court for Lancaster County: Lori A. Maret, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

Robert Wm. Chapin, Jr., for appellant.

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

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

Per Curiam.

Case No. S-16-464 is before this court on the appellee's motion for rehearing concerning our opinion in *State v. Artis*.[1] We overrule the motion, but we modify the original opinion as follows: In the section entitled "V. ANALYSIS," under subheading "2. Plain Error," subsection "(a) Artis' Sentence Is Indeterminate," we withdraw the third and fourth sentences of the single paragraph of that subsection, which now reads:

[1] *State v. Artis, ante* p. 172, 893 N.W.2d 421 (2017).

(a) Artis' Sentence Is Indeterminate

[9-12] The State has mischaracterized Artis' sentence of "not less than 2 years, nor more than 2 years" as a determinate sentence. A determinate sentence is imposed when the defendant is sentenced to a single term of years, such as a sentence of 2 years' imprisonment. See *State v. White*, 256 Neb. 536, 590 N.W.2d 863 (1999). In contrast, when imposing an indeterminate sentence, a sentencing court ordinarily articulates either a minimum term and maximum term or a range of time for which a defendant is to be incarcerated. Neb. Rev. Stat. § 28-105 (Reissue 2016); *State v. White, supra*. In Nebraska, the fact that the minimum term and maximum term of a sentence are the same does not affect the sentence's status as an indeterminate sentence. See, *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006); *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999). Thus, we conclude that Artis' sentence for his Class IV felony is an indeterminate sentence in which the minimum and maximum terms are the same. Such sentence complies with L.B. 1094's requirement that the court impose an indeterminate sentence for a Class IV felony when that sentence is imposed consecutively with a Class IIA felony, and we therefore find no plain error in this regard.[2]

The remainder of the opinion shall remain unmodified.

Former opinion modified.
Motion for rehearing overruled.

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[2] *Id.* at 179-80, 893 N.W.2d at 427-428.

Nebraska Supreme Court
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# Robert L. Kohout, appellant, v. Bennett Construction and The Travelers Indemnity Company, appellees.

894 N.W.2d 821

Filed May 5, 2017. No. S-16-609.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence.
3. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation: Independent Contractor: Insurance.** Under Neb. Rev. Stat. § 48-116 (Reissue 2010), a contractor's act of engaging a subcontractor without actually compelling the subcontractor to acquire workers' compensation insurance constitutes a device to escape liability under the Nebraska Workers' Compensation Act.
5. **Workers' Compensation: Insurance: Proof.** Under Neb. Rev. Stat. § 48-116 (Reissue 2010), a laborer has the burden to prove, by a preponderance of the evidence, that the employer set up a scheme, artifice, or device to defeat provisions of the workers' compensation laws.
6. **Workers' Compensation.** Under Neb. Rev. Stat. § 48-116 (Reissue 2010), the existence of a scheme, artifice, or device does not require active fraud or evil design.

7. **Principal and Agent.** Apparent authority is authority that is conferred when the principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon an actor's apparent authority.
8. ____. Apparent authority gives a professed agent the power to affect the principal's legal relationships with third parties. The power arises from, and is limited to, the principal's manifestations to those third parties about the relationships.
9. **Principal and Agent: Liability: Proof.** Apparent authority for which a principal may be liable exists only when the third party's belief is traceable to the principal's manifestation and cannot be established by the actor's acts, declarations, or conduct.
10. **Principal and Agent.** For apparent authority to exist, the principal must act in a way that induces a reasonable third person to believe that another person has authority to act for him or her.
11. ____. Whether an actor has apparent authority to bind the principal is a factual question determined from all the circumstances of the transaction.
12. ____. Indicia of authority expressing association with but not authority from a business may contribute to the impression of apparent authority, but that impression alone cannot bind the agent's principal to a third party.
13. **Joint Ventures: Partnerships: Contribution.** A joint venture is in the nature of a partnership and exists when (1) two or more persons contribute cash, labor, or property to a common fund (2) with the intention of entering into some business or transaction (3) for the purpose of making a profit to be shared in proportion to the respective contributions and (4) each of the parties has an equal voice in the manner of its performance and control of the agencies used therein, though one may entrust performance to the other.
14. **Joint Ventures: Proof.** The moving party bears the burden to prove a joint venture or enterprise exists by clear and convincing evidence.
15. **Joint Ventures: Intent.** The relationship of joint venturers depends largely upon the intent of the alleged parties as manifested from the facts and circumstances involved in each particular case.
16. **Joint Ventures.** A joint venture can exist only by voluntary agreement of the parties and cannot arise by operation of law. Even a close relationship between two parties does not create an implied joint venture.
17. ____. In considering whether a joint venture exists, the acts and circumstances between family members may not have the same significance as the same acts and circumstances between strangers might have.

Appeal from the Workers' Compensation Court: James R. Coe, Judge. Affirmed.

Michael W. Khalili and Terry M. Anderson, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellant.

Julie A. Jorgensen, of Morrow, Willnauer, Klosterman & Church, for appellee.

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

Funke, J.

## NATURE OF CASE

Robert L. Kohout sustained an injury while performing construction work at the residence of Brian Shook. He sued Bennett Construction and its workers' compensation insurer for workers' compensation benefits. The Nebraska Workers' Compensation Court ruled that under Neb. Rev. Stat. § 48-116 (Reissue 2010), Bennett Construction was neither Kohout's direct employer nor his statutory employer, and dismissed the complaint. We affirm.

## FACTS

### Background

Bennett Construction is a sole proprietorship owned and operated by Mark Bennett. Mark testified that he typically works alone performing carpentry labor but hires subcontractors for jobs broader in scope than carpentry. He will also hire estimators to bid jobs for him during busy periods.

Nicholaus Bennett (Nick) is Mark's son. Nick owns and operates the sole proprietorships Nick Bennett Construction and Housecraft. He testified that he works as a contractor and subcontractor, primarily on roofing and guttering.

Mark and Nick testified that Nick worked for his father, as an estimator, until the work from a hailstorm in 2013 was

completed. Mark stated that he and Nick decided to work independently from that point so that Nick could begin building his own clientele. Nevertheless, Mark continued to hire Nick as a subcontractor for jobs with metal and gutter work.

In 2014, there was a severe hailstorm. The day after the hailstorm, Shook saw Nick patching a neighbor's roof and asked Nick to patch his roof as well. Shook testified that after Nick patched his roof, Nick left him a business card that included Nick's name, a cell phone number, and a "Bennett's Construction & Roofing" logo.

Shook testified that he later contacted Nick to provide a bid for more extensive repairs to his house and barn. Nick provided Shook an estimate on a proposal form labeled "Bennett's Construction & Roofing," with the business number for Bennett Construction crossed off and Nick's name and number written on the top. Shook never signed the proposal form, but both he and Nick testified that it reflected their verbal agreement. Nick subsequently completed the work.

Nick testified that he retained the Bennett Construction business cards and proposal forms from when he previously worked for the company. Nick stated that he used the proposal forms when he did not have anything else available and that when using the forms, he would sometimes explain that he did not work for Bennett Construction. Mark testified that he was unaware that Nick still used the company's proposal forms and business cards.

The portion of the proposal form relevant to this dispute reads: "Our workers are fully covered by Workmen's Compensation Insurance." Shook testified that he would not have hired Nick absent this affirmation. The record reflects that neither of Nick's sole proprietorships had workers' compensation insurance, but that Bennett Construction did.

Shook testified that Nick never told him he did not work for Bennett Construction and that he had never heard the name "Housecraft." But, Shook did testify that an invoice he received for work done on the property had "Nick Bennett"

printed on it. Nick testified that his invoices contained a Nick Bennett Construction logo.

Shook paid Nick for the repair work with four checks. The first check was written to "Nick Bennett's Construction" on August 21, 2014. The second check, dated September 18, 2014, was written to "Bennett's Construction." Mark testified that he cashed the check and wrote a check to Nick for the same amount after it cleared. Mark and Nick testified that Nick received checks in the name of Bennett Construction several times a year and that Mark always cashed them and reimbursed Nick to prevent him from having to obtain new checks from clients. After this check was received, Nick asked Shook to write future checks to "Nick Bennett." Shook wrote the final two checks to "Nick Bennett Construction" in 2015.

### Kohout's Employment

Kohout was looking for work in 2015 when a friend, who was employed by Nick, introduced Kohout to Nick. Nick hired Kohout, and Kohout began working at a job in Arlington, Nebraska. The Arlington job had been contracted by Mark, who hired Nick as a subcontractor.

Kohout's next project with Nick was the Shook job. Kohout testified that while only Nick regularly appeared and directed him at the Shook job, Mark did come to the property once during construction. Kohout believed it was to supervise the work. However, Mark testified he was there to obtain a tool that Nick had borrowed from him and that while he was there, he introduced himself to Shook as Nick's father and talked casually about the job with him before leaving. Shook testified that he did not know why Mark came to his property.

Nick testified that Kohout worked directly for him. Nick paid Kohout weekly with personal checks signed by him and identified as coming from "Housecraft." Nick supplied Kohout with the tools for the job, but Nick frequently borrowed Mark's tools.

On May 4, 2015, Kohout fell from the roof of the barn on Shook's property. As a result of the fall, Kohout suffered an injury.

## Procedural History

Kohout filed a petition against Bennett Construction and its workers' compensation insurer seeking workers' compensation benefits. In their answer, Bennett Construction and its insurer raised the affirmative defense that Kohout was not employed by Bennett Construction. The parties stipulated that Kohout's injury arose out of and in the course of employment.

After a trial, the court dismissed Kohout's petition. It ruled that Kohout was employed by either Nick Bennett Construction or Housecraft and that under § 48-116, Bennett Construction was neither Kohout's direct employer nor his statutory employer. The court stated that "[i]t is clear from [Shook's] testimony that Nick . . . was solely responsible for negotiating the job and performing and supervising the work at that site." Kohout appealed.

## ASSIGNMENT OF ERROR

Kohout assigns, restated, that the Nebraska Workers' Compensation Court erred by finding that Bennett Construction was not Kohout's employer under the Nebraska Workers' Compensation Act.

## STANDARD OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings

of fact by the compensation court do not support the order or award.[1]

[2,3] Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence.[2] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.[3]

## ANALYSIS

Kohout contends that Bennett Construction is a statutory employer pursuant to § 48-116. Section 48-116 states:

> Any person . . . creating or carrying into operation any scheme, artifice, or device to enable him or her . . . to execute work without being responsible to the workers for the provisions of the Nebraska Workers' Compensation Act shall be included in the term employer, and with the immediate employer shall be jointly and severally liable to pay the compensation herein provided for and be subject to all the provisions of such act. This section, however, shall not be construed as applying to an owner who lets a contract to a contractor in good faith, or a contractor, who, in good faith, lets to a subcontractor a portion of his or her contract, if the owner or principal contractor, as the case may be, requires the contractor or subcontractor, respectively, to procure a policy or policies of insurance [that] guarantee[s] payment of compensation according to the Nebraska Workers' Compensation Act to injured workers.

[4] Under § 48-116, we have long held that a contractor's act of engaging a subcontractor without actually compelling

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[1] *Interiano-Lopez v. Tyson Fresh Meats*, 294 Neb. 586, 883 N.W.2d 676 (2016).

[2] *Id.*

[3] See *id.*

the subcontractor to acquire workers' compensation insurance constitutes a device to escape liability under the Nebraska Workers' Compensation Act.[4] Neither of Nick's sole proprietorships had workers' compensation insurance at the time of the Shook job. Accordingly, if Mark's company was the general contractor of the Shook job and allowed either of Nick's sole proprietorships to act as a subcontractor, the company may be liable for Kohout's injury as a statutory employer.

[5,6] A laborer has the burden to prove, by a preponderance of the evidence, that the employer set up a scheme, artifice, or device to defeat provisions of the workers' compensation laws.[5] The existence of a scheme, artifice, or device does not require active fraud or evil design.[6]

Kohout asserts two theories under which Mark and Nick employed a "scheme, artifice, or device" that allowed Bennett Construction to avoid liability under the Nebraska Workers' Compensation Act. First, Kohout argues that Nick had the apparent authority to enter into a contract with Shook on behalf of Bennett Construction and that Nick was hired as an uninsured subcontractor to do the work on the job. Second, Kohout contends that Mark and Nick entered into a joint venture to obtain repair jobs after the 2014 hailstorm and that the Shook job was one of those joint ventures.

## Nick Lacked Apparent Authority to Enter Into Contract With Shook on Behalf of Bennett Construction

[7-9] Apparent authority is authority that is conferred when the principal affirmatively, intentionally, or by lack of ordinary

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[4] See *Rogers v. Hansen*, 211 Neb. 132, 317 N.W.2d 905 (1982), citing *Hiestand v. Ristau*, 135 Neb. 881, 284 N.W. 756 (1939), and *Sherlock v. Sherlock*, 112 Neb. 797, 201 N.W. 645 (1924), *disapproved on other grounds, Franklin v. Pawley*, 215 Neb. 624, 340 N.W.2d 156 (1983).

[5] *O'Brien v. Barnard*, 145 Neb. 596, 17 N.W.2d 611 (1945).

[6] See *Keith v. Wilson*, 165 Neb. 58, 84 N.W.2d 192 (1957).

care causes third persons to act upon an actor's apparent authority.[7] Apparent authority gives a professed agent the power to affect the principal's legal relationships with third parties.[8] The power arises from, and is limited to, the principal's manifestations to those third parties about the relationships.[9] Stated another way, apparent authority for which a principal may be liable exists only when the third party's belief is traceable to the principal's manifestation and cannot be established by the actor's acts, declarations, or conduct.[10]

[10,11] For apparent authority to exist, the principal must act in a way that induces a reasonable third person to believe that another person has authority to act for him or her.[11] Whether an actor has apparent authority to bind the principal is a factual question determined from all the circumstances of the transaction.[12]

Kohout argues that Nick acted with apparent authority to bind a contract between Shook and Bennett Construction because Nick provided Shook a business card identifying him as a representative of the company, Nick used one of the company's proposal forms, the company accepted a check from Shook, and Mark visited the Shook worksite on one occasion. Additionally, Kohout contends that because Mark took no action to disavow Nick as an agent of his company, Mark's lack of ordinary care caused Shook to believe the contract was with Mark and/or Bennett Construction. Kohout further contends that because Nick was a subcontractor on the Shook job and Mark did not compel Nick to obtain workers' compensation

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[7] *RM Campbell Indus. v. Midwest Renewable Energy*, 294 Neb. 326, 886 N.W.2d 240 (2016).

[8] *State ex rel. Medlin v. Little*, 270 Neb. 414, 703 N.W.2d 593 (2005). See, also, 1 Restatement (Third) of Agency § 2.03 (2006).

[9] See *RM Campbell Indus., supra* note 7.

[10] See *id.*

[11] *Id.*

[12] *Id.*

insurance, Bennett Construction employed a device to avoid liability under the Nebraska Workers' Compensation Act and that therefore, it was Kohout's statutory employer.

Bennett Construction argues that it was not the principal or contractor of the Shook job and that Nick was solely responsible for negotiating, performing, and supervising the job. It contends that Mark made no representations to Shook, that Nick informed Shook he would be the contractor both orally and by altering the proposal, and that Bennett Construction retained no benefit from the Shook job.

The focal points of the analysis are the representations Mark and Bennett Construction made to Shook and what Shook could have reasonably believed based on those representations. Mark and Bennett Construction had only three interactions with Shook: First, after a previous hailstorm in 2009 or 2011, Mark may have given Shook an estimate for repairs which did not result in a contract; second, Bennett Construction cashed a check addressed to it by Shook; and third, Mark visited the Shook worksite on one occasion. However, Shook's testimony did not establish that he intended the check written to "Bennett's Construction" to actually go to Mark's company, as opposed to Nick, and Shook testified that he did not know why Mark had visited the worksite.

[12] Nick's actions are also relevant to the reasonableness of Shook's belief, but only insofar as they are traceable to Mark or Bennett Construction. The business card and proposal form presented by Nick were indicia of authority regarding Bennett Construction. However, the card contained nothing to verify that it was current or more than a declaration made solely by Nick, and the proposal form, altered by Nick, also provided no verification that Nick was authorized to enter into a contract on the company's behalf. Further, there was no evidence that Mark or Bennett Construction were aware that Nick had used the business card or the proposal form or that Mark or his company gave Nick permission to use either document. While such indicia of authority may contribute to

the impression of apparent authority, that impression alone cannot bind the agent's principal to a third party.[13]

When seeking an estimate for his repairs, Shook contacted Nick directly and had no communications through Mark or his company. Shook did not testify that Nick stated he was employed by Bennett Construction or that Shook's contract would be with Bennett Construction. In fact, Shook testified that Nick provided him with an invoice bearing Nick's name, not Bennett Construction, and that Nick asked him to write checks to Nick after Shook wrote the one check to "Bennett's Construction." The fact that Shook addressed his first check to "Nick Bennett's Construction" provides the most tangible evidence that he did not believe he had contracted with Bennett Construction.

Based on the preceding facts, Shook could not have reasonably believed that he was contracting with Mark or Bennett Construction. Shook's testimony does not show that Mark or his company manifested any authority to him. The indicia of authority alone—the business card and the proposal form—does not provide a reasonable basis to conclude the contract was with Bennett Construction. Finally, Shook's actions show that he did not actually believe he had contracted with someone other than Nick. Therefore, we find that Nick lacked the apparent authority to bind Bennett Construction to the contract with Shook and that as a result, Shook entered the contract with Nick alone.

### Nick Did Not Enter Into Joint Venture With Mark or Bennett Construction

[13,14] A joint venture is in the nature of a partnership and exists when (1) two or more persons contribute cash, labor, or property to a common fund (2) with the intention of entering into some business or transaction (3) for the purpose of making

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[13] *Herbert Const. Co. v. Continental Ins. Co.*, 931 F.2d 989 (2d Cir. 1991).

a profit to be shared in proportion to the respective contributions and (4) each of the parties has an equal voice in the manner of its performance and control of the agencies used therein, though one may entrust performance to the other.[14] The moving party bears the burden to prove a joint venture or enterprise exists by clear and convincing evidence.[15]

[15-17] The relationship of joint venturers depends largely upon the intent of the alleged parties as manifested from the facts and circumstances involved in each particular case.[16] A joint venture can exist only by voluntary agreement of the parties and cannot arise by operation of law. Even a close relationship between two parties does not create an implied joint venture.[17] In considering whether a joint venture exists, the acts and circumstances between family members may not have the same significance as the same acts and circumstances between strangers might have.[18]

Kohout also argues that Mark and Nick employed a joint venture as a scheme to avoid liability under the Nebraska Workers' Compensation Act, citing *Thomas v. Hansen*.[19] He contends that Mark and Nick had a common purpose of securing as much work from the hailstorm for their family as possible and that Mark allowed Nick to use his proposal forms to induce business based on the statement about workers' compensation coverage.

In *Thomas*, the Iowa Supreme Court held that Hansen & Sons Welding (Hansen) and Leo Morgan were engaged in a joint venture when Morgan's employee, Edward Thomas, was injured. Hansen had agreed to bill a packing plant with which

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[14] See *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999).

[15] See *id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Thomas v. Hansen*, 524 N.W.2d 145 (Iowa 1994).

Hansen had a contract on Morgan's behalf for 8 percent of Morgan's portion of the contract, because Morgan did not have workers' compensation insurance and the packing plant would not contract with uninsured contractors. The court identified that Hansen paid Thomas and that Hansen and Morgan often exchanged workers and exercised mutual control over them. The court found that the facts showed the only reason for the arrangement was to avoid workers' compensation laws. The court stated that although there was conflicting evidence of whether a joint venture existed, based on the strong evidence of the parties' intent, a joint venture did exist, and that Hansen was liable for Thomas' injuries.[20]

In *O'Brien v. Barnard*,[21] we considered whether a lease arrangement constituted a "scheme, artifice, or device" under § 48-116. Raymond Barnard operated a gas station, which he leased from Charles Larsen. At the inception of the lease, Larsen provided Barnard a $1,000 loan, which Barnard agreed to repay at the rate of one-half cent per gallon of gas purchased until paid in full, plus interest. He also paid Larsen 1 cent per gallon of gas purchased for rent. Barnard purchased all of his gas and products through Larsen, who was a sales representative for a petroleum company.

The plaintiff in *O'Brien*, who was an employee at the gas station, claimed that Larsen was a statutory employer, because he set up the business through Barnard to increase his own income, essentially claiming that a joint venture existed. We held that Larsen was not a statutory employer.[22] In doing so, we noted that (1) Larsen did not contribute financially to the station because his $1,000 loan was being repaid by Barnard; (2) Larsen did not control, supervise, or give direction on the station's management or to Barnard's employees; (3) Larsen

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[20] *Id.*

[21] *O'Brien v. Barnard, supra* note 5.

[22] *Id.*

did not share in the profits of the station; and (4) there was no evidence that Larsen and Barnard intended to enter into business together.[23] While we determined that the facts of the case did not warrant liability for the alleged joint venture, we did not foreclose applicability of the concept.

Here, Kohout has failed to show by clear and convincing evidence that Nick engaged in a joint venture with Mark or Bennett Construction on the Shook job.

First, because a joint venture cannot arise as an operation of law, there must be evidence that Mark and Nick intended to enter into a voluntary agreement. In *Thomas*, the circumstances implied that Hansen and Morgan made an agreement to avoid the packing plant's prohibition on contracting with uninsured contractors, because there was no other reasonable explanation for their arrangement and there was also direct evidence that they had agreed to the joint venture.[24] In *O'Brien*, Larsen's arrangement with Barnard was beneficial to Larsen individually and as a sales representative, but we did not infer from this that Larsen and Barnard were joint venturers.[25]

Kohout failed to elicit evidence that Mark and Nick had the intent to enter into a joint venture to complete the Shook job. Mark and Nick both testified that Nick was operating his own business after the hailstorm. Though Kohout argues that Nick testified that he occasionally worked on jobs with Mark and split the profits, there is no evidence regarding those jobs or that this was the situation on the Shook job. While Nick continued to be a subcontractor for Mark on other jobs, there is no evidence that Nick benefited more than any other subcontractor would have or that his subcontracting constituted a joint venture.

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[23] *Id.*

[24] See *Thomas v. Hansen, supra* note 19.

[25] See *O'Brien v. Barnard, supra* note 5.

While Nick testified that he intended people to rely on the statement concerning workers' compensation insurance in the proposal form, there was no evidence that Mark or Bennett Construction was complicit or even aware of Nick's actions.

In addition, there is neither circumstantial evidence that Mark would have entered into a joint venture with Nick's sole proprietorships nor direct evidence that he did, as was the case in *Thomas*. Further, there is no evidence as to how such an arrangement would have benefited Bennett Construction, as was the case in *O'Brien*. Accordingly, we cannot infer a voluntary agreement or an intent by Mark and Nick to enter a joint venture on the Shook job.

Second, there is no evidence that Mark contributed cash or labor to the Shook job. While Kohout established that Nick, at times, used some of Mark's tools, he did not show that this provided a significant contribution to the Shook job. Further, we recognize our statement in *Lackman v. Rousselle*[26] that circumstances between family members are not the same as strangers; a father allowing his son to use tools is an incident of their closeness and does not alone imply a joint venture.

Third, there is no evidence that Mark and Nick split the profits from the Shook job. In fact, there is no evidence that Mark profited from the Shook job at all. While Mark did cash the check Shook wrote to "Bennett's Construction," he testified that he provided Nick with a check for the full amount shortly thereafter.

Fourth, there is no evidence that Mark had an equal right to control the performance at the Shook worksite. Though Mark visited the site on one occasion, neither Kohout nor Shook testified that Mark directed any actions at the site or examined the work. While Mark could have entrusted performance of the Shook job to Nick under a joint venture, Kohout failed to show any evidence that would warrant such a determination.

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[26] *Lackman v. Rousselle, supra* note 14.

Accordingly, we hold that neither Mark nor Bennett Construction was engaged in a joint venture with Nick concerning the Shook job.

## CONCLUSION

We find that the Nebraska Workers' Compensation Court's application of § 48-116 was not contrary to law and that its determination that Bennett Construction was not Kohout's statutory employer was not clearly wrong in light of the evidence. Therefore, for the reasons stated above, we affirm the judgment of the court.

Affirmed.

Nebraska Supreme Court
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# State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Bell Island, respondent.

894 N.W.2d 804

Filed May 5, 2017. No. S-16-715.

Original action. Judgment of public reprimand.

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

Per Curiam.

## INTRODUCTION

On July 22, 2016, formal charges containing one count were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against Bell Island, respondent. Respondent filed an answer to the formal charges on September 19. A referee was appointed, and the referee held a hearing on the charges.

The referee filed a report on February 6, 2017. With respect to the formal charges, the referee concluded that respondent's conduct had violated the following provisions of the Nebraska Rules of Professional Conduct: Neb. Ct. R. of Prof. Cond. §§ 3-503.6 (trial publicity), 3-504.1(a) (truthfulness in statements to others), and 3-508.4(a) and (d) (misconduct). With respect to the discipline to be imposed, the referee recommended a public reprimand. Neither relator nor respondent filed exceptions to the referee's report. The parties filed a joint motion for judgment on the pleadings under Neb. Ct. R.

§ 3-310(L) (rev. 2014) of the disciplinary rules. We grant the motion for judgment on the pleadings and impose discipline as indicated below.

## STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 22, 1994. At all times relevant to these proceedings, he was engaged in the practice of law in Gering, Nebraska.

On July 22, 2016, relator filed formal charges against respondent. The formal charges contain one count generally regarding respondent's statements to the press regarding his client's refusal to testify at a murder trial. The formal charges alleged that by his conduct, respondent violated his oath of office as an attorney pursuant to Neb. Rev. Stat. § 7-104 (Reissue 2012) and Neb. Ct. R. of Prof. Cond. § 3-504.4(a) (respect for rights of third persons), as well as professional conduct rules §§ 3-503.6(a), 3-504.1(a), and 3-508.4(a), (c), and (d). On September 19, respondent filed his answer to the formal charges, generally denying the allegations set forth in the formal charges.

A referee was appointed on October 5, 2016. The referee held a hearing on the formal charges on December 21.

After the hearing, the referee filed his report and recommendation on February 6, 2017. The substance of the referee's findings may be summarized as follows: In July 2008, a 2-year-old child was murdered in her home in Scotts Bluff County. At the time she was murdered, the only adults present in the home were the child's mother, who became respondent's client; the client's boyfriend, Dustin Chauncey; and their friend. A law enforcement investigation ensued, but no criminal charges were filed at that time. During the investigation, in late 2008 or early 2009, respondent began representing the client. Prior to respondent's involvement, the client had given several inconsistent statements to law enforcement regarding the events that occurred on the night that her child was

murdered, but after respondent became involved, the client gave no further statements to law enforcement.

Following pressure from the community, the district court for Scotts Bluff County appointed James Zimmerman to conduct a grand jury. The court appointed Zimmerman from outside the Scotts Bluff County Attorney's office in order to alleviate community concerns that the county attorney had not brought criminal charges. The grand jury convened and returned an indictment against Chauncey for intentional child abuse resulting in death, a Class IB felony. The grand jury also indicted the client as an accessory after the fact in the death of her child, a Class IV felony. The charges against the client were dismissed because the statute of limitations had run. The charges against Chauncey proceeded to trial.

Chauncey's trial commenced on February 23, 2015. Zimmerman wanted the client to testify. On February 24, Zimmerman sent respondent an email containing an outline of the questions which Zimmerman intended to ask the client during his direct examination of her. Respondent did not respond to Zimmerman's email. The client invoked her Fifth Amendment right to remain silent, and Zimmerman moved to grant the client immunity regarding her testimony. The court ordered that the client give her testimony and that if she refused, she would be held in contempt of court. After conferring with respondent, the client refused to testify, and she was held in contempt of court by an order filed February 24. On February 25, the client was brought back before the court. She again indicated that she was refusing to testify, and she continued to be held in contempt of court.

During the trial on February 25, 2015, Zimmerman learned that a press release had been issued to a local radio station. The press release had been issued at respondent's direction on behalf of his client, and it stated:

> "[The client] continues to desire to cooperate with the Prosecution, however, the only testimony they want to

> believe is their version of the truth. The Prosecution's version of the truth, while inconsistent with the actual events, forces [respondent's client] to either lie or face perjury charges. She continues to desire justice for her daughter . . . but will not lie to achieve that result."

Chauncey's trial was concluded on February 26, 2015, and Chauncey was found guilty of intentional child abuse resulting in death. See *State v. Chauncey*, 295 Neb. 453, 890 N.W.2d 453 (2017). The client was released from custody, because there was no longer a need for her to testify.

On April 27, 2015, after the completion of Chauncey's trial, Zimmerman submitted a formal complaint to relator in which he outlined the formal charges he felt should be brought against respondent.

In the referee's report on the formal charges, the referee determined that respondent knowingly made false statements of material fact and/or law to a third person, made an extrajudicial statement that was disseminated by means of public communication that would have had a substantial likelihood of materially prejudicing the adjudicative proceeding at issue, and engaged in conduct which is prejudicial to the administration of justice. Accordingly, the referee found that respondent violated professional conduct rules §§ 3-503.6, 3-504.1(a), and 3-508.4(a) and (d). However, the referee found that respondent did not violate his oath of office as an attorney or professional conduct rule § 3-504.4.

The referee identified certain aggravating factors, including that the nature of the press release was highly offensive given the fact that it directly called into question Zimmerman's integrity in the prosecution of the criminal proceedings against Chauncey. The referee stated that the public nature of the press release called into question the reputation of the bar in a community that was already struggling with the lengthy delay in the prosecution of this matter. The referee also recognized that the discipline to be imposed must be clear in order to deter

others who feel the need to issue such press releases. The referee further noted that respondent had received a public reprimand for an incident that occurred around the same time as the incident at issue in this case.

The referee also identified certain mitigating factors, including that respondent's actions did not endanger the public, that respondent regretted the wording of the press release, and that respondent did not mean to call into question Zimmerman's integrity and ethics. The referee also noted that other than the public reprimand noted above, respondent had not received any other discipline, and the referee stated: "Two incidents occurring near the same time over a twenty (20) year period of practice, would not indicate that he is not fit to continue the practice of law in the State of Nebraska."

With respect to the sanctions to be imposed for the foregoing actions, considering the aggravating and mitigating factors, the referee recommended a public reprimand.

## ANALYSIS

In view of the fact that neither party filed written exceptions to the referee's report, relator filed a motion for judgment on the pleadings under § 3-310(L). When no exceptions to the referee's findings of fact are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. *State ex rel. Counsel for Dis. v. Ubbinga*, 295 Neb. 995, 893 N.W.2d 694 (2017). Based upon the findings in the referee's report, which we consider to be final and conclusive, we conclude that the formal charges are supported by clear and convincing evidence, and the motion for judgment on the pleadings is granted.

A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Thebarge*, 289 Neb. 356, 854 N.W.2d 914 (2014). Violation of a disciplinary rule concerning the practice of law is a ground for discipline, and disciplinary charges against an attorney must be established

by clear and convincing evidence. *State ex rel. Counsel for Dis. v. Sundvold*, 287 Neb. 818, 844 N.W.2d 771 (2014). See, also, *State ex rel. Counsel for Dis. v. Tighe*, 295 Neb. 30, 886 N.W.2d 530 (2016).

Based on the record and the undisputed findings of the referee, we find that the above-referenced facts have been established by clear and convincing evidence. Based on the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated §§ 3-503.6, 3-504.1(a), and 3-508.4(a) and (d) of the professional conduct rules.

We have stated that the basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the appropriate discipline under the circumstances. See *State ex rel. Counsel for Dis. v. Ubbinga, supra*. Neb. Ct. R. § 3-304 of the disciplinary rules provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
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> (1) Disbarment by the Court; or
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> (2) Suspension by the Court; or
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> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
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> (4) Censure and reprimand by the Court; or
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> (5) Temporary suspension by the Court; or
>
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
>
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

See, also, § 3-310(N).

With respect to the imposition of attorney discipline in an individual case, each attorney discipline case must be evaluated in light of its particular facts and circumstances. *State ex rel. Counsel for Dis. v. Ubbinga, supra*. 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. *Id*.

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. *Id*.

The evidence in the present case establishes, among other facts, that respondent knowingly issued a press release on behalf of his client which called into question the integrity of Zimmerman, who was the attorney prosecuting the criminal case against Chauncey. The press release indicated that Zimmerman wanted respondent's client to testify at the trial and "'to either lie or face perjury.'" More fully, the press release stated that "'[t]he Prosecution's version of the truth, while inconsistent with the actual events, forces [the client] to either lie or face perjury charges. She continues to desire justice for her daughter . . . but will not lie to achieve that result.'"

As aggravating factors, we note, as did the referee, that the press release was offensive and that the public nature of the press release called into question the reputation of the bar as a whole. We further note that respondent had received a public reprimand for an incident that occurred around the same time as the incident at issue in this case.

As mitigating factors, we acknowledge, as did the referee, that respondent has indicated that he regretted the wording of the press release and that he did not mean to call into question Zimmerman's integrity and ethics. We further note, as did the referee, that other than a prior public reprimand, respondent has not received any other discipline.

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, the court finds that respondent should be publicly reprimanded.

## CONCLUSION

The motion for judgment on the pleadings is granted. Respondent is publicly reprimanded. Respondent is directed to pay costs and expenses in accordance with § 3-310(P) and Neb. Ct. R. § 3-323(B) of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of public reprimand.

Nebraska Supreme Court
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# Linda Clarke, appellee, v. First National Bank of Omaha, defendant and third-party plaintiff, appellee, and Gregg Graham, third-party defendant, appellant.

895 N.W.2d 284

Filed May 12, 2017. No. S-16-146.

1. **Jurisdiction.** A question of jurisdiction is a question of law.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **Judgments: Appeal and Error.** Appellate courts independently review questions of law decided by a lower court.
4. **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.
5. **Jurisdiction: Time: Notice: Appeal and Error.** Under Neb. Rev. Stat. § 25-1912 (Reissue 2016), to vest an appellate court with jurisdiction, a party must timely file a notice of appeal.
6. **Judgments: Time: Notice: Appeal and Error.** Under Neb. Rev. Stat. § 25-1912(3) (Reissue 2016), filing a timely postjudgment motion terminates the time in which a notice of appeal must be filed; instead, the 30-day period to appeal starts anew upon the entry of the order ruling upon the postjudgment motion.
7. ____: ____: ____: ____. Neb. Rev. Stat. § 25-1912(3) (Reissue 2016) provides a savings clause for a notice of appeal filed after the announcement of the court's decision on a timely postjudgment motion but before a ruling thereon has been entered; the notice of appeal is treated as filed on the date of and after the entry of the order.
8. ____: ____: ____: ____. Under Neb. Rev. Stat. § 25-1912 (Reissue 2016), to determine if a notice of appeal filed before the court has entered an order or judgment on a postjudgment motion is effective, an appellate court must answer two questions: (1) Was the postjudgment motion timely and effective, and (2) Was the notice of appeal

filed after the court announced its decision or order on the postjudgment motion?

9. **New Trial: Words and Phrases.** Under Neb. Rev. Stat. § 25-1142 (Reissue 2016), a new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, a report of a referee, or a trial and decision by the court.
10. **Summary Judgment: Motions for New Trial: Time: Notice: Appeal and Error.** A motion for new trial following the entry of summary judgment is not a proper motion and does not terminate the 30-day period to file a notice of appeal under Neb. Rev. Stat. § 25-1912 (Reissue 2016).
11. **Pleadings: Judgments.** Neb. Rev. Stat. § 25-1329 (Reissue 2016) does not clearly define the grounds for filing a motion to alter or amend a judgment.
12. **Pleadings: Judgments: Appeal and Error.** An appellate court reviews a postjudgment motion based on the relief it seeks, rather than its title.
13. **Pleadings: Judgments.** Under Neb. Rev. Stat. § 25-1329 (Reissue 2016), if a postjudgment motion seeks a substantive alteration of the judgment—as opposed to the correction of clerical errors or relief wholly collateral to the judgment—a court may treat the motion as one to alter or amend the judgment.
14. ____: ____. Under Neb. Rev. Stat. § 25-1329 (Reissue 2016), a motion for reconsideration is the functional equivalent of a motion to alter or amend a judgment.
15. **Judges: Words and Phrases.** A judge's proclamation from the bench is an announcement.
16. **Words and Phrases.** An announcement may include trial docket notes, file-stamped but unsigned journal entries, or signed journal entries which are not file stamped.
17. **Judgments: Notice: Appeal and Error.** For the savings clause in Neb. Rev. Stat. § 25-1912(3) (Reissue 2016) to be effective, the notice of appeal must show on its face that it relates to the decision which has been announced by the trial court and the record must show that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the notice of appeal relates.
18. **Pleadings: Judgments: Appeal and Error.** Under Neb. Rev. Stat. § 25-1912 (Reissue 2016), *Reutzel v. Reutzel*, 252 Neb. 354, 562 N.W.2d 351 (1997), has been superseded on its holding that a portion of *Dale Electronics, Inc. v. Federal Ins. Co.*, 203 Neb. 133, 277 N.W.2d 572 (1979), is of no effect and on its holding that the savings clause adopted in *Dale Electronics, Inc.*, does not apply to § 25-1912.

19. **Records: Appeal and Error.** It is the appellant's burden to create a record for the appellate court which supports the errors assigned.
20. ____: ____. A party's brief may not expand the evidentiary record.

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

Norman Denenberg for appellant.

Susan J. Spahn, of Endacott, Peetz & Timmer, P.C., L.L.O., for appellee First National Bank of Omaha.

Edward W. Hasenjager and Howard A. Kaiman for appellee Linda Clarke.

Heavican, C.J., Wright, Cassel, Stacy, Kelch, and Funke, JJ.

Funke, J.

## NATURE OF CASE

Gregg Graham appealed from orders by the district court for Douglas County which granted summary judgment for appellee Linda Clarke against appellee First National Bank of Omaha (FNB) and in favor of FNB against Graham. Graham filed his notice of appeal after filing a motion for new trial but before the court had ruled on the motion.

FNB filed a motion for summary dismissal arguing that the Nebraska Court of Appeals lacked jurisdiction, under Neb. Rev. Stat. § 25-1912(3) (Reissue 2016). The Court of Appeals overruled the motion for summary dismissal. We dismiss the appeal for lack of jurisdiction because Graham's notice of appeal was filed prematurely and is, therefore, without effect.

## FACTS

### Background

In February 2013, Hilda Graham (Hilda) and Clarke opened an account (the Account) with FNB to hold a certificate of deposit (CD). The account agreement classified the Account as

a multiparty account with rights of survivorship in both Hilda and Clarke.

In August 2013, Hilda called FNB and spoke with Naomi Craven, an assistant branch manager. During the call, Hilda requested that the account be changed to a single-party account with a pay-on-death beneficiary, removing Clarke as the co-owner with a right of survivorship. Hilda requested that Graham be named the pay-on-death beneficiary.

Despite FNB's internal procedure and Neb. Rev. Stat. § 30-2724(a) (Reissue 2016), each requiring signed written notice before changing an account's type, Craven made the change to the Account before Hilda signed a new account agreement. Craven claimed that she printed an updated account agreement for Hilda to sign and mailed it to her. Craven testified that she believed she saw Hilda's account agreement, signed, days later, but that the account agreement was not scanned into FNB's electronic document system and could not be located.

Hilda died in September 2013. When Clarke requested payment of the CD from FNB, she was denied access because she was listed as neither a co-owner nor a pay-on-death beneficiary on the Account in FNB's computer records. Instead, Graham was paid the balance of the CD based on Craven's changes to the Account.

## Procedural History

Clarke filed suit against FNB, alleging that she was the owner of the CD. FNB denied the allegations of Clarke's complaint but also filed a third-party action seeking recovery against Graham to the extent FNB was liable to Clarke. Clarke subsequently filed a motion for summary judgment against FNB, and as a result, FNB filed a motion for summary judgment against Clarke and, in the alternative, against Graham.

The following timeline includes the relevant dates to this appeal:

- February 1, 2016: Clarke's motion for summary judgment against FNB and FNB's motion for summary judgment against Graham were sustained by written order of the court.
- February 5, 2016: Graham's "Motion for New Trial to Amend Judgment of Summary Judgment Order" was filed.
- February 9, 2016: Graham's notice of appeal was filed.
- February 12, 2016: The order denying Graham's motion for new trial was entered.

FNB filed a motion for summary dismissal before the Court of Appeals, arguing that it lacked jurisdiction because Graham's notice of appeal was filed prematurely and, therefore, was without effect, under § 25-1912. In response, Graham argued that he filed the notice of appeal after the district court judge's bailiff had informed his attorney that his motion would be vacated because a motion for a new trial is not allowed to challenge an order of summary judgment.

In response to the motion for summary dismissal, Graham's attorney filed an "Opposition" and an "Affidavit in Opposition" to the motion for summary dismissal. Attached to the "Opposition" was an unsigned correspondence dated February 11, 2016, from Graham's counsel to the bailiff. The letter indicated that Graham's counsel had filed a motion for new trial; that a hearing date had been set; that he had been advised by the bailiff that his motion for new trial was not allowed to challenge a summary judgment; and that as a result, he had filed a notice of appeal.

The Court of Appeals overruled the motion for summary dismissal. We moved this case to our docket under our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

## ASSIGNMENTS OF ERROR

Graham assigns, restated, that the court erred in (1) finding that there was no evidence that the account agreement was actually signed and returned by Hilda, (2) finding that the

[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

funds from the CD in the Account were erroneously released to him, and (3) not applying Neb. U.C.C. § 3-309 (Cum. Supp. 2016) to enforce the lost or destroyed signature card.

## STANDARD OF REVIEW

[1] A question of jurisdiction is a question of law.[2]

[2] Statutory interpretation presents a question of law.[3]

[3] Appellate courts independently review questions of law decided by a lower court.[4]

## ANALYSIS

[4] 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.[5]

[5,6] Under § 25-1912, to vest an appellate court with jurisdiction, a party must timely file a notice of appeal.[6] A party must file a notice of appeal within 30 days of the judgment, decree, or final order from which the party is appealing.[7] However, filing a timely motion for a new trial or a timely motion to alter or amend a judgment terminates the time in which a notice of appeal must be filed.[8] Instead, the 30-day period to appeal starts anew upon the entry of the order ruling upon the motion for a new trial or the motion to alter or amend a judgment.[9]

[7] Section 25-1912(3) provides a savings clause for a notice of appeal filed after the announcement of the court's decision

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[2] *Cain v. Custer Cty. Bd. of Equal.*, 291 Neb. 730, 868 N.W.2d 334 (2015).

[3] *RM Campbell Indus. v. Midwest Renewable Energy*, 294 Neb. 326, 886 N.W.2d 240 (2016).

[4] *Douglas County v. Archie*, 295 Neb. 674, 891 N.W.2d 93 (2017).

[5] *State v. Thieszen*, 295 Neb. 293, 887 N.W.2d 871 (2016).

[6] See, also, *Despain v. Despain*, 290 Neb. 32, 858 N.W.2d 566 (2015).

[7] § 25-1912(1).

[8] § 25-1912(3).

[9] *Id.*

on a timely postjudgment motion but before a ruling thereon has been entered. In relevant part, it states:

> When any motion terminating the time for filing a notice of appeal is timely filed by any party, a notice of appeal filed before the court announces its decision upon the terminating motion shall have no effect, whether filed before or after the timely filing of the terminating motion. A new notice of appeal shall be filed within the prescribed time after the entry of the order ruling on the motion. . . . *A notice of appeal filed after the court announces its decision or order on the terminating motion but before the entry of the order is treated as filed on the date of and after the entry of the order*.[10]

[8] Accordingly, we must consider two questions to determine if Graham's notice of appeal was timely. First, we must decide whether Graham's motion for new trial in response to the order granting summary judgment terminated the 30-day appeal period. Second, if the motion did terminate the 30-day appeal period, we must decide whether Graham's notice of appeal was filed after the court announced its decision or order on the postjudgment motion.

### Graham's Motion for New Trial Was Effectively Motion to Alter or Amend Which Terminated Time to File Notice of Appeal

[9,10] Under Neb. Rev. Stat. § 25-1142 (Reissue 2016), a new trial is a reexamination in the same court of an issue of fact after a verdict by a jury, a report of a referee, or a trial and decision by the court.[11] Summary judgment proceedings

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

[11] *Strong v. Omaha Constr. Indus. Pension Plan*, 270 Neb. 1, 701 N.W.2d 320 (2005), *abrogated, Kennedy v. Plan Administrator for DuPont Sav. and Investment Plan*, 555 U.S. 285, 129 S. Ct. 865, 172 L. Ed. 2d 662 (2009).

do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.[12] Therefore, a motion for new trial following the entry of summary judgment is not a proper motion and does not terminate the 30-day period to file a notice of appeal under § 25-1912.[13]

[11-13] However, our statutes do not clearly define the grounds for filing a motion to alter or amend a judgment, unlike a motion for new trial.[14] Accordingly, we review a postjudgment motion based on the relief it seeks, rather than its title.[15] If the postjudgment motion seeks a substantive alteration of the judgment—as opposed to the correction of clerical errors or relief wholly collateral to the judgment—a court may treat the motion as one to alter or amend the judgment.[16] A motion to alter or amend a judgment must be filed no later than 10 days after the entry of judgment.[17]

[14] In *Strong v. Omaha Constr. Indus. Pension Plan*,[18] the appellant filed a motion for new trial after the entry of an order for summary judgment. The motion for new trial sought "'an Order granting a new trial' and any other 'relief deemed equitable and just'" because "there were irregularities in the proceedings and . . . the court erred on questions of law." We stated that "[i]n effect, [the appellant had] requested that the court reconsider its grant of summary judgment."[19] We further held that a motion for reconsideration is the functional equivalent of a motion to alter or amend a judgment, which

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[12] *Id.*

[13] See, *Despain, supra* note 6; *Strong, supra* note 11.

[14] See Neb. Rev. Stat. § 25-1329 (Reissue 2016).

[15] See *Diversified Telecom Servs. v. Clevinger*, 268 Neb. 388, 683 N.W.2d 338 (2004).

[16] *Strong, supra* note 11.

[17] See § 25-1329.

[18] *Strong, supra* note 11, 270 Neb. at 6, 701 N.W.2d at 326.

[19] *Id.*

terminates the period in which a party must file a notice of appeal.[20]

Graham's motion for new trial requested that the court vacate its decisions granting summary judgment and hold a trial to resolve the genuine issues of material fact. Graham based his request on numerous grounds, including a claim of irregularities in the proceedings and a claim that the order was contrary to law. Accordingly, Graham's motion for new trial was, in effect, a motion for reconsideration, which we treat as a motion to alter or amend the judgment.

Graham filed his motion 4 days after the court granted summary dismissal. Therefore, the motion was timely filed and terminated the 30-day period to appeal.

### Graham's Notice of Appeal Was Without Effect Because It Was Filed Before Court Announced Its Decision on Graham's Postjudgment Motion

FNB argues that under § 25-1912(3), a notice of appeal is without effect when it is filed before the court enters an order on a timely postjudgment motion, citing *Haber v. V & R Joint Venture*[21] and *Reutzel v. Reutzel*.[22] Further, it contends that there is no evidence on the record, other than Graham's allegations, that the court had actually ruled on Graham's motion for new trial.

Graham contends that § 25-1912(3) has been amended since our decision in *Reutzel* to include the savings clause discussed above. He further contends that the district court judge announced the denial of his motion for new trial through her bailiff prior to the filing of his notice of appeal.

Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation

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[20] *Id.*

[21] *Haber v. V & R Joint Venture*, 263 Neb. 529, 641 N.W.2d 31 (2002).

[22] *Reutzel v. Reutzel*, 252 Neb. 354, 562 N.W.2d 351 (1997).

to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[23]

The Legislature has not defined "announces" in § 25-1912(3). The word "announcement" is also used in § 25-1912(2) and Neb. Rev. Stat. § 25-1144.01 (Reissue 2016), which latter is the statute setting forth the time to file a motion for new trial. However, neither statute nor any related statutes define announcement.

Section 25-1912(2) states:

> A notice of appeal or docket fee filed or deposited 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 or deposited after the entry of the judgment, decree, or final order and on the date of entry.

Section 25-1144.01, which is mentioned in § 25-1912, provides, in relevant part, that "[a] motion for a new trial filed after the announcement of a verdict or decision but before the entry of judgment shall be treated as filed after the entry of judgment and on the day thereof."

In *Despain v. Despain*,[24] the appellant filed a motion for new trial after the court distributed an unsigned journal entry containing its substantive decision, but before the court filed the signed dissolution decree. The unsigned journal entry contained the following statements: "'In order to avoid confusion as to appeal time, [t]his order shall be forwarded to counsel both unsigned and unfiled. A signed copy will be filed contemporaneously with the entry of the decree.'"[25] The court subsequently overruled the motion for new trial, and the appellant filed a notice of appeal.[26]

The appellee argued that the motion for new trial was untimely and without effect because it was filed before the

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[23] *In re Interest of Tyrone K.*, 295 Neb. 193, 887 N.W.2d 489 (2016).

[24] See *Despain, supra* note 6.

[25] *Id.* at 35, 858 N.W.2d at 569.

[26] *Despain, supra* note 6.

court entered its decree.[27] Accordingly, the appellee contended that a notice of appeal filed more than 30 days after the decree was entered was not timely and that we, therefore, lacked jurisdiction over the appeal.[28]

We rejected the appellee's argument and determined that based on the plain language of § 25-1144.01, the copies of the "unsigned journal entry . . . sent to the parties [were] the court's 'announcement of a . . . decision' as that expression is used in § 25-1144.01."[29]

Justice Cassel wrote separately to concur with our decision in *Despain*, noting that even with the savings clause set forth in § 25-1144.01, a premature motion for new trial is still possible "[i]f the motion is filed before the 'announcement' of the verdict or decision" and that such a motion would be a nullity.[30] Justice Cassel's reasoning leads to the same conclusion in the context of § 25-1912(3).

The Court of Appeals has also considered what qualifies as an announcement under § 25-1912(2). In *State v. Brown*,[31] the Court of Appeals provided a nonexhaustive list of statements that constitute an announcement of a decision or order: those "orally from the bench, from trial docket notes, file-stamped but unsigned journal entries, or signed journal entries which are not file stamped."

We are also informed by the ordinary meanings of "announce" and "announcement." Black's Law Dictionary defines "announce" as "[t]o make publicly known; to proclaim formally <the judge announced her decision in open court>."[32]

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[27] *Id.*

[28] *Id.*

[29] *Id.* at 40, 858 N.W.2d at 572.

[30] *Id.* at 46, 858 N.W.2d at 576 (Cassel, J., concurring).

[31] *State v. Brown*, 12 Neb. App. 940, 941, 687 N.W.2d 203, 206 (2004).

[32] Black's Law Dictionary 109 (10th ed. 2014). See, also, "Announce," Oxford English Dictionary Online, http://www.oed.com/view/Entry/7931 (last visited May 2, 2017) ("to make public or official intimation of, to proclaim").

The Oxford English Dictionary defines "announcement" as "[t]he action or process of announcing; public or official notification, intimation, declaration."[33]

[15,16] Based on our prior holdings and the preceding definitions, it is clear that a judge's proclamation from the bench is an announcement. However, an announcement is not limited to statements from the bench. An announcement may also include trial docket notes, file-stamped but unsigned journal entries, or signed journal entries which are not file stamped. It is clear that making an announcement requires some type of public or official notification, as the ordinary meaning of "announce" requires.

[17] In *Dale Electronics, Inc. v. Federal Ins. Co.*,[34] we held that a notice of appeal filed after the court announced its decision by letter, but before it had entered its decision, was timely. Specifically, we stated:

> [A] notice of appeal filed after the trial court has announced its decision, but before a judgment has been rendered or entered, is effective to confer jurisdiction on this court if the notice of appeal shows on its face that it relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the notice of appeal relates.[35]

After our decision in *Dale Electronics, Inc.*, the Legislature added § 25-1912(2) (Reissue 1995) (now codified as § 25-1912(3) (Reissue 2016)[36]), but without the savings clause.[37] The revised language was as follows:

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[33] "Announcement," Oxford English Dictionary Online, http://www.oed.com/view/Entry/7933 (last visited May 2, 2017).

[34] *Dale Electronics, Inc. v. Federal Ins. Co.*, 203 Neb. 133, 277 N.W.2d 572 (1979).

[35] *Id.* at 137, 277 N.W.2d at 574.

[36] See 2000 Neb. Laws, L.B. 921, § 15.

[37] See 1997 Neb. Laws, L.B. 398, § 1.

> The running of the time for filing a notice of appeal shall be terminated as to all parties (a) by a motion for a new trial . . . , and the full time for appeal fixed in subsection (1) of this section commences to run from the entry of the order ruling upon the motion filed pursuant to subdivision (a) . . . of this subsection. *When any motion terminating the time for filing a notice of appeal is timely filed by any party, a notice of appeal filed before the entry of the order ruling upon the motion shall have no effect, whether filed before or after the timely filing of the motion. A new notice of appeal shall be filed within the prescribed time from the ruling on the motion.* No additional fees shall be required for such filing.[38]

We then interpreted the amended version of § 25-1912(2) (Reissue 1995) in *Reutzel v. Reutzel*[39] and determined that our holding in *Dale Electronics, Inc.* was superseded by the new statutory language. We held that the appellant's notice of appeal, filed after the filing of a motion for new trial but before the court had entered its ruling on the motion, was of no effect.

[18] However, in 1997, the Legislature added the savings clause to § 25-1912(3) (Cum. Supp. 1998). The savings clause is substantively similar to our statement in *Dale Electronics, Inc*.[40] As a result, we determine that our holding in *Reutzel* has been superseded by statute and our holding in *Dale Electronics, Inc.* again has merit.

FNB also references *Haber* in support of its jurisdictional argument. However, *Haber* is not informative, insofar as it is procedurally distinguished. In *Haber*, the appellant filed a notice of appeal after the court had overruled one party's motion for new trial and partially overruled the other party's

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[38] § 25-1912(2) (Reissue 1995) (emphasis supplied).

[39] *Reutzel, supra* note 22.

[40] *Dale Electronics, Inc., supra* note 34.

motion for new trial.[41] We held that the notice of appeal was of no effect because the court had not finally disposed of all postjudgment motions. There was no claim that the court had announced its final disposition of the motion for new trial before the notice of appeal was filed.

[19,20] Further, it is the appellant's burden to create a record for the appellate court which supports the errors assigned.[42] This burden also requires that the record establish the appellate court's basis for jurisdiction over the appeal.[43] Additionally, a party's brief may not expand the evidentiary record.[44]

Here, Graham argues that the savings clause treats his notice of appeal as filed on the date of the court's entry overruling his postjudgment motion, February 12, 2016. The only evidence in the record that an announcement was made was the "Affidavit in Opposition" to Clarke's motion for summary dismissal filed by Graham's counsel. This affidavit indicates that between February 5 and 9, the paralegal for Graham's counsel was informed by the bailiff that the motion for new trial would be overruled because a motion for new trial was not allowed to challenge a summary judgment.

The unsigned letter that Graham purportedly sent the court on February 11, 2016, contends that Graham's attorney was told by the bailiff that his motion for new trial was not allowed to challenge a summary judgment. This correspondence is not evidence, as it was merely attached to the pleading filed in opposition to the motion for summary dismissal.

Graham also alleges, for the first time in his brief on appeal, that the date of the announcement was February 7 or 8, 2016. This statement from Graham's brief may not expand the evidentiary record.

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[41] *Haber, supra* note 21.

[42] *In re Interest of Tyrone K., supra* note 23.

[43] *Despain, supra* note 6 (Cassel, J., concurring).

[44] *In re Estate of Baer*, 273 Neb. 969, 735 N.W.2d 394 (2007).

We find that the record presented by Graham is insufficient to determine whether any statement made to him was made as an official announcement by the court. Therefore, we cannot determine that an announcement was made which was sufficient to invoke the savings clause of § 25-1912(3) (Reissue 2016).

## CONCLUSION

Because Graham filed his notice of appeal before the court ruled on his timely motion to alter or amend the judgment, his notice of appeal was without effect. Therefore, we dismiss this appeal for lack of jurisdiction.

Appeal dismissed.

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. Arturo Barrera-Garrido, appellant.

895 N.W.2d 661

Filed May 12, 2017. No. S-16-426.

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: Effectiveness of Counsel: Proof: Appeal and Error.** To establish a right to postconviction relief because of counsel's ineffective assistance, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. 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.
3. **Convictions: Effectiveness of Counsel: Pleas: Proof.** When a conviction is based upon a guilty or no contest plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty or no contest.
4. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** When a district court denies postconviction relief without conducting an evidentiary hearing, an appellate court must determine whether the petitioner has alleged facts that would support a claim of ineffective assistance of counsel and, if so, whether the files and records

affirmatively show that he or she is entitled to no relief. However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.

5. **Effectiveness of Counsel: Pleas: Proof.** Self-serving declarations that a defendant would have gone to trial are not enough to warrant a hearing; a defendant must present objective evidence showing a reasonable probability that he or she would have insisted on going to trial.

Appeal from the District Court for Douglas County: W. Mark Ashford, Judge. Affirmed.

Daniel S. Reeker, of Kendall Law Office, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Sarah E. Marfisi for appellee.

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

Miller-Lerman, J.

## I. NATURE OF CASE

Arturo Barrera-Garrido appeals the order of the district court for Douglas County which overruled his motion for postconviction relief without conducting an evidentiary hearing. We affirm.

## II. STATEMENT OF FACTS

In 2014, Barrera-Garrido pled no contest to one count of first degree false imprisonment and one count of use of a deadly weapon, not a firearm, to commit a felony. The State set forth a factual basis in support of the pleas. The State generally asserted that Barrera-Garrido had used a knife and other means to hold his then-girlfriend, M.C., captive after she attempted to leave him "due to some alleged domestic abuse." At the time the pleas were accepted, the State dismissed a third charge, which was for one count of first degree sexual assault.

As context for the crimes, the State explained that M.C.'s sister called police on the morning of February 1, 2014. According to the sister, on the previous night, she and her husband had attempted to help M.C., but Barrera-Garrido displayed a knife and "pulled" M.C. into a bedroom. The sister and her husband then left, hoping their departure would defuse the situation. When the police responded to the call, they found M.C. "in his, meaning [Barrera-Garrido's], embrace and he had a knife displayed as well." The police were able to free M.C. from Barrera-Garrido.

When police interviewed M.C., she said that the previous night, Barrera-Garrido had pulled her into the bedroom, locked the door, and refused to let her leave. She said that throughout the night, Barrera-Garrido had "threatened her several times with a knife, indicating that he would kill her if she left him as well as have her family killed." M.C. further stated that Barrera-Garrido had "hit her several times all over her body and even grabbed her by her throat, squeezing slightly, while he threatened her life" and that "he would take the knife and tap her left shoulder blade with it over and over while he was talking to her."

M.C. initially told police that Barrera-Garrido had asked her to perform oral sex on him, but that when she refused, he "grabbed her by the hair" and forced her to engage in oral sex. She later stated that she had "volunteered" to perform oral sex "thinking that would help her get out of the situation."

After police arrested Barrera-Garrido, they placed him in a cruiser and searched the house for the knife. They did not find the knife in the house, but they later found a knife in the cruiser in the area where Barrera-Garrido had been seated. The State concluded its factual basis by stating that these events had occurred in Douglas County, Nebraska.

The district court found that Barrera-Garrido's pleas had been entered knowingly, understandingly, intelligently, and voluntarily. The court further found that there was a factual basis for the pleas and that proper advisement had been made

in regard to the potential for removal from the United States. The court found Barrera-Garrido guilty of false imprisonment in the first degree and use of a deadly weapon, not a firearm, to commit a felony.

On September 18, 2014, the court sentenced Barrera-Garrido to imprisonment for 5 to 5 years for first degree false imprisonment and for 15 to 20 years for use of a deadly weapon. The court ordered the sentences to run consecutively to one another.

On September 14, 2015, Barrera-Garrido filed a motion for postconviction relief. He claimed that his trial counsel provided ineffective assistance in certain respects and that but for such ineffective assistance, he would not have entered his pleas. He claimed that counsel (1) did not adequately explain the charges or the evidence to him, (2) did not "adequately address evidentiary issues" and failed to pursue potential witnesses suggested by him, (3) failed to pursue an affirmative defense based on his assertion that he possessed a knife for the sole purpose of self-defense because M.C.'s family members had threatened him, (4) refused to "fight the charges" and instead coerced him to take a plea agreement he did not want, and (5) did not adequately advise him regarding the consequences of entering pleas and instead advised him that "he should just plead guilty to the charges with no plea agreement." As an additional claim, Barrera-Garrido asserted that the court's order entered after the plea hearing "points out that no plea agreement was entered into in the case."

In an order filed March 29, 2016, the district court overruled Barrera-Garrido's motion for postconviction relief without conducting an evidentiary hearing. The court considered and rejected each of Barrera-Garrido's claims of ineffective assistance of counsel.

The court first addressed Barrera-Garrido's claim that counsel failed to explain the charges and the evidence against him. The court referred to the record of the plea hearing and noted that whether or not counsel had advised him properly, the court

itself "fully explained the charges," and that Barrera-Garrido stated he understood the charges. The court also noted that Barrera-Garrido replied in the affirmative when asked whether he had sufficient time to discuss the case with his attorney and whether the attorney had done a good job. The court finally noted that after the State "provided a thorough description" of the factual basis for the charges and the evidence supporting such factual basis, Barrera-Garrido stated that he did not have any questions or concerns for the court. The court concluded that these "unequivocal representations" by Barrera-Garrido at the plea hearing established that he was not entitled to an evidentiary hearing on his claim that counsel failed to adequately explain the charges and evidence against him.

The court then considered together the next three of the five claims set forth above. The court characterized the claims as a claim that "counsel was ineffective in several areas of his investigation of the case, including failing to depose [M.C.], not contacting witnesses he provided to counsel or in pursuing a self-defense claim." The court noted that during the plea hearing, both the State and defense counsel referred to a deposition of M.C. With regard to Barrera-Garrido's other claims, including his reference to the "other witnesses" that counsel allegedly failed to pursue, the court determined that Barrera-Garrido "failed to set forth enough facts, such as the name[s] of the witnesses or what exculpatory evidence would have been found had such further investigation been pursued." The court concluded that these claims did not warrant an evidentiary hearing.

Finally, the court addressed Barrera-Garrido's claim that counsel coerced him to enter pleas and did not pursue plea negotiations. The court noted that the record refuted this allegation, because the court stated at the plea hearing that the State would request that the sexual assault charge be dismissed pursuant to a plea agreement negotiated by defense counsel and the county attorney. The court concluded that this claim did not warrant an evidentiary hearing.

Barrera-Garrido appeals the district court's order which overruled his motion for postconviction relief without conducting an evidentiary hearing.

## III. ASSIGNMENT OF ERROR

Barrera-Garrido claims that the district court erred when it overruled his motion for postconviction relief and denied his request for an evidentiary hearing on his claims of ineffective assistance of counsel.

## IV. 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. Robertson*, 294 Neb. 29, 881 N.W.2d 864 (2016).

## V. ANALYSIS

### 1. Postconviction Standards

We begin by setting forth standards relating to our review of the district court's order which overruled Barrera-Garrido's motion for postconviction relief.

Barrera-Garrrido makes various postconviction claims of ineffective assistance of counsel in connection with the entry of his pleas. The district court overruled Barrera-Garrido's motion for postconviction relief without conducting an evidentiary hearing.

[2] To establish a right to postconviction relief because of counsel's ineffective assistance, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.

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. *State v. Ely*, 295 Neb. 607, 889 N.W.2d 377 (2017).

[3] When a conviction is based upon a guilty or no contest plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty or no contest. See *State v. Armendariz*, 289 Neb. 896, 857 N.W.2d 775 (2015).

[4] When a district court denies postconviction relief without conducting an evidentiary hearing, an appellate court must determine whether the petitioner has alleged facts that would support a claim of ineffective assistance of counsel and, if so, whether the files and records affirmatively show that he or she is entitled to no relief. *State v. Ely, supra*. However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required. *State v. Harrison*, 293 Neb. 1000, 881 N.W.2d 860 (2016).

Finally, we note that the State concedes in its brief that Barrera-Garrido was represented by his trial counsel during the time in which he could have filed a direct appeal and that therefore, this postconviction motion was his first opportunity to assert ineffective assistance of trial counsel. See *State v. Payne*, 289 Neb. 467, 855 N.W.2d 783 (2014).

### 2. Merits of Barrera-Garrido's Appeal

On appeal, Barrera-Garrido generally claims that the district court erred when it rejected his claims of ineffective assistance of counsel and overruled his motion for postconviction relief without conducting an evidentiary hearing. Although he alleged various instances of ineffective assistance, Barrera-Garrido focuses on three claims: (1) that counsel failed to adequately inform him regarding the charges and the evidence

against him, (2) that counsel failed to investigate and pursue potential witnesses and potential defenses, and (3) that counsel pressured him to enter pleas that were not advantageous to him.

(a) Alleged Failure to Inform

Barrera-Garrido first argues that the district court erred when it rejected his claim that counsel failed to adequately inform him of the charges and the evidence against him. We conclude that the district court did not err when it determined that this claim did not warrant an evidentiary hearing.

Barrera-Garrido claimed in his postconviction motion that "counsel did not fully explain the charges to him and that [counsel] did not adequately review the evidence with him." He alleged that as a result of counsel's failure to adequately inform him of these matters, it was "impossible for [him] to knowingly and intelligently enter a plea in his case." The district court rejected this claim because the record showed that at the plea hearing, the court fully explained the charges to Barrera-Garrido and he indicated that he understood the charges. The district court also noted that Barrera-Garrido stated to the court that he did not have any questions or concerns regarding the factual basis for the pleas that was set forth by the State. The district court concluded that these "unequivocal representations" showed that no evidentiary hearing was required on Barrera-Garrido's claim that counsel failed to adequately inform him.

In connection with his failure to inform claim, Barrera-Garrido refers us to *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), a case regarding the failure to inform a defendant of immigration consequences. Barrera-Garrido relies on *Padilla* in support of his argument that counsel's failure to explain important information to a defendant is considered ineffective assistance regardless of whether or not the court explains such information to the defendant. Barrera-Garrido seems to conclude that under

*Padilla* deficient performance equates to ineffective assistance of counsel. We believe that *Padilla* does not support the broad conclusion Barrera-Garrido urges.

As the State notes, the U.S. Supreme Court in *Padilla* stated that allegations of counsel's failure to inform were sufficient allegations of "constitutional deficiency to satisfy the first prong of *Strickland*," i.e., deficient performance, but that whether the defendant was "entitled to relief on his claim will depend on whether he can satisfy *Strickland*'s second prong, prejudice." 559 U.S. at 369. Consistent with *Padilla*, we have looked to a court's advisements in a plea hearing to refute a defendant's claim that he was prejudiced by counsel's failure to advise him of important information. See *State v. Armendariz*, 289 Neb. 896, 857 N.W.2d 775 (2015).

Whether or not Barrera-Garrido's counsel adequately informed him regarding the charges and the evidence against him, Barrera-Garrido could not show prejudice because he was informed of the charges and the evidence at the plea hearing. We further note that Barrera-Garrido indicated that he understood the charges and did not have concerns regarding the factual basis. Thus, Barrera-Garrido could not show a reasonable probability that he would not have entered pleas and insisted on going to trial but for counsel's alleged failures to adequately inform him. We therefore determine that the district court did not err when it rejected this claim without conducting an evidentiary hearing.

(b) Alleged Failure to Investigate

Barrera-Garrido next claims that the district court erred when it rejected his claim that counsel failed to investigate and pursue potential witnesses and potential defenses. We conclude that the district court did not err when it determined that this claim did not warrant an evidentiary hearing.

In his postconviction motion, Barrera-Garrido alleged that trial counsel failed to interview potential witnesses suggested by him and failed to investigate and pursue a self-defense

theory based on his claim that M.C.'s family members were threatening him. The district court concluded that these allegations did not warrant an evidentiary hearing, because Barrera-Garrido failed to set forth facts to indicate how such further investigation would have helped his defense.

In his postconviction motion, Barrera-Garrido did not identify the potential witnesses or what they would have said that would have helped his defense. To the extent it may be assumed that these witnesses would have supported his claim of self-defense based on the existence of threats by members of M.C.'s family, Barrera-Garrido did not show how such a defense would have been successful. The charges to which Barrera-Garrido pled—false imprisonment and use of a weapon to commit a felony—were based on allegations that he held M.C. captive overnight after she attempted to leave him and that he used a knife to do so. Although the evidence indicated that members of M.C.'s family were present at a previous point in time, the evidence further indicated that for much of the period during which Barrera-Garrido was holding M.C. captive, only the two of them were present. Barrera-Garrido does not explain how the earlier threats required him to use a knife to hold M.C. captive or how holding her captive overnight was necessary to defend himself from the earlier threats of family members.

Barrera-Garrido presents no plausible explanation of how his proposed theory of self-defense could have been successful against the charges of false imprisonment and use of a weapon or how any other witnesses could have helped his defense. We therefore conclude that the district court did not err when it rejected this claim without conducting an evidentiary hearing.

### (c) Alleged Failure to Negotiate Plea Agreement

Barrera-Garrido finally argues that the district court erred when it rejected his claim that counsel failed to negotiate a

plea agreement or, in any event, pressured him to enter a plea agreement that was not advantageous. We conclude that the district court did not err when it determined that this claim did not warrant an evidentiary hearing.

We note first that in connection with this argument, Barrera-Garrido asserts that counsel failed to negotiate a plea agreement. In his brief in this appeal, Barrera-Garrido asserts that his pleas were made "pursuant to no negotiated plea agreement." Brief for appellant at 6. To support this assertion, Barrera-Garrido refers us to a checkmarked form in the record on which a box for "no" is checked next to the words "Negotiated Plea." The record of the hearing at which the court accepted Barrera-Garrido's pleas refutes the claim that there was no negotiated plea agreement.

At the beginning of the hearing, Barrera-Garrido's counsel stated, "Judge, we are here and we've reached an agreement with the State. My client will plead no contest to two of the charges and the third will be dismissed." Later in the hearing, during a colloquy with Barrera-Garrido, the court stated that a serious charge of first degree sexual assault was going to be dismissed and that "[t]he reason for that is your attorney has worked with the county attorney and negotiated this plea arrangement where that third count would be dropped in exchange for your pleas to Counts I and II, which you've just now pled no contest to." The court then asked Barrera-Garrido, "Do you understand the benefit you're getting or receiving due to your attorney's efforts?" Barrera-Garrido replied, through an interpreter, "Yes." Therefore, the record refutes Barrera-Garrido's allegation that counsel failed to negotiate a plea agreement.

[5] Furthermore, Barrera-Garrido's general allegation that counsel forced him to accept the plea agreement does not warrant an evidentiary hearing. We have stated that self-serving declarations that a defendant would have gone to trial are not enough to warrant a hearing; a defendant must present objective evidence showing a reasonable probability that he or she

would have insisted on going to trial. See *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011). The record of the plea hearing supports the court's finding that Barrera-Garrido's pleas had been entered knowingly, understandingly, intelligently, and voluntarily. In light of the available evidence against him, the plea agreement—pursuant to which the State dropped a first degree sexual assault charge—benefited Barrera-Garrido. He did not allege facts showing a reasonable probability that he would have rejected the plea agreement and insisted on going to trial but for counsel's alleged coercion; and his bare assertion of counsel's coercion did not warrant an evidentiary hearing. We conclude that the district court did not err when it rejected this claim without conducting an evidentiary hearing.

## VI. CONCLUSION

Having reviewed all of Barrera-Garrido's claims of ineffective assistance of counsel, including those claims specifically discussed above, we conclude that the district court did not err when it determined that Barrera-Garrido's motion for postconviction relief should be overruled without conducting an evidentiary hearing. We therefore affirm the district court's order overruling the motion.

Affirmed.

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

# In re Estate of Herman M. Vollmann, deceased. Cathy Densberger, Personal Representative of the Estate of Herman M. Vollmann, deceased, appellant, v. Nebraska Department of Health and Human Services, appellee.

896 N.W.2d 576

Filed May 12, 2017. No. S-16-608.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Medical Assistance: Federal Acts: States.** The Medicaid program provides joint federal and state funding of medical care for individuals whose resources are insufficient to meet the cost of necessary medical care.
4. ____: ____: ____. A state is not obligated to participate in the Medicaid program; however, once a state has voluntarily elected to participate, it must comply with standards and requirements imposed by federal statutes and regulations.
5. **Medical Assistance.** Neb. Rev. Stat. § 68-919(1)(a) (Cum. Supp. 2014) provides that a recipient of medical assistance under the medical assistance program, who was 55 years of age or older at the time the medical assistance was provided, is indebted to the Department of Health and Human Services for the total amount paid for medical assistance on the recipient's behalf.

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: Legislature: Intent.** Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
8. **Administrative Law: Statutes.** Properly adopted and filed agency regulations have the effect of statutory law.
9. **Decedents' Estates: Administrative Law: Medical Assistance.** Under the Medical Assistance Act, Neb. Rev. Stat. §§ 68-901 to 68-974 (Reissue 2009 & Cum. Supp. 2014), where a Medicaid recipient is not survived by a spouse or by a child who is either under the age of 21 or is blind or totally and permanently disabled and where no undue hardship as provided in the Department of Health and Human Services' rules and regulations would result, the beneficiaries of a recipient's estate are not entitled to an inheritance at the public's expense.

Appeal from the County Court for Otoe County: John F. Steinheider, Judge. Affirmed.

Phillip Wright for appellant.

Douglas J. Peterson, Attorney General, and Ronald L. Sanchez, Special Assistant Attorney General, for appellee.

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

Cassel, J.

## INTRODUCTION

In this appeal, we must determine whether "medical assistance" provided to a Medicaid recipient includes costs for his room and board and other "nonmedical" expenses at nursing facilities. A chain of statutes and regulations dictates that it does. Because federal law requires a state to seek recovery of medical assistance,[1] those costs can be recovered from the

[1] 42 U.S.C. § 1396p(b)(1) (2012).

recipient's estate. The county court granted a summary judgment for that recovery, and we affirm.

## BACKGROUND

On September 4, 2014, Herman M. Vollmann died at the age of 78. The Nebraska Department of Health and Human Services (DHHS) filed a claim for $22,978.35 for services provided to Vollmann while he resided at two different nursing homes and was over 55 years old. Cathy Densberger, personal representative of Vollmann's estate, disallowed the claim.

DHHS filed a petition for allowance of the claim. Densberger objected. The parties filed cross-motions for summary judgment. The evidence showed that DHHS paid $20,545.07 to one nursing home facility for nursing facility services on Vollmann's behalf and paid $2,012.66 to a different facility. The amounts paid were based on the per diem rates calculated under Nebraska's plan less Vollmann's monthly share of cost obligation. But Densberger asserted that only $360.45 of the claim was for "'medical expense' or medical treatment."

The county court sustained DHHS' motion for summary judgment and overruled Densberger's motion. The court determined that the services which Densberger defined as room and board clearly fell within the parameters of services provided under the Medical Assistance Act.[2] Densberger appealed, and we moved the case to our docket.[3]

## ASSIGNMENTS OF ERROR

Densberger assigns that the county court erred in (1) determining that DHHS was entitled to amounts for room and board or other nonmedical expenses, (2) allowing DHHS to "effectively receive the entire value of [Vollmann's] estate," and (3) granting DHHS' motion for summary judgment.

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[2] Neb. Rev. Stat. §§ 68-901 to 68-974 (Reissue 2009 & Cum. Supp. 2014).

[3] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

## STANDARD OF REVIEW

[1] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[4]

[2] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[5]

## ANALYSIS

### Overview of Medicaid

[3] The Medicaid program provides joint federal and state funding of medical care for individuals whose resources are insufficient to meet the cost of necessary medical care.[6] The program provides federal financial assistance to states that choose to reimburse certain costs of medical treatment for needy persons.[7] Between 50 and 83 percent of a state's expenditures for services under an approved state plan are paid for by the federal government[8]; this is referred to as the "Federal medical assistance percentage."[9]

[4] A state is not obligated to participate in the Medicaid program; however, once a state has voluntarily elected to participate, it must comply with standards and requirements

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[4] *Edwards v. Hy-Vee*, 294 Neb. 237, 883 N.W.2d 40 (2016).

[5] *Maycock v. Hoody*, 281 Neb. 767, 799 N.W.2d 322 (2011).

[6] *Smalley v. Nebraska Dept. of Health & Human Servs.*, 283 Neb. 544, 811 N.W.2d 246 (2012).

[7] *Id.*

[8] See 42 C.F.R. § 433.10(b) (2016).

[9] See 42 U.S.C. § 1396b(a)(1) (2012).

imposed by federal statutes and regulations.[10] A state risks the loss of part or all federal funding if it does not comply with the provisions of the Medicaid program.[11] Nebraska elected to participate in the Medicaid program through enactment of the Medical Assistance Act, and DHHS is responsible for administering Nebraska's program.[12]

## Medical Assistance

[5] The heart of this appeal is Densberger's contention that the law does not allow reimbursement to the State for costs incurred at a nursing facility for expenses such as room and board and administrative expenses. A Nebraska statute provides that a recipient of medical assistance under the medical assistance program, who was 55 years of age or older at the time the medical assistance was provided, is indebted to DHHS for the total amount paid for medical assistance on the recipient's behalf.[13] But before analyzing whether recovery is authorized, we must examine what constitutes medical assistance. This requires us to examine a chain of complex federal and state statutes and regulations.

[6-8] Because the meaning of medical assistance requires interpretation of statutes and regulations, we recall three basic principles. First, statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[14] Second, components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent

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[10] *Id.*

[11] See 42 U.S.C. § 1396c (2012).

[12] See *Smalley v. Nebraska Dept. of Health & Human Servs., supra* note 6.

[13] § 68-919(1)(a).

[14] *Stewart v. Nebraska Dept. of Rev.*, 294 Neb. 1010, 885 N.W.2d 723 (2016).

of the Legislature, so that different provisions are consistent, harmonious, and sensible.[15] Finally, properly adopted and filed agency regulations have the effect of statutory law.[16]

A federal statute defines "medical assistance" to mean "payment of part or all of the cost" of certain care and services,[17] including nursing facility services.[18] Federal statutes dictate that a state plan for medical assistance must provide for making medical assistance available for nursing facility services.[19] Accordingly, a Nebraska statute provides that medical assistance includes "coverage for health care and related services," including nursing facility services.[20] In sum, medical assistance includes nursing facility services.

We then turn to the meaning of nursing facility services. A federal statute instructs that nursing facility services are "services which are or were required to be given an individual who needs or needed on a daily basis nursing care . . . or other rehabilitation services which as a practical matter can only be provided in a nursing facility on an inpatient basis."[21]

This takes us to the definition of a nursing facility, which includes an institution primarily engaged in providing to residents "skilled nursing care and related services for residents who require medical or nursing care."[22] According to a Nebraska regulation, "[r]outine nursing facility services include regular room, dietary, and nursing services . . . ."[23]

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[15] *Cisneros v. Graham*, 294 Neb. 83, 881 N.W.2d 878 (2016).

[16] *Merie B. on behalf of Brayden O. v. State*, 290 Neb. 919, 863 N.W.2d 171 (2015).

[17] 42 U.S.C. § 1396d(a) (2006).

[18] § 1396d(a)(4)(A).

[19] See 42 U.S.C. §§ 1396a(a)(10)(A) (2006) and 1396d(a)(4)(A).

[20] § 68-911(1)(c).

[21] § 1396d(f).

[22] 42 U.S.C. § 1396r(a)(1)(A) (2012).

[23] 471 Neb. Admin. Code, ch. 12, § 011.04B (2014).

### Rates for Nursing Facility Services

Congress allowed the states to develop payment methods and standards for nursing facilities. A state plan for medical assistance must provide for a public process for determination of rates of payment under the plan for nursing facility services.[24]

Nebraska regulations set forth the methodology for determining a nursing facility's per diem. DHHS determines rates under a cost-based prospective methodology.[25] DHHS "determines facility-specific prospective per diem rates . . . based on the facility's allowable costs incurred and documented during the Report Period."[26] A facility's prospective rate consists of four components: the direct nursing component, the support services component, the fixed cost component, and the nursing facility quality assessment component.[27] Allowable costs—"those facility costs which are included in the computation of the facility's per diem"[28]—include such things as room and dietary services.[29]

### Recovery for Room and Board

Densberger argues that DHHS is not entitled to recover money paid for room and board and other nonmedical expenses. She concedes in her brief that DHHS "has a duty to provide nursing home services including room and board . . . for a Medicaid recipient" but asserts that "there is nothing in the statute to allow recovery for non-medical assistance expenses."[30] We disagree.

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[24] § 1396a(a)(13)(A).

[25] See 471 Neb. Admin. Code, ch. 12, § 011.08 (2012).

[26] § 011.08D.

[27] *Id.*

[28] 471 Neb. Admin. Code, ch. 12, § 011.02 (2014).

[29] See § 011.04B.

[30] Brief for appellant at 7.

Section 68-919(1) plainly provides that a recipient of medical assistance "shall be indebted to [DHHS] for the total amount paid for *medical assistance* on behalf of the recipient." (Emphasis supplied.) Densberger claims that § 68-919 "is careful to draw a distinction between costs incurred for medical assistance as compared to costs for a medical institution."[31] We see no distinction. Whether the recipient of medical assistance (1) was 55 years of age or older or (2) resided in a medical institution and could not reasonably be expected to be discharged and resume living at home, the statute is clear that the debt "shall include the total amount of medical assistance provided."[32] And, as set forth above, the State provides "medical assistance" when it pays part or all of the costs for routine nursing services in a nursing facility—which costs include room and board and other "nonmedical" expenses.

Nor does the federal statute concerning liens, adjustments and recoveries, and transfers of assets[33] support Densberger's argument. Although Densberger refers to a "lien," DHHS' claim was unsecured. Thus, the portion of the federal statute regarding liens does not apply here.[34] Section 1396p(b)(1) directs that "the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan." The statute specifically authorizes recovery of medical assistance consisting of "nursing facility services."[35] Densberger's argument that "medical assistance" as used in § 1396p is "traditional medically related services such as nursing, hospital and prescription services"[36] ignores the meaning of "nursing facility services."

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[31] *Id.* at 6.

[32] § 68-919(3).

[33] See § 1396p.

[34] See § 1396p(a)(1) and (b)(1)(A).

[35] § 1396p(b)(1)(B)(i).

[36] Brief for appellant at 6.

Densberger next argues that it would be inequitable to allow DHHS to effectively receive the value of the entire estate. But DHHS' claim is founded in a contractual relationship governed by the provisions of the Medical Assistance Act. Anyone seeking medical assistance from the State must file an application.[37] The act's provisions determine eligibility for benefits,[38] establish a debt to DHHS,[39] and authorize its recovery after the recipient's death except under certain circumstances.[40] Densberger did not argue that any of those circumstances applied to this estate.

Densberger relies on a U.S. Supreme Court decision[41] concerning third-party liability for medical expenses. But her reliance is misplaced. That case did not concern the meaning of medical assistance, but, rather, involved the apportionment of damages recovered by a living Medicaid recipient between the recipient and the state Medicaid agency.

Densberger also asserts that DHHS' attempt to collect 71 percent of the net value of the remaining estate is unconscionable and contrary to law. Again, we disagree. Although DHHS may waive its claim in whole or in part,[42] it declined to do so in this case. A Nebraska regulation explains the public policy underlying waivers for undue hardship:

> Waivers granted by [DHHS] based on undue hardship are intended to prevent the impoverishment of the deceased recipient's family if [DHHS] were to pursue its estate recovery claim. The fact that family members anticipate or expect an inheritance or may be inconvenienced

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[37] See § 68-914.

[38] See, e.g., § 68-915.

[39] See § 68-919(1).

[40] See § 68-919(2).

[41] *Arkansas Dept. of Health and Human Servs. v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006).

[42] See § 68-919(5).

economically by the lack of an inheritance is not a valid basis for an undue hardship waiver.[43]

[9] The evidence does not establish grounds for a waiver. Vollmann was survived by five children, who, under his will, were the devisees of his estate in equal shares. Densberger admitted that there was no child who was under 21 years old, blind, or totally and permanently disabled at the time of Vollmann's death. Under the Medical Assistance Act, where a Medicaid recipient is not survived by a spouse or by a child who is either under the age of 21 or is blind or totally and permanently disabled and where no undue hardship as provided in DHHS' rules and regulations would result, the beneficiaries of a recipient's estate are not entitled to an inheritance at the public's expense.[44] That is the situation here. Densberger's assertion that the State "seems to make a profit at the expense of Nebraska residents"[45] because of reimbursement by the federal government[46] is incorrect. When the State recovers funds from an estate, "the federal government is credited with a percentage equal to the state's [federal medical assistance percentage], and the state retains the balance."[47] The notion that the Medicaid program constitutes a moneymaking scheme for the State borders on the frivolous.

### Summary Judgment

Finally, Densberger argues that summary judgment was improper due to a material question of fact. She stated in her affidavit that most of Vollmann's expenses were nonmedical in nature, and she contends that "there is a material question of fact whether room and board and other non-medical

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[43] 471 Neb. Admin. Code, ch. 38, § 004.01 (2008).

[44] See § 68-919.

[45] Reply brief for appellant at 3.

[46] See § 1396b.

[47] *West Virginia v. U.S. Dept. Health and Human Serv.*, 289 F.3d 281, 285 (4th Cir. 2002).

expenses are in fact 'medical assistance' as defined by the statutes."[48] But that issue presents a question of law, which does not prevent summary judgment. This assignment of error lacks merit.

## CONCLUSION

Medical assistance includes sums paid on a Medicaid recipient's behalf for nursing facility services. Because nursing facility services include room and board costs and other expenses, DHHS is statutorily authorized to recover the sums it paid for such medical assistance from Vollmann's estate. We affirm the summary judgment in favor of DHHS.

Affirmed.

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[48] Brief for appellant at 9.

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

# State of Nebraska, appellee, v. Bashir V. Loding, appellant.

895 N.W.2d 669

Filed May 12, 2017. No. S-16-614.

1. **Effectiveness of Counsel: Appeal and Error.** Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law.
2. ____: ____. In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only questions of law: Are the undisputed facts contained within the record sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance?
3. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.
4. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
5. **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.
6. **Effectiveness of Counsel: Appeal and Error.** When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred.
7. **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 will recognize whether the claim was brought before the appellate court.

8. **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.
9. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** To establish a right to postconviction relief because of counsel's ineffective assistance, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. A court may address the two prongs of this test, deficient performance and prejudice, in either order.
10. **Statutes: Rules of the Supreme Court.** Just as statutes relating to the same subject are in pari materia and should be construed together, Nebraska Supreme Court rules should be read and construed together.
11. **Attorneys at Law.** A passing score on the Multistate Professional Responsibility Examination is a substantive requirement for admittance to the Nebraska bar.
12. **Attorneys at Law: Disciplinary Proceedings.** Violations of the standards and rules of professional conduct can subject an attorney to disciplinary proceedings.
13. **Attorneys at Law: Effectiveness of Counsel.** An applicant for admittance to the Nebraska bar who has demonstrated that he or she lacks the required knowledge of his or her ethical obligations is incompetent to act as counsel.
14. **Attorneys at Law: Words and Phrases.** A nonlawyer is any person not duly licensed or otherwise authorized to practice law in the State of Nebraska.
15. **Attorneys at Law: Rules of the Supreme Court.** The Nebraska Supreme Court rules do not allow a nonlawyer to engage in the practice of law.
16. **Attorneys at Law: Disciplinary Proceedings.** Because the Nebraska Supreme Court regards the unauthorized practice of law as a serious offense, any unauthorized practice is a nullity.
17. **Constitutional Law: Right to Counsel.** A complete denial of assistance of counsel is a per se violation of a defendant's right to counsel.

18. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** When reviewing claims of ineffective assistance, an appellate court will not second-guess a trial counsel's reasonable strategic decisions. An appellate court must assess the trial counsel's performance from the counsel's perspective when the counsel provided the assistance.
19. **Trial: Attorneys at Law.** Defense counsel are not deficient for failing to defeat their own legitimate defense theory.
20. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, an appellate court does not pass on the credibility of witnesses. 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. **Indictments and Informations: Evidence: Time.** The State can present evidence of several violations within a specific timeframe to secure one conviction.
22. **Sentences: Appeal and Error.** In reviewing a sentence imposed within the statutory limits, an appellate court considers whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
23. **Sentences.** When imposing a sentence, the sentencing court is to consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.
24. ____. Traditionally, a sentencing court is accorded very wide discretion in determining an appropriate sentence.

Appeal from the District Court for Douglas County: Gregory M. Schatz, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, W. Patrick Dunn, and Andrew J.K. Johnson for appellant.

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

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

Per Curiam.

## I. INTRODUCTION

In this direct appeal, Bashir V. Loding challenges his conviction for first degree sexual assault of a child. He alleges that he received ineffective assistance of counsel, that there was insufficient evidence to support his conviction, and that he received an excessive sentence. He presents one issue of first impression: whether representation by a former senior certified law student, who was not yet an admitted member of the Nebraska bar, although accompanied by an admitted lawyer, constitutes per se ineffective assistance of counsel. We conclude that it does not. The record is insufficient to address two claims of ineffective assistance. Because we find no merit in Loding's other claims, we affirm the judgment of the district court.

## II. BACKGROUND

Loding was charged with first degree sexual assault of a child. The information filed alleged that on or about May 1 through September 17, 2015, Loding, a man at least 19 years old or older, subjected A.B., a child less than 12 years old, to sexual penetration.

### 1. Evidence at Trial

Trial was held in April 2016, at which A.B. testified that she was born in 2006 and lived in Douglas County, Nebraska. She testified that Loding was her mother's friend and that he was 43 years old. She testified that Loding would visit her home and that beginning in May 2015, he penetrated her anus with his penis on multiple occasions. He also penetrated her anus and vagina with his fingers on multiple occasions. She was able to describe events in detail, what his penis looked like, and how after he penetrated her anus, "sometimes [her] pee would be brown." Her older sister corroborated her testimony and confirmed that Loding had access to A.B. without her mother's direct supervision.

Several expert witnesses testified as to A.B.'s initial disclosure and explained that her allegations were consistent

with her testimony and not unusual for child victims of sexual assault.

Loding did not testify in his own behalf or call any witnesses.

### 2. Conviction and Sentence

The jury convicted Loding of first degree sexual assault of a child, and the district court sentenced Loding to 35 to 50 years' imprisonment with credit for 129 days served.

Loding timely appealed, and we granted the State's petition to bypass review by the Nebraska Court of Appeals.

## III. ASSIGNMENTS OF ERROR

Loding assigns, reordered and restated, that (1) he received ineffective assistance of counsel when (a) a former senior certified law student, who was not yet an admitted member of the Nebraska bar, participated in critical stages of the proceedings, (b) he did not validly consent to representation by a certified law student, and (c) trial counsel made prejudicial remarks during opening statement and closing argument; (2) there was insufficient evidence to sustain a guilty verdict; and (3) his sentence was excessive.

## IV. STANDARD OF REVIEW

[1,2] Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law.[1] In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only questions of law: Are the undisputed facts contained within the record sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance?[2]

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[1] *State v. Parnell*, 294 Neb. 551, 883 N.W.2d 652 (2016).

[2] *Id.*

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

[4,5] We will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[4] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[5]

## V. ANALYSIS

### 1. Ineffective Assistance of Counsel

[6,7] Loding is represented on direct appeal by different counsel than the counsel who represented him at trial. When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred.[6] 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 will recognize whether the claim was brought before the appellate court.[7]

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

[4] *Id.*

[5] *Id.*

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

[7] See *id.*

[8] The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved.[8] The determining factor is whether the record is sufficient to adequately review the question.[9]

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

### (a) Per Se Ineffective Assistance of Counsel

Loding alleges that he received ineffective assistance of counsel because he was represented by a law school graduate who was not a certified senior law student or an admitted member of the Nebraska bar. He invites this court to find per se ineffective assistance of counsel.

This is an issue of law, and the record is sufficient to adequately review this claim. Before we do, we assess the law school graduate's senior certified status.

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[8] *State v. Parnell, supra* note 1.

[9] *Id.*

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

[11] *State v. Ely*, 295 Neb. 607, 889 N.W.2d 377 (2017).

[12] *Id.*

[13] *Id.*

[14] *Id.*

*(i) Senior Certified Status*

Loding was represented at trial by a licensed attorney, James Schaefer, and the attorney's son, Robert Schaefer. At one point, Robert had been certified to practice law under James' supervision pursuant to our rules authorizing limited practice of law by senior law students.[15] Believing that he was still certified to practice, Robert participated during voir dire and gave the opening statement and closing argument at Loding's trial in April 2016.

But Robert's status had changed. He graduated from law school in the spring of 2015. After graduation, he took both the Uniform Bar Examination (UBE)[16] and the Multistate Professional Responsibility Examination (MPRE).[17] He passed the UBE but failed the MPRE. And the record is clear that he was notified of this failure prior to the April 2016 trial.

The first question is how this affected his senior practice certification. The relevant senior practice rule provides that senior certification of a law student "*shall terminate* if the student does not take the first bar examination following his or her graduation, or if *the student takes such bar examination and fails it*, or if he or she is admitted to full practice before this court."[18]

Before applying this rule, however, we must determine whether the rule's use of the term "bar examination"[19] applies only to the UBE or to both the UBE and the MPRE. The State suggests that it is unclear whether failure of the MPRE is a terminating event under the rule and argues that "the passing of the MPRE is a prerequisite to the ethical practice of law in this state but it has nothing to do with the legal ability of the attorney."[20] We disagree.

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[15] See Neb. Ct. R. §§ 3-701 to 3-706 (rev. 2012).

[16] See Neb. Ct. R. § 3-101(L) (rev. 2015).

[17] § 3-101(J).

[18] § 3-705(A) (emphasis supplied).

[19] *Id.*

[20] Brief for appellee at 17.

[10] Just as statutes relating to the same subject are in pari materia and should be construed together,[21] our rules should be read and construed together. "Examination applicants are required to pass the MPRE and are required to pass by a combined score the [component parts of the UBE]."[22] This rule makes it clear that the "bar examination" consists of both the UBE and the MPRE and that examination applicants (including Robert) are required to pass both of them. In other words, a failure of either the MPRE or the UBE, taken after graduation, is a failure of the "bar examination." Because Robert's failure to pass the MPRE, and thus, the bar examination, was known before Loding's trial, Robert's certification under the senior practice rules had terminated before the trial.

The second question is whether, as the State also argues, Robert still met the substantive requirements to provide effective assistance of counsel. In making this argument, the State analogizes the passing of the MPRE to the paying of bar dues as mere "'technical licensing requirements'" and argues that Robert was "otherwise competent and qualified to act as counsel."[23] We disagree.

[11,12] As we have already explained, a passing score on the MPRE is a substantive requirement for admittance to the Nebraska bar.[24] The MPRE measures "examinees' knowledge and understanding of established standards related to the professional conduct of lawyers."[25] These standards guide the Nebraska Rules of Professional Conduct to which all licensed attorneys within Nebraska are held accountable. Violations of

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[21] See *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012).

[22] Neb. Ct. R. § 3-117(A) (rev. 2013).

[23] Brief for appellee at 17. See, also, *State v. Vanderpool*, 286 Neb. 111, 835 N.W.2d 52 (2013).

[24] See § 3-117(A).

[25] Nat. Conf. of Bar Examiners, Multistate Professional Responsibility Examination, http://www.ncbex.org/exams/mpre/ (last visited May 3, 2017).

these standards and rules of professional conduct can subject an attorney to disciplinary proceedings.[26]

[13] In sum, our standards and rules emphasize the importance of the ethical practice as indicative of an attorney's legal ability. An applicant for admittance to the Nebraska bar who has demonstrated that he or she lacks the required knowledge of his or her ethical obligations is incompetent to act as counsel.

Having found that Robert lost his status as a senior certified law student and failed to meet the substantive requirements to be a licensed attorney at trial, we now consider the effect of his participation at trial.

### *(ii) Robert's Participation at Trial*

Courts in other jurisdictions have consistently found legal representation by an unlicensed individual who did not meet the substantive requirements for admittance to the bar, or was a layperson posing as an attorney, constitutes per se ineffective assistance of counsel.[27] In such circumstances, an individual is entitled to postconviction relief without proving prejudice. As one court explained, "one never admitted to practice law and therefore who never acquired the threshold qualification to represent a client in court cannot be allowed

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[26] See Neb. Ct. R. of Prof. Cond. Scope, comment 19.

[27] See, *U.S. v. Bergman*, 599 F.3d 1142 (10th Cir. 2010), *cert. denied* 562 U.S. 887, 131 S. Ct. 219, 178 L. Ed. 2d 132; *U.S. v. Mitchell*, 216 F.3d 1126 (D.C. Cir. 2000); *U.S. v. Novak*, 903 F.2d 883 (2d Cir. 1990); *United States v. Mouzin*, 785 F.2d 682 (9th Cir. 1986), *cert. denied sub nom. Carvajal v. United States*, 479 U.S. 985, 107 S. Ct. 574, 93 L. Ed. 2d 577; *Solina v. United States*, 709 F.2d 160 (2d Cir. 1983); *McKeldin v. Rose*, 482 F. Supp. 1093 (E.D. Tenn. 1980), *reversed on other grounds* 631 F.2d 458 (6th Cir.); *Huckelbury v. State*, 337 So. 2d 400 (Fla. App. 1976); *In re Denzel W.*, 237 Ill. 2d 285, 930 N.E.2d 974, 341 Ill. Dec. 460 (2010); *Benbow v. State*, 614 So. 2d 398 (Miss. 1993); *People v Felder*, 47 N.Y.2d 287, 391 N.E.2d 1274, 418 N.Y.S.2d 295 (1979). But see *Blanton v. U.S.*, 896 F. Supp. 1451 (M.D. Tenn. 1995), *rehearing denied* 94 F.3d 227 (6th Cir. 1996).

to do so, and no matter how spectacular a performance may ensue, it will not constitute 'effective representation of counsel' for purposes of the Sixth Amendment."[28] This is consistent with our treatment of nonlawyers who engage in the practice of law.

[14-16] A nonlawyer is "any person not duly licensed or otherwise authorized to practice law in the State of Nebraska."[29] As we have demonstrated, Robert was a nonlawyer at the time of trial. Our court rules are clear and firm; they do not allow a nonlawyer to engage in the practice of law.[30] Because we regard the unauthorized practice of law as a serious offense, any unauthorized practice is a nullity.[31] Obviously, such a nullity cannot satisfy a defendant's right to effective representation of counsel.

[17] We concede that if Loding had been represented only by Robert, he would have been completely denied the right to assistance of counsel. A complete denial of assistance of counsel is a per se violation of his right to counsel.

However, other jurisdictions have declined to find per se ineffective assistance of counsel when there has been "*active* participation of a licensed attorney throughout a defendant's trial."[32] As the Eighth Circuit explained, "[i]f co-counsel provides petitioners with effective assistance at all critical stages

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[28] *United States v. Mouzin, supra* note 27, 785 F.2d at 697.

[29] Neb Ct. R. § 3-1002(A).

[30] Neb Ct. R. § 3-1003.

[31] See *Kelly v. Saint Francis Med. Ctr.*, 295 Neb. 650, 889 N.W.2d 613 (2017).

[32] *People v. Jacobs*, 6 N.Y.3d 188, 190, 844 N.E.2d 1126, 1127, 811 N.Y.S.2d 604, 605 (2005) (emphasis supplied). See, also, *U.S. v. Novak, supra* note 27; *U.S. v. Cocivera*, 104 F.3d 566 (3d Cir. 1996); *U.S. v. Rimell*, 21 F.3d 281 (8th Cir. 1994), *cert. denied* 513 U.S. 976, 115 S. Ct. 453, 130 L. Ed. 2d 362; *The People v. Cox*, 12 Ill. 2d 265, 146 N.E.2d 19 (1957); *Riggs v. State*, 235 Ind. 499, 135 N.E.2d 247 (1956); *State v. Deruy*, 143 Kan. 590, 56 P.2d 57 (1936); *Higgins v. Parker*, 354 Mo. 888, 191 S.W.2d 668 (1945), *cert. denied* 327 U.S. 801, 66 S. Ct. 902, 90 L. Ed. 1026 (1946).

of the proceedings, [a defendant's] Sixth Amendment rights have been protected."[33] The theory is that effective assistance of licensed cocounsel would include correcting any error by the unadmitted cocounsel. And, in finding no per se violation in circumstances quite similar to those before us, the Eighth Circuit relied on its earlier decision in *U.S. v. Rosnow*.[34]

James, a qualified, licensed attorney in Nebraska, was the lead attorney for Loding's trial. It is undisputed that he was present at all times throughout the trial and for all interactions between Loding and Robert. Thus, there was no per se violation of Loding's constitutional right to counsel. We now turn to consider whether Loding is entitled to relief on his claims under *Strickland*.

### (b) Ineffective Assistance Under *Strickland*

#### *(i) Lack of Written Consent*

Loding alleges that he received ineffective assistance of counsel because James did not secure his written consent to be represented by Robert. While this alleges a very serious violation of our court rules,[35] there is a disciplinary process established to adjudicate rule violations.[36] But that is not the matter before us in this appeal. The question here is whether James (and Robert, under James' direction) provided ineffective assistance of counsel under *Strickland.* We conclude that the record is not adequate to address this matter on direct appeal.

#### *(ii) Opening Statement and Closing Argument*

Loding alleges that he received ineffective assistance of counsel during opening statement and closing argument. He

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[33] *U.S. v. Rosnow*, 981 F.2d 970, 972 (8th Cir. 1992).

[34] See *U.S. v. Rimell, supra* note 32.

[35] See § 3-704(C).

[36] See Neb. Ct. R. §§ 3-301 to 3-328 (rev. 2016).

claims that counsel was ineffective in failing (1) to call on A.B.'s mother to testify or explain her absence after stating during opening statement she would be called upon, (2) to mention during closing argument other individuals who had sexually assaulted A.B., and (3) to give a longer closing argument or say more than that Loding was not guilty.

[18] When reviewing claims of ineffective assistance, an appellate court will not second-guess a trial counsel's reasonable strategic decisions.[37] And an appellate court must assess the trial counsel's performance from the counsel's perspective when the counsel provided the assistance.[38]

It is clear from the record that Loding's trial counsel organized his defense around the theory that A.B. did not like Loding and that she made up allegations of sexual assault. This was a legitimate strategy aimed at acquitting Loding of the charged offense. Therefore, we review Loding's claims with this defense theory in mind.

a. Absence of A.B.'s Mother as Witness

As Loding conceded at oral argument, his brief misstated the record when he argued that counsel failed to explain why A.B.'s mother did not testify. The record shows that Loding's counsel explained, "We said we would call the mother . . . we said that in the beginning because we thought the state would prove its case, and it has not."

During closing argument, counsel explained multiple times that the burden of proof was on the State to prove beyond a reasonable doubt that Loding was guilty. Counsel then reviewed the evidence and explained to the jury why the State had not met its burden. Outside the presence of the jury, Loding confirmed on the record that the mother did not want to testify and that he did not want her to testify.

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[37] *State v. Alarcon-Chavez*, 295 Neb. 1014, 893 N.W.2d 706 (2017).

[38] *Id.*

But the record does not explain why, during opening statement, counsel elected to tell the jury that A.B.'s mother would be called to testify. Although the record shows how the problem was addressed, the record does not show how it came about. Under these circumstances, we conclude that the record is not sufficient to address this matter on direct appeal.

b. Other Alleged Assault Perpetrators

Loding alleges that his trial counsel was ineffective during their closing argument for failing to mention two other known individuals who had both allegedly sexually assaulted A.B. in the past. He does not explain why this should have been done, but the implication would seem to be that it could have convinced the jury someone other than Loding committed the sexual assaults charged in this case. This is in direct conflict with Loding's defense that A.B. made up the allegations of sexual assault.

[19] We conclude that defense counsel were not deficient for failing to defeat their own legitimate defense theory. As to this argument, the record affirmatively shows that Loding's counsel acted reasonably and consistently in presenting his defense and were not ineffective.

c. Closing Argument

Loding alleges that his trial counsel was ineffective because "closing argument was too short and not much was said other than that [Loding] was not guilty."[39] This, too, is clearly refuted by the record.

During their closing argument, Loding's counsel discussed the State's burden of proof, the presumption of innocence, perceived conflicts in the State's evidence, A.B.'s lack of credibility, the defense's theory of the case, the function of the criminal justice system, the significance of the jury's

[39] Brief for appellant at 16.

role, the magnitude of the charge, and the standard for reasonable doubt. Because there was no deficiency in this argument, the record establishes that Loding's counsel were not ineffective.

### 2. Sufficiency of Evidence

Loding alleges that there was insufficient evidence to support his conviction. He does not argue that the evidence did not establish the elements of the crime. He essentially argues that A.B., the one witness to testify to all the elements of the crime, was not a credible witness because of her youth, her prior history as a sexual assault victim, her dislike of Loding, and because she "admitted she was confused about who had touched her inappropriately at which times"[40] in regard to previous incidents of sexual assault.

[20] But, in reviewing a sufficiency of the evidence claim, we do not pass on the credibility of witnesses.[41] 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.[42]

Viewed in the light most favorable to the State, and without passing on the credibility of the witnesses, there was sufficient evidence for any rational juror to find Loding guilty beyond a reasonable doubt.

[21] Loding also alleges that there was insufficient evidence to determine which of the different circumstances of sexual assault was found to be proved by a reasonable doubt by all jurors. He argues that such a finding was necessary where he was charged with only one count of sexual assault while the State alleged several different incidents. Because we have consistently held that the State

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[40] *Id.* at 12.

[41] See *State v. Draper, supra* note 3.

[42] See *id.*

can present evidence of several violations within a specific timeframe to secure one conviction,[43] this argument is without merit.

### 3. Excessive Sentence

Lastly, Loding alleges that he received an excessive sentence, because the court failed to consider all the appropriate mitigating factors in imposing the sentence. He was convicted of first degree sexual assault of a child—a Class IB felony,[44] which is punishable by a mandatory minimum of 15 years' imprisonment and a maximum of life imprisonment.[45] He was sentenced to 35 to 50 years' imprisonment with credit for 129 days served. As such, his sentence is within the statutory limits.

[22,23] In reviewing a sentence imposed within the statutory limits, an appellate court considers whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.[46] When imposing a sentence, the sentencing court is to consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.[47] The district court reviewed the presentence investigation report, which addressed all of these matters.

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[43] See, *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010); *State v. Martinez*, 250 Neb. 597, 550 N.W.2d 655 (1996).

[44] Neb. Rev. Stat. § 28-319.01(2) (Reissue 2016).

[45] *Id.* See, also, Neb. Rev. Stat. § 28-105 (Reissue 2016); *State v. Russell*, 291 Neb. 33, 863 N.W.2d 813 (2015).

[46] *State v. Draper, supra* note 3.

[47] *Id.*

[24] Given that, traditionally, a sentencing court is accorded very wide discretion in determining an appropriate sentence,[48] we find no abuse of discretion in the sentence imposed.

## VI. CONCLUSION

We emphasize that we take very seriously Loding's complaint that James failed to obtain Loding's written consent to Robert's participation in the conduct of his trial. Although we decline to find a per se violation of the right to effective assistance of counsel, it deserves careful scrutiny under *Strickland*. And we conclude that the record is insufficient to do so. Loding's allegation regarding counsel's actions regarding A.B.'s mother also raises a serious claim of ineffective assistance of counsel. But here again, the record is insufficient.

As to Loding's other allegations of ineffective assistance of counsel, the record affirmatively refutes them. And we find no merit to his assignments of insufficient evidence and excessive sentence. We therefore affirm the judgment of the district court.

Affirmed.

Kelch, J., not participating.

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[48] See *id.*

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. William E. Gast, respondent.

896 N.W.2d 583

Filed May 19, 2017. No. S-15-800.

1. **Disciplinary Proceedings: Appeal and Error.** Because attorney discipline cases are original proceedings before the Nebraska Supreme Court, the court reviews a referee's recommendations de novo on the record, reaching a conclusion independent of the referee's findings.
2. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against an attorney are whether the Nebraska Supreme Court should impose discipline and, if so, the appropriate discipline under the circumstances.
3. **Disciplinary Proceedings: Proof.** Violation of a disciplinary rule concerning the practice of law is a ground for discipline, and disciplinary charges against an attorney must be established by clear and convincing evidence.
4. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer 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 offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
5. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.
6. ____. Responding to disciplinary complaints in an untimely manner and repeatedly ignoring requests for information from the Counsel for Discipline indicate a disrespect for the Nebraska Supreme Court's disciplinary jurisdiction and a lack of concern for the protection of the public, the profession, and the administration of justice.
7. ____. In evaluating attorney discipline cases, the Nebraska Supreme Court considers aggravating and mitigating circumstances.

8. ____. The propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.

Original action. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

William E. Gast, pro se.

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

Per Curiam.

## I. NATURE OF CASE

Attorney William E. Gast was charged by the Counsel for Discipline with violating Neb. Ct. R. of Prof. Cond. §§ 3-503.5(a)(1), 3-508.2(a), and 3-508.4(a) and (d), and violating his oath of office as an attorney as set forth in Neb. Rev. Stat. § 7-104 (Reissue 2012). The charges were based on a series of communications sent by Gast to Douglas County District Court Judge Peter C. Bataillon and attorney Robert Craig. We conclude that Gast violated these provisions as charged and order that he be suspended from the practice of law for a period of 1 year, to be followed by a period of 2 years' probation upon reinstatement.

## II. BACKGROUND

This disciplinary proceeding results from Gast's conduct in the course of litigation in the case *State of Florida v. Countrywide Truck Ins. Agency*[1] in the district court for Douglas County. The case has been appealed to this court several times since it was originally filed in 1998.[2] The details of the litigation are summarized: The State of Florida,

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[1] *State of Florida v. Countrywide Truck Ins. Agency*, 294 Neb. 400, 883 N.W.2d 69 (2016).

[2] See, *State of Florida v. Countrywide Truck Ins. Agency*, 275 Neb. 842, 749 N.W.2d 894 (2008); *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005); *State of Florida v. Countrywide Truck Ins. Agency*, 258 Neb. 113, 602 N.W.2d 432 (1999).

Department of Insurance (Florida), was appointed as the receiver of an insolvent Florida insurance company.[3] Florida pursued a claim on behalf of the insolvent company against Countrywide Truck Insurance Agency, Inc. (Countrywide), and its owner David L. Fulkerson, alleging that Fulkerson converted money that was owed to the insolvent company for his personal use. Gast began representing Fulkerson in early 2002. Fulkerson died in 2009, and his widow, Diederike M. Fulkerson (Diederike), who was the executor of his estate, was added as a defendant.

In the most recent appearance of that case before this court, Gast appealed the district court's order granting Florida $15,000 in attorney fees as a sanction for a frivolous motion to recuse that he had filed.[4]

Judge Bataillon had taken over the case from another judge when that judge retired in 2000. Over the long course of the Countrywide litigation, Gast became very dissatisfied with the rulings of Judge Bataillon. He believed that Judge Bataillon made "blatant errors of law."

In 2004, Judge Bataillon denied Gast's motion for partial summary judgment on what Gast believed was an unsound legal basis and which he believed "made absolutely no sense whatsoever." This led Gast to believe that "something is really wrong here, something is really, really wrong." Gast filed a motion to recuse Judge Bataillon on the basis that one of his prior orders contained errors that could reasonably be believed to be based on either a lack of attention, a lack of ability, a lack of impartiality, or some combination of these reasons. The motion was denied by Judge Bataillon. Thereafter, Gast filed an appeal and a writ of mandamus. The mandamus was denied, and the appeal was dismissed for lack of a final, appealable order.[5] Gast testified at his disciplinary hearing that

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[3] See *State of Florida v. Countrywide Truck Ins. Agency, supra* note 1.

[4] *Id.*

[5] *State of Florida v. Countrywide Truck Ins. Agency, supra* note 2, 270 Neb. 454, 703 N.W.2d 905 (2005).

after this point, "everything that happened . . . made it appear to me that the outcome was being engineered."

In 2006, the case was tried, and Gast was convinced the result was "predetermined." At the conclusion of the evidence, Florida moved for a directed verdict, which the district court granted.[6] On appeal, this court reversed the directed verdict, reasoning that the intent to defraud creditors is a factual question that should have been decided by the jury.[7]

After Fulkerson died in 2009, Florida pursued its claim against his estate in probate court, which denied the claim. After this, Fulkerson's estate was dropped as a defendant in the district court litigation, but Florida continued pursuing its claims against his widow, Diederike.

The case was retried to the bench and submitted in April 2014. After submitting proposed findings of fact and conclusions of law to the court, Gast sent a "Personal, Private and Confidential Memorandum" to Judge Bataillon and opposing counsel Craig, dated April 15, 2014 (referred to as "exhibit A"). The memorandum insinuated that "personal reasons" were driving Judge Bataillon's actions in the case. It states in part:

> I can only speculate as to your personal reasons, but I choose not to. Unfortunately, whatever those might be, they may indeed overwhelm [Diederike's] health. If that happens, how will you feel? Not good, I'm sure.
>
> I have long accepted that I will die without ever knowing the real reason(s) for what has transpired in this matter since I first became involved in early 2002. But I do know that neither I, . . . Fulkerson, nor [Diederike] have ever done anything to deserve the hostility that has prevailed from my very initial involvement. Which, by the way, long predated and actually necessitated the recusal request.

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[6] *State of Florida v. Countrywide Truck Ins. Agency, supra* note 2, 275 Neb. 842, 749 N.W.2d 894 (2008).

[7] *Id.*

> . . . Consider what it is doing to a very sweet 79-year-old woman who deserves NONE of the emotional and physical damage that this is causing her. Also, how it could impact the integrity and reputation of an otherwise respectable Judgeship. And third, the worsening consequences to [Craig] for the mounting costs to Florida and the [insolvent company's] creditors.
>
> . . . .
>
> Bottom line, this case is over, and you both know it. The sooner that it is made official, the better it will be for all concerned . . . especially the justice system of this State, for which it has been a "black eye" for years. If it is left to the Supreme Court to do so, it could be very ugly indeed for everyone. Ending it now might allow for some face-saving for all concerned, and for some well-deserved relief for [Diederike].

This memorandum was sent about a week after the case was submitted to the court.

In July 2014, Gast's wife had lunch with the ex-wife of Craig. She told Gast's wife that Craig and Judge Bataillon (then-attorney Bataillon) had been "best buds." According to Gast:

> [Craig's ex-wife] related parties, dinner engagements at the Omaha Press Club, and the softball team on which . . . Craig and [then-attorney] Bataillon played. She told me the details, and they would have parties afterwards, and sometimes they would go to bars, and the wives would meet them, and she referred to Bataillon as Pete.

In August 2014, Gast filed a second motion to recuse Judge Bataillon, citing Neb. Rev. Code of Judicial Conduct § 5-302.4 that "[a] judge shall not permit . . . social . . . interests or relationships to influence the judge's judicial conduct or judgment." The motion also stated:

> This Motion is additionally based upon (among other violations) newly-acquired evidence of this Court's lack of "impartiality," lack of "independence," and lack of "integrity" (as those terms are defined in the Nebraska

> Code of Judicial Conduct) that existed from soon after the Hon. Peter C. Bataillon inherited this action from the Hon. Michael McGill and that has continuously persisted throughout the period of more than twelve years to the very date of this Motion.

It further alleged that Gast "very recently acquired reliable information that, for a period of at least twenty years prior to the appointment of . . . Judge Bataillon to the Douglas County District Court, a very close personal friendship and continuous social relationship had existed between" Judge Bataillon, Craig, and Craig's cocounsel. The petition alleged that the relationship was never disclosed by Craig or Judge Bataillon and that "the relationship has been improvidently, unethically and continuously concealed by the Hon. Peter C. Bataillon, Craig and [cocounsel] from the time Bataillon inherited this case . . . until the very present day."

The specific allegations in the motion to recuse included that then-attorney Bataillon and Craig played on a summer softball team together "for approximately three years in the 1970s or early 1980s," including socializing after games; attended parties together at the cocounsel's home; and attended dinners at the Omaha Press Club.

Following the motion to recuse, Gast sent a letter to Judge Bataillon and Craig (referred to as "exhibit B"). It said, in part:

> Now that the truth of your pre-suit relationship has been discovered, the Docket Sheet itself demonstrates the "cover-up" quality to each and every successive refusal to disclose it after your initial failure to do so. Check it out yourselves. It actually takes on a crescendo-like appearance on its very face. The lesson about cover-ups is that they usually come undone eventually, and the consequences to those involved always amplify in direct proportion to their pre-discovery duration. This "cover-up" is more than 12 years old!
>
> Judge, your responsibility is obvious and it is immediate. . . . You must now recuse *sua sponte*. And I trust that

> you will not force me to file the augmented Motion, or to conduct a public hearing on it, or to serve the Subpoenas or to take the Depositions.

Later in August 2014, the court held a hearing on the motion to recuse. At the hearing, Judge Bataillon said, "The only contact that I had with . . . Craig was probably in the early '80s I played on the same softball team with him for maybe a year or two. That's it." Craig did not remember being on the same softball team as Judge Bataillon during the late 1970's or early 1980's, but had been told by Craig's cocounsel that Judge Bataillon had "played some" on the team. Judge Bataillon was not persuaded by Gast's claims. He said:

> At all times I have upheld the law. At all times I have acted fairly and impartially based upon what the evidence has been, based upon what the facts have been, and things of that nature.
>
> This allegation that I failed to disclose, there was nothing to disclose that — that rises to any level under the judicial ethics or any of the lawyers in this matter. As such, your motion is overruled.

In September 2014, Gast sent another letter to Judge Bataillon, urging him to recuse, citing a case from the Missouri Court of Appeals.[8] In this letter, Gast suggested that Judge Bataillon had "badgered" Gast in a previous hearing and Gast "insist[ed]" that Judge Bataillon recuse "at once, for your own sake as much as anything else."

In October 2014, Gast sent yet another letter to Judge Bataillon (referred to as "exhibit C"), which said, in part:

> Judge Bataillon, you should realize that you have an ever-so-brief opportunity to quietly back out of this case on a purely technical ground, *i.e.* one that is *not* related to misconduct. Before you elect to pass it [sic] up this chance, I respectfully submit that you think very carefully about your own best interests.

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[8] *Williams v. Reed*, 6 S.W.3d 916 (Mo. App. 1999).

(Emphasis in original.) In this letter, Gast references an incident in a prior hearing (after the motion to recuse hearing) in which Judge Bataillon disclosed that he, his wife, and her brother were eating dinner at a restaurant and noticed that Craig was also eating in the restaurant. Judge Bataillon's wife went over and greeted Craig. Gast said in the letter that Judge Bataillon, his wife, and his brother-in-law were all material witnesses to the "recusal issue." Gast wrote, "It is also extraordinarily curious that such a meeting with . . . Craig might have occurred purely by chance, at that very time." He went on to say:

> Sir, since all of that makes it "material," my client is entitled to your own sequestered deposition in the event that you refuse to recuse. Moreover, all conceivable means of conventional and electronic communication between yourself and . . . Craig will have to be subpoenaed, in order to learn just how "chance" the . . . [r]estaurant encounter actually was.

Gast also threatened to depose Judge Bataillon's wife, his brother-in-law, and Craig, "Unless, of course, you recuse now." He concluded, "Sir, I know that you will eventually do the right thing. I just pray that it happens in time to do the most justice to the office that you hold."

In May 2015, Judge Bataillon entered judgment for Florida in the approximate amount of $2.2 million. Later that month, Judge Bataillon granted Florida's motion for sanctions, concluding that Gast's motion to recuse was "'groundless and frivolous,'" and awarded $15,000 in attorney fees.[9] On appeal, this court did not review the district court's award of attorney fees, because Gast's license to practice law was suspended at the time he filed his brief, due to his failure to pay his annual dues and complete his required continuing legal education courses.[10]

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[9] *State of Florida v. Countrywide Truck Ins. Agency, supra* note 1, 294 Neb. at 403, 883 N.W.2d at 71.

[10] *State of Florida v. Countrywide Truck Ins. Agency, supra* note 1.

Amended formal charges were filed against Gast in February 2016, to which Gast filed an answer. The charges were based on three communications he sent to Judge Bataillon and Craig: exhibit A, the memorandum sent in April 2014; exhibit B, the letter sent in August 2014; and exhibit C, the letter sent in October 2014.

A disciplinary hearing was held before a referee in June 2016, at which Gast and Craig testified. At the hearing, Gast submitted an amended answer. The referee issued his report and recommendation, making the recommended finding that Gast had violated certain provisions of the Nebraska Rules of Professional Conduct and recommending that Gast be suspended for 30 days and placed on probation upon reinstatement for a period of 2 years. The counsel for discipline filed exceptions to the referee's report and recommended findings and a supporting brief, agreeing with some of the recommended findings and disagreeing with others. Gast did not file a brief or any exceptions. He appeared at oral arguments but did not argue or make any comments.

### 1. Charges

Gast was charged with violating two particular provisions of the Nebraska Rules of Professional Conduct in the amended formal charges. These rules provide that "[a] lawyer shall not: (1) seek to influence a judge . . . by means prohibited by law"[11] and that "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . . ."[12] Violation of these particular rules was alleged to constitute a violation of the general rule against professional misconduct, which provides: "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct [or] (d) engage in conduct that is

[11] § 3-503.5(a)(1).

[12] § 3-508.2(a).

prejudicial to the administration of justice."[13] These violations also were alleged to violate Gast's oath of office as an attorney, as provided in § 7-104, which requires an attorney to "solemnly swear [to] support the Constitution of the United States, and the Constitution of this state, and [to] faithfully discharge the duties of an attorney and counselor, according to the best of [his or her] ability."

Gast admitted that he had violated § 3-503.5(a)(1) of the Nebraska Rules of Professional Conduct by seeking to improperly influence Judge Bataillon by going "beyond arguing the issues of the case and the facts in evidence therein." But he denied that he had violated § 3-508.2(a) by making a statement that he knew was false or with reckless disregard as to its truth or falsity concerning the integrity of Judge Bataillon.

### 2. Exceptions to Recommendations of Referee

The Counsel for Discipline took exception to three of the referee's recommended findings and conclusions: (1) that Gast did not make the statement in exhibit B with reckless disregard for its truth or falsity, in violation of § 3-508.2(a); (2) that Gast had withdrawn his admission that he violated § 3-503.5(a)(1) by sending exhibit C and that Gast did not violate § 3-503.5(a)(1) by sending exhibit C; and (3) that Gast be suspended for 30 days and given probation for 2 years upon reinstatement.

## III. STANDARD OF REVIEW

[1-3] Because attorney discipline cases are original proceedings before this court, we review a referee's recommendations de novo on the record, reaching a conclusion independent of the referee's findings.[14] The basic issues in a disciplinary proceeding against an attorney are whether the Nebraska

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[13] § 3-508.4(a) and (d).

[14] See *State ex rel. Counsel for Dis. v. Walz*, 291 Neb. 566, 869 N.W.2d 71 (2015).

Supreme Court should impose discipline and, if so, the appropriate discipline under the circumstances.[15] Violation of a disciplinary rule concerning the practice of law is a ground for discipline, and disciplinary charges against an attorney must be established by clear and convincing evidence.[16]

## IV. ANALYSIS

### 1. § 3-503.5(a)(1): Seeking to Influence Judge by Means Prohibited by Law

The referee recommended that we find that Gast had violated § 3-503.5(a)(1) with respect to exhibits A and B, but not with respect to exhibit C. The Counsel for Discipline disagreed with the referee's recommended finding that Gast did not violate § 3-503.5(a)(1) with respect to exhibit C.

The referee recommended we find that Gast violated § 3-503.5(a)(1) by authoring and transmitting exhibits A and B on the basis that in his answer and at the hearing, Gast admitted that those communications violated that provision. But the referee made the recommended finding that Gast had not violated this provision with respect to exhibit C for two reasons. First, the referee appears to have concluded that Gast withdrew the admission made in his answer that exhibit C violated this provision. Second, the referee read our decision in *State ex rel. Counsel for Dis. v. Koenig*[17] as supporting a very narrow reading of the phrase "by means prohibited by law" in § 3-503.5(a)(1). He concluded that Gast did not seek to influence Judge Bataillon by means prohibited by law. We will address these two issues in turn.

We agree that Gast clearly admitted in his answer that he violated § 3-503.5(a)(1) by authoring and sending exhibit A.

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[15] *Id.*

[16] *State ex rel. Counsel for Dis. v. Ubbinga*, 295 Neb. 995, 893 N.W.2d 694 (2017).

[17] *State ex rel. Counsel for Dis. v. Koenig*, 278 Neb. 204, 769 N.W.2d 378 (2009).

We do not agree that Gast withdrew his admission that he violated that provision by sending exhibit C.

Gast admitted in his answer that he authored the letter and that by sending it, he "sought to improperly influence Judge Bataillon in violation of § 3-503.5(a)(1) of the Nebraska Rules of Professional Conduct." And Gast stated at the hearing that his answer admitted violating this rule with respect to exhibits A, B, and C. But in another part of his answer, he says of exhibit C that "although its content remained within the facts established on the record of the courtroom proceedings" of the *State of Florida v. Countrywide Truck Ins. Agency* case, "the threatening tone" of the letter, which was "transmitted on a personal and confidential basis, may indeed be violative of Comment [4] of § 3-503.5(a)(1) of the Nebraska Rules of Professional Conduct." The referee relied upon Gast's statements at the hearing, in which he appeared to equivocate on his admission: "I'm now of the opinion [that] I was too hasty in agreeing that this was offensive of any rule," and "I now regret the fact that I conceded a violation of Exhibit [C], but it's in the Answer."

Gast acknowledged that he did, in fact, admit to a violation of § 3-503.5(a)(1). At no point in the hearing did Gast seek to withdraw his admission orally or to amend his answer. We find that Gast has waived his right to contest the fact that he violated § 3-503.5(a)(1) of the Nebraska Rules of Professional Conduct by authoring and transmitting exhibits A and C.

Even if Gast had not made the admission, we conclude that he did violate that rule by sending those exhibits. We address this issue in order to clarify our interpretation of § 3-503.5(a)(1) of the Nebraska Rules of Professional Conduct and the *Koenig* case, which apparently caused some confusion.

Section 3-503.5(a)(1), which is based on rule 3.5(a)(1) of the American Bar Association (ABA) Model Rules of Professional Conduct, prohibits attorneys from seeking to influence a judge "by means prohibited by law." The relevant question is: What constitutes "means prohibited by law" for

purposes of this rule? Does this include only criminal acts, such as bribery? Or does "law" include rules of professional conduct applicable to attorneys and judges?

The editors' comments to § 3-503.5 of the Nebraska Rules of Professional Conduct, as well as the ABA Model Rules of Professional Conduct, state: "Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions."[18] This comment appears to support a broader interpretation of the term "means prohibited by law," to include means prohibited by the Nebraska Revised Code of Judicial Conduct.

The Restatement (Third) of the Law Governing Lawyers states that "[a] lawyer may not . . . attempt to influence [a judicial] officer otherwise than by legally proper procedures,"[19] and explains in a comment that "[t]he lawyer codes impose correlative duties on lawyers to avoid knowing participation in a violation of the judicial codes."[20] This persuasive authority (although not binding as are the Rules of Professional Conduct) supports a broader understanding of the prohibition on attempting to improperly influence a judge.

Similarly, other states with rules of professional conduct based on the ABA Model Rules of Professional Conduct have read rule 3.5(a) broadly.[21] For example, the Supreme Court of Louisiana expressly rejected an argument that the "phrase 'by means prohibited by law' [in rule 3.5(a)] must be construed

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[18] § 3-503.5, comment 1. Accord Model Rules of Prof. Conduct Rule 3.5, comment 1 (ABA 2004).

[19] Restatement (Third) of the Law Governing Lawyers § 113(2) at 191 (2000).

[20] *Id.*, comment *f.* at 193.

[21] E.g., *Louisiana State Bar Ass'n v. Harrington*, 585 So. 2d 514 (La. 1990). See, also, generally, *Mississippi Bar v. Lumumba*, 912 So. 2d 871 (Miss. 2005); *In re Disciplinary Action Against Garaas*, 652 N.W.2d 918 (N.D. 2002); *Disciplinary Action Against Wilson*, 461 N.W.2d 105 (N.D. 1990).

narrowly to include only such activities as would amount to obstruction of justice, public bribery, or other criminal acts."[22] Instead the court said, "'Conduct "prohibited by law" clearly includes violations of criminal law and presumably includes other acts that violate statutes, court rules, or other legal norms.'"[23] The court noted that the Rules of Professional Conduct and the Code of Judicial Conduct have the force of law and found that the attorney in that case violated rule 3.5(a) by attempting to induce a judge to violate the judicial canon prohibiting ex parte communications.[24]

The editors' comments to the Nebraska Rules of Professional Conduct, along with other persuasive authorities, support the conclusion that § 3-503.5(a)(1)'s prohibition on attempting to influence a judge "by means prohibited by law," includes by means prohibited by the Nebraska Revised Code of Judicial Conduct and the Nebraska Rules of Professional Conduct, and is not limited to means prohibited by criminal law.

Relevant to this case, § 5-302.4(B) of the Nebraska Revised Code of Judicial Conduct provides: "A judge shall not permit family, social, political, financial, *or other interests* or relationships to influence the judge's judicial conduct or judgment." The comment to that rule explains that "[a]n independent judiciary requires that judges decide cases according to the law and facts . . . ." (Emphasis supplied.) Section 5-302.4(A) states: "A judge shall not be swayed by public clamor or fear of criticism." Neb. Rev. Code of Judicial Conduct § 5-302.9(C) provides: "A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed." And comment 4 to § 3-503.5 of the Nebraska Rules of Professional Conduct explains that "[t]he advocate's function is to present evidence and argument so that the cause may be decided according to law."

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[22] *Louisiana State Bar Ass'n v. Harrington, supra* note 21, 585 So. 2d at 521.

[23] *Id.* at 521-22.

[24] *Id.*

Ours is a system in which judicial decisions must be made on the basis of the evidence properly before the court and the applicable law.[25] Urging a judge to make a judicial decision for reasons that go beyond the facts and law of the case may constitute a violation of an attorney's ethical obligations and may constitute an invitation for the judge to violate his or her own ethical duties. This is especially true when, as here, the communication is made in private and outside the public light of court room proceedings.

The referee perceived some tension between the broader interpretation of the term "by means prohibited by law" that the editors' comments to the rule support and the narrower interpretation the referee believed was supported by our decision in *Koenig*.[26] In *Koenig*, an attorney discipline case, Lyle J. Koenig represented a person—who was an associate in Koenig's law practice—charged with driving without a valid registration or proper proof of insurance. Koenig photographed the license plate of the county attorney, which was apparently also expired. He sent a picture of the expired license plate along with a letter and a draft "'Motion to Appoint Special Prosecutor'" to prosecute the county attorney for his expired vehicle registration.[27] In the letter, Koenig threatened to file the motion if the charges against

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[25] See, e.g., *Matter of Boso*, 160 W. Va. 38, 45, 231 S.E.2d 715, 718 (1977) ("[c]ourts decide cases on the basis of facts and law"). See, also, generally, e.g., *McNair v. Campbell*, 307 F. Supp. 2d 1277, 1332 (M.D. Ala. 2004), *affirmed in part, and in part reversed on other grounds* 416 F.3d 1291 (11th Cir. 2005) (noting proposition that "the administration of justice should be free from extraneous control and influence, that is, factors outside the facts and law upon which a case is based"); *Reed v. State*, 232 Miss. 432, 434, 99 So. 2d 455, 456 (1958) (stating that trials "should be decided on the facts and law, [free] of improper and irrelevant influences and possible prejudices"); *State v. Hansford*, 43 W. Va. 773, 777, 28 S.E. 791, 793 (1897) (stating that "courts must decide solely upon the facts and law of the case").

[26] *State ex rel. Counsel for Dis. v. Koenig, supra* note 17.

[27] *Id.* at 205, 769 N.W.2d at 382.

Koenig's associate were not dropped and promised secrecy if they were.

We found that Koenig's actions constituted "conduct that is prejudicial to the administration of justice," in violation of § 3-508.4(d) of the Nebraska Rules of Professional Conduct. We also concluded that Koenig had violated § 3-508.4(e) by suggesting that he was able to influence a public official through unethical means.

However, we found that Koenig had not violated § 3-508.4(b), which states that it is professional misconduct for an attorney to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," and that he had not violated § 3-503.5(a)(1). We said:

> In this case, the State of Nebraska has not brought a charge of bribery or attempted bribery against Koenig. There has been no trial or finding by any court that Koenig was guilty of any crime associated with the misconduct at issue. We decline to determine or hypothesize whether Koenig's misconduct in this case would constitute a criminal act—i.e., an act that is deemed criminal, beyond a reasonable doubt. *For similar reasons, we also conclude that there is insufficient evidence to show that Koenig violated § 3-503.5(a)* which provides that "[a] lawyer shall not: (1) seek to influence a judge, juror, prospective juror or other official by means prohibited by law." We therefore conclude that Koenig did not violate §§ 3-503.5(a)(1) and 3-508.4(b).[28]

The referee in the present case appears to have concluded that this section of our *Koenig* opinion adopted a narrow reading of the phrase "by means prohibited by law." But that section does not constitute an endorsement of an interpretation that limits the reach of § 3-503.5(a)(1) only to criminal acts. As our analysis in the *Koenig* opinion shows (and our review of the formal charges in that case confirms), the alleged

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[28] *Id.* at 210, 769 N.W.2d at 385 (emphasis supplied).

violation of § 3-503.5(a)(1) was premised on the allegation that Koenig had engaged in attempted bribery, not that he had violated or urged the county attorney to violate the ethical duties under the Nebraska Rules of Professional Conduct. To clarify any ambiguity, we disapprove of *Koenig* to the extent that it can be read as limiting our interpretation of § 3-503.5(a)(1) to violations of criminal law alone.

We conclude that there is clear and convincing evidence that Gast violated § 3-503.5(a)(1) by attempting to influence Judge Bataillon "by means prohibited by law," that is, by means prohibited by the Nebraska Revised Code of Judicial Conduct and by the Rules of Professional Conduct, when he attempted to convince the judge to grant his motion to recuse and rule in his favor in the case for reasons outside of the evidence in the case and the applicable law, and through extrajudicial communications.

In exhibit A, the memorandum that Gast sent to Judge Bataillon and opposing counsel Craig, he urged the judge to look to the applicable law in the case but then also urged him and Craig to "examine your respective consciences in light of your Christian upbringings." He goes on to write, "I can only speculate as to your personal reasons, but I choose not to. Unfortunately, whatever those might be, they may indeed overwhelm [Diederike's] health. If that happens, how will you feel? Not good, I'm sure." By doing so, Gast urged the judge to decide the case on the basis of his client's health rather than on the evidence in the case and the applicable law.

Gast went on to write, "I only ask now that each of you carefully consider the consequences for not terminating it now, before it gets beyond the control of any of us." He then urged the judge to decide the case on the basis of "how it could impact the integrity and reputation of an otherwise respectable Judgeship."

He then said, "If it is left to the Supreme Court" to reverse on this basis, "it could be very ugly indeed for everyone. Ending it now might allow for some face-saving for all concerned, and for some well-deserved relief for [Diederike]."

Here, Gast went beyond urging the court to decide on the basis of the evidence in the case and the applicable law, but to rule in his client's favor for "some face-saving" and for the sake of his client's well-being.

In exhibit C, Gast urged Judge Bataillon to reconsider the denial of his motion to recuse. He wrote to the judge that "you should realize that you have an ever-so-brief opportunity to quietly back out of this case on a purely technical ground, *i.e.* one that is *not* related to misconduct." (Emphasis in original.) Gast then wrote, "Before you elect to pass it [sic] up this chance, I respectfully submit that you think very carefully about your own interests." By writing this, Gast urged Judge Bataillon to either "back out of this case on a purely technical ground," presumably on Gast's subject matter jurisdiction argument, and to do so in order to protect the judge's own interests, his reputation.

Within exhibits A and C, Gast urged the judge to decide the case on the basis of the judge's reputation, the judge's "Christian upbringing[]," the judge's own interests, and the health and well-being of his client. But a judge is to make judicial decisions on the basis of the facts of the case and the applicable law.

By sending exhibits A and C, Gast violated § 3-503.5(a)(1) by attempting to influence Judge Bataillon to violate the Nebraska Revised Code of Judicial Conduct by deciding the case on improper and legally irrelevant grounds. As advocates, attorneys must "zealously assert[] the client's position," but must do so "under the rules of the adversary system," including our ethical rules.[29]

We also pause to make clear that Gast's conduct violated § 3-503.5(a)(1) not only because he went beyond arguing the facts and the law of the case, but because he did so in confidential, out-of-court communications. What made Gast's conduct unethical was that he not only made arguments that

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[29] Nebraska Rules of Professional Conduct, Preamble ¶ 2. See, also, *State ex rel. Counsel for Dis. v. Koenig, supra* note 17.

went beyond the evidence of the case and the applicable law, but that he went outside of the judicial system and made these improper arguments in private, confidential communications to the judge.

### 2. § 3-508.2(a): Making Statement With Reckless Disregard as to Its Truth or Falsity Concerning Integrity of Judge

The referee recommended that we find that there is not clear and convincing evidence that Gast violated the Nebraska Rules of Professional Conduct § 3-508.2(a) with respect to exhibit B. Specifically, the referee found that while Gast's statement that Judge Bataillon engaged in a "cover-up" was false, there is not clear and convincing evidence that Gast made the statement with reckless disregard for its truth or falsity. The Counsel for Discipline disagrees with the referee's recommended finding that Gast did not violate § 3-508.2(a). We agree with the Counsel for Discipline.

Section 3-508.2(a) of the Nebraska Rules of Professional Conduct states: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . . ." Comment 1 to § 3-508.2 explains that "false statements by a lawyer can unfairly undermine public confidence in the administration of justice."

While not raised by Gast, the referee cites authority that truth is an absolute defense to attorney sanctions for impugning the integrity of a judge and that the disciplinary body bears the burden of proving falsity.[30] Counsel for Discipline has proved by clear and convincing evidence that Gast's allegation that

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[30] See S*tanding Committee v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995) ("[a]ttorneys who make statements impugning the integrity of a judge are, however, entitled to other First Amendment protections applicable in the defamation context. To begin with, attorneys may be sanctioned for impugning the integrity of a judge or the court only if their statements are false; truth is an absolute defense. . . . Moreover, the disciplinary body bears the burden of proving falsity").

Judge Bataillon engaged in a "cover-up" of a friendship with Craig was false.

Everyone agrees that Gast did not make a knowingly false statement. That is, he did not make a false statement that he believed to be false. By all accounts, Gast may have believed that Judge Bataillon had engaged in a "cover-up" of a friendship with Craig. The relevant question is whether, under § 3-508.2(a), Gast acted "with reckless disregard as to [the] truth or falsity" of this allegation. We conclude that there is clear and convincing evidence that he did.

Because the relevant inquiry is whether Gast made the "cover-up" statement in exhibit B with reckless disregard as to its truth or falsity, we will focus on his knowledge at that time. We determine "reckless disregard" for the truth and falsity of a statement about the qualifications or integrity of a judge under § 3-508.2(a) under an objective standard: "Did the attorney lack any objectively reasonable basis for making the statement at issue, considering its nature and the context in which the statement was made?"[31]

In exhibit B, Gast accused Judge Bataillon and Craig of engaging in a "cover-up" of their "pre-suit relationship." He wrote:

> Now that the truth of your pre-suit relationship has been discovered, the Docket Sheet itself demonstrates the "cover-up" quality to each and every successive refusal to disclose it after your initial failure to do so. Check it out yourselves. It actually takes on a crescendo-like

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[31] See *In re Dixon*, 994 N.E.2d 1129, 1137 (Ind. 2013) (interpreting identical provision under Indiana Professional Conduct Rules). See, also, *Board of Prof. Responsibility v. Davidson*, 205 P.3d 1008, 1014 (Wyo. 2009) ("[d]eterminations of recklessness under [the Wyoming Rules of Professional Conduct] are made using an objective, rather than a subjective standard. . . . This means that the attorney must have had an 'objectively reasonable' basis for making the statements. . . . In other words, the standard is whether a reasonable attorney would have made the statements, under the circumstances, not whether this particular attorney, with her subjective state of mind, would have made the statements").

> appearance on its very face. The lesson about cover-ups is that they usually come undone eventually, and the consequences to those involved always amplify in direct proportion to their pre-discovery duration. This "cover-up" is more than 12 years old!

A coverup is generally defined as "[a]n attempt to prevent authorities or the public from discovering the truth about something; [especially] the concealment of wrongdoing by a conspiracy of deception, nondisclosure, and destruction of evidence," and "[a] cover-up often involves obstruction of justice."[32] It has also been defined as "a device or stratagem for masking or concealing" and "a [usually] concerted effort to keep an illegal or unethical act or situation from being made public."[33] Thus, accusing a judge of a "cover-up" of a relationship with counsel is an accusation that the judge has purposefully concealed an intentional violation of the judge's ethical obligations. No reasonable attorney would make such an accusation lightly and without a significant basis in fact.

While he has failed to file a brief with this court, Gast's answer appears to dispute the charged violation of § 3-508.2(a) on the basis that his statement that Judge Bataillon and Craig had engaged in a coverup "did not constitute a declarative statement of fact which could be deemed to be true or false[, but, rather,] constituted only a possible characterization, description or conclusion which could be derived from other facts." To the extent that this constitutes an argument that his statements are not subject to § 3-508.2(a) because they are merely expressions of opinion, not of fact, we disagree. As discussed above, the term "coverup" connotes an active concealment of improper or unethical conduct. This is not merely a subjective statement of opinion, but an allegation susceptible to an objective, factual inquiry.

At the time he sent exhibit B, Gast's only basis of knowledge upon which he may have reached his conclusion that Judge

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[32] Black's Law Dictionary 446 (10th ed. 2014).

[33] Merriam-Webster's Collegiate Dictionary 267 (10th ed. 2001).

Bataillon had engaged in a coverup was Gast's wife's conversation with Craig's ex-wife. At the time he sent the letter, he had not followed up with any of the individuals whose names he was given to substantiate the claim that Judge Bataillon and Craig had been friends. None of the facts provided to Gast, as relayed by Gast in his testimony, show anything but a general social acquaintance between the two. They played on the same softball team and socialized with the team and the players' spouses afterward, and also attended some of the same social events. Gast's motion to recuse, filed days before he sent exhibit B, shows that he knew the two played on the same softball team for only 3 years during the 1970's or early 1980's, well over 30 years earlier. He had no evidence of a continuing relationship. Most importantly, Gast had no evidence that either Craig or Judge Bataillon had acted to intentionally cover up any past relationship.

No reasonable attorney would accuse a judge of not only violating his ethical duty to disclose potential conflicts but of covering up a relationship with counsel on the sole basis of knowledge (obtained from the counsel's ex-spouse) that the two had decades earlier been general social acquaintances. No reasonable attorney would conclude that a failure to disclose an acquaintance with counsel from over 30 years ago was due to an attempt to cover up the relationship, rather than because the fact of the acquaintance was trivial or had been forgotten. No reasonable attorney would make this accusation without first obtaining a significant factual basis to substantiate it.

But Gast did not substantiate his claim before accusing Judge Bataillon of engaging in a coverup. His letters display an almost conspiracy-theory-like obsession with his belief that Judge Bataillon was biased against him. While any attorney, as a zealous advocate, is disappointed when he or she loses an argument the attorney feels should have been won, Gast's behaviors exceed reasonable conduct. A reasonable attorney would have amassed extensive substantiating evidence before lodging such a serious accusation of bias and unethical conduct against a judge. But Gast took the unremarkable fact of a

decades-ago social acquaintance between the judge and counsel to conclude that Judge Bataillon had engaged in a coverup. We find by clear and convincing evidence that Gast made the accusation of a coverup with reckless disregard as to its truth or falsity, in violation of § 3-508.2(a) of the Nebraska Rules of Professional Conduct.

### 3. Other Provisions

Gast admitted in his answer that he had violated the other provisions he was accused of violating: § 3-508.4(a) and (d) (violating rules of professional conduct and engaging in conduct prejudicial to administration of justice). We agree with the referee that Gast has waived any objection to the charges that he violated these provisions.

### 4. Oath of Office

Gast's oath of office as an attorney under § 7-104 includes the commitment to "faithfully discharge the duties of an attorney and counselor, according to the best of [one's] ability." By violating the Nebraska Rules of Professional Conduct as discussed above, he violated his oath of office.

### 5. Sanction

[4-8] Having concluded that Gast violated the Rules of Professional Conduct and his oath of office as attorney, we must determine the appropriate sanction. To determine whether and to what extent discipline should be imposed in a lawyer 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 offender generally, and (6) the offender's present or future fitness to continue in the practice of law.[34] Cumulative acts of attorney misconduct are distinguishable from isolated incidents,

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[34] *State ex rel. Counsel for Dis. v. Tighe*, 295 Neb. 30, 886 N.W.2d 530 (2016).

therefore justifying more serious sanctions.[35] Responding to disciplinary complaints in an untimely manner and repeatedly ignoring requests for information from the Counsel for Discipline indicate a disrespect for our disciplinary jurisdiction and a lack of concern for the protection of the public, the profession, and the administration of justice.[36] In evaluating attorney discipline cases, we consider aggravating and mitigating circumstances.[37] The propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.[38]

(a) Mitigating Factors

One mitigating factor is the fact that Gast has no prior history of discipline in his over four decades of legal practice in this state. While his license was suspended for a time due to his failure to pay his dues and complete his continuing legal education requirements, this did not involve a violation of the Rules of Professional Conduct.

Additionally, Gast's behavior does not appear to pose a risk to his clients or the public. It does not appear that his behavior here harmed his client in any way. In fact, he seemed to be motivated by a desire to serve his client, albeit in a seriously misguided manner. Gast appears to be a competent and capable attorney.

(b) Aggravating Factors

One of the chief aggravating factors is Gast's lack of remorse. At the hearing in this case, he stated several times that he did not regret sending the letter. He also stated, "I regret only the tone. There isn't anything in here that isn't absolutely true. There isn't anything in here that isn't absolutely appropriate . . . ."

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[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

Gast seems to lack any appreciation of how serious his violations were and how baseless and inappropriate his attacks on the integrity of Judge Bataillon were. What is troubling is Gast's inability to see anything wrong with his conduct. His lack of remorse is a significant aggravating factor, as is the serious nature of his infractions.

We also agree with the referee that during the hearing in this case, Gast engaged in unnecessary and inappropriate verbal attacks on the Counsel for Discipline. The Counsel for Discipline has an important job to do in our profession and has performed that job ably in this case.

## V. CONCLUSION

We conclude that the appropriate sanction is suspension from the practice of law for a period of 1 year, effective from March 3, 2017. After 1 year from the date of his suspension, Gast may apply for reinstatement. His reinstatement shall be conditioned on his being on probation for a period of 2 years. Gast is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323(B) of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of suspension.

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

# Janice M. Hinrichsen, Inc., a Nebraska corporation, appellant and cross-appellee, v. Messersmith Ventures, L.L.C., a Nebraska limited liability company, appellee and cross-appellant, and Risk Assessment and Management, Inc., a Nebraska corporation, appellee.

895 N.W.2d 683

Filed May 19, 2017. No. S-16-086.

1. **Conveyances: Fraud: Equity.** An action under the Uniform Fraudulent Transfer Act is equitable in nature.
2. **Conveyances: Fraud: Equity: Appeal and Error.** An appeal of a district court's determination that transfers of assets were in violation of the Uniform Fraudulent Transfer Act is equitable in nature.
3. **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.

Appeal from the District Court for Buffalo County: John P. Icenogle, Judge. Affirmed in part, and in part reversed and remanded with directions.

Larry W. Beucke, of Parker, Grossart, Bahensky, Beucke, Bowman & Symington, L.L.P., for appellant.

Bradley D. Holbrook and Nicholas R. Norton, of Jacobsen, Orr, Lindstrom & Holbrook, P.C., L.L.O., for appellee Messersmith Ventures, L.L.C.

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

Miller-Lerman, J.

## NATURE OF CASE

In this action brought under the Uniform Fraudulent Transfer Act (UFTA), Neb. Rev. Stat. §§ 36-701 to 36-712 (Reissue 2016), Janice M. Hinrichsen, Inc. (JMH), alleged that Risk Assessment and Management, Inc. (RAM), against whom JMH had a judgment from a previous action, had fraudulently transferred certain assets to Messersmith Ventures, L.L.C. The district court for Buffalo County entered judgment in favor of JMH in the amount of $250. JMH appeals, and Messersmith Ventures cross-appeals.

We conclude that the district court did not err when it implicitly found that a fraudulent transfer of assets had occurred. However, we further conclude that the judgment in the amount of $250 was not the appropriate relief. Instead, the appropriate relief afforded under the UFTA in this case is for the court to enter an order that would allow JMH's previous judgment against RAM to be satisfied by authorizing JMH to levy execution on the assets or the proceeds of the assets that RAM transferred to Messersmith Ventures. We therefore affirm the judgment of the district court to the extent it found that there was a fraudulent transfer, but we reverse the order to the extent it awarded JMH a monetary judgment of $250. We remand the cause with directions to the district court to order the appropriate relief.

## STATEMENT OF FACTS

Janice M. Hinrichsen purchased an insurance agency in Elm Creek, Nebraska, in 1999. She incorporated the business in 2000 as JMH and operated it under the name "Platte Valley Insurance Agency." In January 2011, JMH sold 90 percent of its assets to RAM; Chad Messersmith is the sole shareholder of RAM. Pursuant to the purchase agreement, RAM was to pay JMH $108,870 over a period of time. JMH and RAM

formed PVIA Partnership and operated the insurance agency through the partnership. RAM held a 90-percent interest in the partnership, and JMH held a 10-percent interest.

In late 2011, RAM failed to make a required payment under the purchase agreement. JMH thereafter left the partnership and filed an action against RAM to enforce the purchase agreement. In the amended complaint, this earlier case was referred to as "Case No. C112-88." In July 2012, the district court for Buffalo County entered a judgment in favor of JMH and against RAM in the amount of $98,606.94. In its answer in the instant case, Messersmith Ventures admits the existence of this judgment.

In October 2013, Messersmith created Messersmith Ventures to operate a business under the name "Mid-States Insurance Agency." On October 28, RAM, as managing partner of PVIA Partnership, transferred to Messersmith Ventures the customer list of PVIA Partnership for the amount of $250. The primary agency contracts of PVIA Partnership were subsequently renewed in the name of Messersmith Ventures. In November, RAM notified JMH that RAM was withdrawing as a partner of PVIA Partnership, and RAM filed paperwork with the Nebraska Secretary of State indicating that PVIA Partnership was dissolved effective October 31, 2013.

In February 2014, JMH filed the present action against Messersmith Ventures in the district court. JMH alleged in its complaint that RAM's transfer of PVIA Partnership assets to Messersmith Ventures was a fraudulent transfer. JMH alleged various reasons the transfer was fraudulent, including (1) the transfer was made with the actual intent to hinder, delay, or defraud; (2) the transfer was made without receiving a reasonably equivalent value, and RAM was engaged, or was about to engage, in a business or transaction for which its remaining assets were unreasonably small in relation to the business or transaction; (3) the transfer was made without receiving a reasonably equivalent value in exchange for the transfer, and RAM was insolvent at the time or became insolvent as a

result of the transfer; (4) the transfer was made to an insider for an antecedent debt, the debtor was insolvent at the time, and the insider knew or reasonably should have known the debtor was insolvent. These allegations generally tracked the language of provisions of the UFTA. JMH requested an order avoiding the transfer to allow the assets to be used to satisfy JMH's judgment against RAM and an order allowing JMH "to levy execution on the assets of Messersmith Ventures and [its] proceeds" in accordance with § 36-708(b) of the UFTA. JMH also requested "further relief as the Court deems just and equitable." JMH amended its complaint, and, inter alia, added RAM as a defendant and added a request for "a charging order charging the assets of Messersmith Ventures."

After a bench trial, the district court filed an order ruling on the action. After reviewing the evidence and JMH's allegations, the court stated, inter alia, that "the only assets considered valuable by [JMH] transferred by RAM would be the customer list and the agency contracts." The court concluded its order with the following paragraphs:

> Nebraska law provides that if the court determines that a transfer is voidable the creditor may recover judgment for the value of the asset transferred as adjusted, or the amount necessary to satisfy the creditor's claim, whichever is less. [Messersmith Ventures] at most acknowledges that the assets transferred were valued at $250.00. [JMH] obviously believes that the assets were valued at a substantially greater amount. It is the burden of [JMH], however, to establish the amount and value of the transferred assets. The court finds that [JMH] did not offer adequate and sufficient evidence to establish the value of the assets transferred at the time of the transfer. The court will therefore rely upon the testimony of [Messersmith Ventures] and enter judgment in favor of [JMH] and against [Messersmith Ventures] in the amount of $250.00. Interest will accrue from today's date at 2.137% per annum.

> The remaining issue is the request of [JMH] to levy an execution on the assets of [Messersmith Ventures] to satisfy [JMH's] judgment against RAM. Nebraska law provides that if a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds. The court again finds that the value of the asset transferred is $250.00 and [JMH] may levy execution against [Messersmith Ventures] to partially satisfy the debt of the transferor to [JMH]. The court, however, finds that there is not sufficient evidence as to the amount of proceeds received by [Messersmith Ventures] from the transferred assets, and the court therefore limits the execution to the amount set forth above.

JMH subsequently filed a motion for new trial, which the district court denied.

JMH appeals, and Messersmith Ventures cross-appeals.

## ASSIGNMENTS OF ERROR

In its appeal, JMH claims, restated, that the district court erred when it (1) failed to specifically find that the transfer of assets from RAM to Messersmith Ventures was a fraudulent transfer and (2) awarded a monetary judgment in the amount of $250 rather than, inter alia, the requested relief of permitting JMH to levy execution on all assets of Messersmith Ventures and their proceeds in accordance with § 36-708(b) or "a charging order" on the assets of Messersmith Ventures.

In its cross-appeal, Messersmith Ventures claims that the district court erred when it awarded relief to JMH, because no fraudulent transfer occurred. Messersmith Ventures contends that, in any event, there was no evidence the assets were worth anything more than the $250 that Messersmith Ventures paid to RAM.

## STANDARDS OF REVIEW

[1-3] An action under the UFTA is equitable in nature, *Reed v. Reed*, 277 Neb. 391, 763 N.W.2d 686 (2009), and an appeal

of a district court's determination that transfers of assets were in violation of the UFTA is equitable in nature. *Eli's, Inc. v. Lemen*, 256 Neb. 515, 591 N.W.2d 543 (1999). 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. *Id*.

## ANALYSIS

In its appeal, JMH assigns error both to the district court's failure to explicitly find that the transfer of assets from RAM to Messersmith Ventures was a fraudulent transfer and to the form of relief that the district court ordered. In its cross-appeal, Messersmith Ventures contends that no relief should have been given, because no fraudulent transfer occurred. It argues in the alternative that, if an award is warranted, the district court's award of $250 in monetary damages was correct. In view of the foregoing arguments, both parties raise issues regarding (1) whether the record supported a finding that a fraudulent transfer occurred and (2) whether the relief given by the district court was appropriate. In our de novo review of the record in this equity action, we consider together the parties' arguments regarding each of these issues. As explained below, we conclude that, although the record supported the district court's implicit finding that a fraudulent transfer occurred, the monetary judgment awarded by the district court was not appropriate relief under the UFTA in this case.

### *The Record Supports the Court's Implicit Finding That Under the UFTA, There Was a Fraudulent Transfer.*

We initially address JMH's claim that the district court erred when it failed to specifically find that a fraudulent transfer

occurred under the UFTA. We agree that, although the court entered a monetary judgment in favor of JMH, it did not explicitly state in its journal entry that it found RAM's transfer of assets to Messersmith Ventures was a fraudulent transfer. However, because JMH brought its action under the UFTA, and because relief under the UFTA generally requires a finding that a fraudulent transfer occurred as a predicate to relief, we read the district court's findings and its entry of a monetary judgment in favor of JMH as an implicit finding that a fraudulent transfer occurred.

In the absence of a claim that JMH made a request for specific findings under Neb. Rev. Stat. § 25-1127 (Reissue 2016), we believe the district court's narrative of its findings was adequate. Further, we note that regardless of whether the district court made an explicit or an implicit finding that a fraudulent transfer had occurred, on appeal, we review the question de novo on the record and reach a conclusion independent of the finding of the district court. Therefore, in our appellate analysis, we consider whether the record supports a finding that a fraudulent transfer occurred.

Sections 36-705 and 36-706 describe various types of transfers that would be considered fraudulent for purposes of the UFTA. JMH contends that RAM's transfer of the assets at issue in this case to Messersmith Ventures was fraudulent, because the debt arose before the transfer was made, no reasonably equivalent value was received in exchange for the transfer, and RAM was insolvent at the time of the transfer. JMH's argument appears to be based on § 36-706(a) which provides in relevant part as follows:

> A transfer made . . . by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made . . . if the debtor made the transfer . . . without receiving a reasonably equivalent value in exchange for the transfer . . . and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer . . . .

Messersmith Ventures does not appear to dispute that RAM's debt to JMH reflected in the judgment against RAM in case No. C112-88, arose before the transfer at issue, nor does it appear to dispute that RAM was insolvent at the time of the transfer or became insolvent as a result of the transfer. Instead, Messersmith Ventures claims that JMH failed to prove a fraudulent transfer of assets had occurred for two reasons: (1) neither the customer lists nor the agency contacts transferred were "assets" within the meaning of the UFTA, because at all relevant times, they were subject to a valid lien of another creditor, and (2) even if a transfer of assets occurred, JMH failed to show that the transfer was not for a reasonably equivalent value, because there was no evidence the assets were worth more than the $250 that Messersmith Ventures paid to RAM.

Regarding Messersmith Ventures' first argument, the word "asset" is defined in § 36-702(2) of the UFTA as follows: "Asset means property of a debtor, but the term does not include[, inter alia,] property to the extent it is encumbered by a valid lien." Messersmith Ventures argues that the evidence shows that RAM's assets, including the customer lists and agency contracts, were encumbered by a bank's security interest which operated as a valid lien against RAM's assets "in the amount of at least $22,750.00." Brief for appellee on cross-appeal at 12. Messersmith Ventures contends that because the assets transferred to it by RAM were worth no more than the $250 it paid to RAM, the transferred assets were fully encumbered by the bank's lien and therefore not "assets" within the meaning of the UFTA. See § 36-702(2).

Messersmith Ventures alternatively argues that JMH did not prove that the transfer was made "without receiving a reasonably equivalent value in exchange for the transfer" as required for a fraudulent transfer under § 36-706(a). Messersmith Ventures asserts that the district court found that JMH had not proved that the transferred assets were worth anything more than the $250 that Messersmith Ventures paid to RAM

and that therefore, in the language of § 36-706(a), RAM had received "a reasonably equivalent value" in exchange for the transfer.

Both of these arguments are premised on Messersmith Ventures' assertion that JMH did not present evidence to prove that the assets transferred to it by RAM were worth anything more than the $250 as found by the court. But, based on our de novo review of the record, we disagree with the court's determination that the assets transferred were worth no more than $250.

Having reviewed the record, we recognize that JMH did not establish the specific value of the assets RAM transferred to Messersmith Ventures in October 2013. However, it was not required to do so to support its contention that the $250 was not a reasonably equivalent value compared to the assets received. The evidence shows that in January 2011, JMH sold 90 percent of its assets to RAM for $108,870; that in July 2012, the district court entered judgment in favor of JMH and against RAM in case No. C112-88 in the amount of $98,606.94; and that in October 2013, RAM transferred its customer lists and agency contracts to Messersmith Ventures for $250.

The record supports JMH's assertion that the $108,870 which RAM paid JMH in 2011 included 90 percent of the book of insurance business and good will of the Platte Valley Insurance Agency, as well as furniture, fixtures, and equipment. The purchase included the carrier and customer contracts, and as JHM notes, "RAM utilized these contracts and was paid commissions of $83,311 in 2012 . . . and $47,220.00 in 2013." Brief for appellant at 12.

It is reasonable to infer from such evidence that the assets RAM transferred to Messersmith Ventures in October 2013 were basically the book of insurance business that RAM purchased from JMH in January 2011 at a price in excess of $100,000. It is further reasonable to infer that the worth of such assets in October 2013 was considerably closer to the $98,606.94 judgment, rather than the $250 that Messersmith

Ventures paid to RAM. Therefore, although JMH did not prove a specific value for the transferred assets, the evidence was sufficient to find both that RAM transferred the assets "without receiving a reasonably equivalent value in exchange for the transfer," under § 36-706(a), and that the transferred assets were not entirely encumbered by the bank's security interest.

Based on this and other evidence noted in our de novo review of the record, we conclude that the district court did not err when it implicitly found that a fraudulent transfer had occurred. Having determined that a fraudulent transfer occurred, we next consider whether the district court awarded appropriate relief under the UFTA.

*Based on the Nature of the Fraudulent Transfer in This Case, a Monetary Judgment of $250 Was Not Appropriate Relief; the Court Instead Should Have Ordered That JMH May Levy Execution on the Assets That Were Transferred to Messersmith Ventures or the Proceeds of Such Assets.*

Both parties claim on appeal that the district court erred when it awarded a monetary judgment in the amount of $250. Messersmith Ventures claims that the judgment was in error, because JMH did not prove a fraudulent transfer and, therefore, should not have been awarded any relief, whereas JMH claims that it was entitled to relief, but that the money judgment in the amount of $250 was not the appropriate relief. We concluded above that JMH proved a fraudulent transfer, and we therefore reject Messersmith Ventures' argument that JMH should not have been awarded any relief. We further conclude that, applying the UFTA, the district court's judgment in favor of JMH in the amount of $250 was not appropriate relief under the facts of this case.

As an initial matter with respect to the appropriate form of relief, we comment briefly on JMH's argument that it was entitled to a "charging order." We believe JMH is contemplating

a provision in the Nebraska Uniform Limited Liability Company Act, Neb. Rev. Stat. § 21-142(a) (Reissue 2012), which provides:

> On application by a judgment creditor of a member or transferee, a court may enter a charging order against the transferable interest of the judgment debtor for the unsatisfied amount of the judgment. A charging order constitutes a lien on a judgment debtor's transferable interest and requires the limited liability company to pay over to the person to which the charging order was issued any distribution that would otherwise be paid to the judgment debtor.

Section 21-142(a) is similar to the limited liability company laws adopted in other states. The Florida equivalent of Nebraska's § 21-142(a) has been explained as follows: "A charging order issued under this provision acts as a lien on the member's interest in the limited liability company and grants the judgment creditor the right to receive distributions from the company which the member would have otherwise been entitled to receive." *Wells Fargo Bank, N.A. v. Barber*, 85 F. Supp. 3d 1308, 1313 (M.D. Fla. 2015). The court in *Barber* continued: "Generally, 'a charging order is the sole and exclusive remedy by which a judgment creditor . . . may satisfy a judgment' from a member's interest in a limited liability company or distributions therefrom." *Id*. See, similarly, § 21-142(g).

In *Barber*, plaintiffs alleged four counts and sought relief under the Florida Limited Liability Company Act and the Florida Uniform Fraudulent Transfer Act. Therefore, the federal district court considered both statutes. In contrast, the instant case has been tried under the UFTA, and accordingly, we restrict our consideration of the appropriate relief to the UFTA's remedies. Remedies under the UFTA are directed at the assets that were transferred; in this case, no membership interests were transferred. A charging order is directed at reaching a debtor's membership interest and is therefore

not applicable to the assets transferred in this case. Compare, § 36-708 (pertaining to remedies) with § 21-142(a) (pertaining to charging orders in connection with limited liability companies), and Neb. Rev. Stat. § 67-430 (Reissue 2009) (pertaining to charging orders in connection with partnerships).

Section 36-708 of the UFTA is entitled "Remedies of creditors," and § 36-709 of the UFTA is entitled "Defenses, liability, and protection of transferee." Both sections relate to remedies. Subsection (a) of § 36-708 sets forth remedies including, inter alia, avoidance of the transfer, attachment against the asset transferred, and "any other relief the circumstances may require." The district court's award of a monetary judgment set at the amount of $250 appears to be either "other relief" under § 36-708(a)(3)(iii) or relief in the form of avoidance of the transfer, which pursuant to § 36-709(b) may be accomplished by a "judgment for the value of the asset transferred." However, as we discussed above, the evidence in this case indicates that the value of the asset transferred was significantly more than the $250 that Messersmith Ventures paid to RAM.

We have considered the record de novo in this equitable case. We determine instead of the relief directed by the district court, the more appropriate relief in this case is that set forth in § 36-708(b) which provides that "[i]f a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds." In this case, JMH is the creditor who had obtained a $98,606.94 judgment on a claim against RAM in case No. C112-88. Given the fraudulent transfer and the equities involved, the court in this case should order, pursuant to § 36-708(b), that JMH may levy execution on the assets or the proceeds of the assets that RAM transferred to Messersmith Ventures. This remedy allows JMH to levy execution on the assets transferred to Messersmith Ventures or their continuing proceeds in order to satisfy JMH's judgment against RAM. This remedy is more equitable than the specific monetary

judgment awarded by the district court because it allows JMH to execute on the assets or the proceeds of such assets in the hands of Messersmith Ventures to the extent of their productive value and JMH's judgment against RAM, rather than limiting JMH's recovery to $250.

## CONCLUSION

Based on our de novo review of the record, we conclude that the district court did not err when it implicitly found that RAM's transfer of assets to Messersmith Ventures was a fraudulent transfer. We affirm this part of the court's order. However, we conclude that the district court's award of a monetary judgment of $250 in favor of JMH was not appropriate relief in this case and that instead, the court should have ordered, pursuant to § 36-708(b), that JMH may levy execution of its judgment against RAM on the assets or the proceeds of the assets that RAM transferred to Messersmith Ventures. We reverse the district court's monetary judgment of $250, and we remand the cause with directions to the district court to order the appropriate relief in accordance with this opinion.

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

Cassel, J., concurring.

The court's opinion, which I join in full, mandates relief under Neb. Rev. Stat. § 36-708(b) (Reissue 2016). This statute authorizes the trial court to order that the judgment creditor "may levy execution on the asset transferred or its proceeds."[1] Thus, this court says, the trial court should have ordered that the creditor "may levy execution of its judgment against [the transferee] on the assets or the proceeds of the assets." On remand, the trial court undoubtedly will do so.

But, in this case, the transferred assets are intangible. Our execution statute makes only "[l]ands, tenements, goods and

[1] § 36-708(b).

chattels, not exempt by law, . . . liable to be taken on execution and sold . . . ."[2] This may prompt some confusion on how our mandate is to be carried out. It may be that an officer to whom a writ of execution is directed regarding intangible assets may find it outside of his or her experience. But the means of carrying out our mandate is a matter that in the first instance must be addressed in the court below.

Equitable principles should guide the parties and the trial court. A claim to set aside fraudulent conveyances is an action in equity.[3] Where a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation.[4] Where relief may be granted, although no precedent may be found, the court will so proceed.[5]

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[2] Neb. Rev. Stat. § 25-1503 (Reissue 2016).

[3] *Bowers v. Dougherty*, 260 Neb. 74, 615 N.W.2d 449 (2000).

[4] *O'Connor v. Kearny Junction*, 295 Neb. 981, 893 N.W.2d 684 (2017).

[5] *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004).

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

# LaTanya Thomas, individually and as Special Administrator of the Estate of Tyler Thomas, deceased, and Kevin Semans, appellants, v. Board of Trustees of the Nebraska State Colleges and Joshua Keadle, appellees.

895 N.W.2d 692

Filed May 19, 2017. No. S-16-480.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment.** On a motion for summary judgment, the question is not how the factual issue is to be decided but whether any real issue of material fact exists.
4. ____. Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
5. **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.
6. ____: ____. Once the moving party makes a prima facie case, the burden shifts to the party opposing a motion for summary judgment to produce admissible contradictory evidence showing the existence of a material issue of fact that prevents judgment as a matter of law.

7. **Tort Claims Act: Proof.** To recover in a negligence action brought under the State Tort Claims Act, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.
8. **Negligence.** The existence of a duty generally serves as a legal conclusion that an actor must exercise such degree of care as would be exercised by a reasonable person under the circumstances.
9. **Negligence: Public Policy.** Whether a duty exists is a policy question.
10. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law.
11. ____. In a negligence action, in order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence.
12. ____. Foreseeability is analyzed as a fact-specific inquiry.
13. ____. Small changes in the facts may make a dramatic change in how much risk is foreseeable.
14. ____. The law does not require precision in foreseeing the exact hazard or consequence which happens; it is sufficient if what occurs is one of the kinds of consequences which might reasonably be foreseen.
15. **Negligence: Assault.** In order to make a risk of attack foreseeable, the existing circumstances to be considered must have a direct relationship to the harm incurred.
16. **Negligence: Judgments.** Courts should leave determinations of foreseeable risk to the trier of fact unless no reasonable person could differ on the matter.
17. ____: ____. Although questions of foreseeable risk are ordinarily proper for a trier of fact, courts may reserve the right to determine that the defendant did not breach its duty, as a matter of law, if reasonable people could not disagree about the unforeseeability of the risk of the harm incurred.

Appeal from the District Court for Nemaha County: Daniel E. Bryan, Jr., Judge. Affirmed.

Vincent M. Powers and Elizabeth A. Govaerts, of Vincent M. Powers & Associates, for appellants.

Ronald F. Krause and Patrick B. Donahue, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee Board of Trustees of the Nebraska State Colleges.

No appearance for appellee Joshua Keadle.

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

Miller-Lerman, J.

## NATURE OF CASE

In the fall of 2010, Tyler Thomas (Thomas) and Joshua Keadle were both students at Peru State College (PSC). On December 3, 2010, Thomas went missing. This appeal arises from Keadle's alleged abduction, rape, and murder of Thomas.

LaTanya Thomas, as the special administrator of Thomas' estate, and LaTanya Thomas and Kevin Semans, individually as Thomas' mother and father (collectively the appellants), filed their fifth amended complaint against the Board of Trustees of the Nebraska State Colleges (Board) and Keadle in the district court for Nemaha County. The appellants filed their action under the State Tort Claims Act and sought damages from the Board for the wrongful death of Thomas, Thomas' pain and suffering, and LaTanya Thomas' and Semans' severe emotional distress. The appellants' causes of action are premised upon the Board's alleged negligence. The appellants also sued Keadle, but their claims against Keadle are not before the court in this appeal.

The appellants and the Board each filed a motion for summary judgment. After a hearing, the district court filed an order in which it granted the Board's motion for summary judgment, denied the appellants' motion, and dismissed the appellants' fifth amended complaint against the Board with prejudice. The appellants subsequently filed a motion for default judgment against Keadle, which was granted as to liability. Following a jury trial on damages, the district court filed an order in which it entered a monetary judgment against Keadle based on the jury's monetary verdict.

The appellants appeal from the district court's order in which it granted summary judgment in favor of the Board. Because we conclude that the risk of Keadle's alleged acts of abducting, raping, and murdering Thomas was not foreseeable

as a matter of law, we affirm the district court's order which granted summary judgment in favor of the Board.

## STATEMENT OF FACTS

In the fall of 2010, Thomas was a freshman student at PSC and lived in a dormitory on campus. Keadle was also a student at PSC, and he lived in the dormitory room next to Thomas'. Keadle was 10 years older than Thomas. Thomas went missing and was last seen on December 3.

In their fifth amended complaint, filed March 19, 2014, the appellants alleged that Thomas was abducted, assaulted, and murdered by Keadle. Although Thomas' body has not been recovered, she has been declared dead by a Nebraska court.

In their fifth amended complaint against the Board and Keadle, the appellants sought damages for the wrongful death of Thomas, for Thomas' pain and suffering prior to her death, and for the severe emotional distress of LaTanya Thomas and Semans as Thomas' parents and next of kin. The appellants' causes of action against the Board are premised upon the Board's negligence. Claims against Keadle are not at issue in this appeal.

On May 27, 2014, the Board filed its answer in which it generally denied the allegations set forth in the appellants' fifth amended complaint and raised various affirmative defenses.

On July 2, 2015, the appellants and the Board each filed a motion for summary judgment. A hearing on the parties' motions was held. Prior to the hearing, the Board filed objections and a motion to strike a number of the appellants' exhibits, including police reports and transcripts and recordings of police interviews with Keadle. The Board's objections to these exhibits were based on "the grounds of being irrelevant, immaterial and constituting hearsay and containing hearsay." At the hearing on the motions for summary judgment, the district court stated that it was "going to take the exhibits offered subject to these objections and . . . the motion."

The evidence received at the hearing is summarized as follows: In August 2010, Keadle applied to be a volunteer strength and conditioning assistant coach for the PSC women's basketball team. When the athletic director learned that Keadle was serving as a voluntary staff member prior to a criminal background check, Keadle's involvement with the women's basketball team was terminated pending completion of a check. The human resources office's criminal background check showed minor traffic offenses.

In September 2010, PSC's director of housing and security received an email from one of his employees informing him that according to a sheriff's deputy, Keadle had been "convicted of robbery of $300 and stealing a purse, in '09 also has other burglary's [sic] but he was not charged for them, also has a forcible fondling (RAPE) on a 18yr old female charge on record, but the charges were droped [sic]." The director of housing and security testified that he verbally informed PSC's athletic director, PSC's vice president for enrollment management and student affairs, and PSC's human resources director about the contents of the email before Thomas' disappearance, but the three administrators deny that they learned about the contents of the email prior to Thomas' disappearance. A second background check on Keadle conducted by the human resources office showed minor traffic offenses and a misdemeanor theft conviction. The director of housing and security recommended that Keadle be removed from the dormitory.

During this time, PSC's athletic director contacted the athletic director at a college Keadle had previously attended for a reference regarding Keadle. The athletic director at that college did not recommend hiring Keadle, and PSC's athletic director decided that Keadle would not be allowed to serve as a voluntary assistant.

In September 2010, Keadle was charged with two separate violations of PSC's code of conduct based on allegations of inappropriate sexual behavior toward two female

students. Neither of the complaints involved Thomas, and neither involved physical contact. With respect to the first charge, Keadle pled responsible and was issued sanctions that consisted of online educational activity and 10 hours of community service. Keadle did not complete these sanctions. With respect to the second charge, Keadle pled not responsible, and after a hearing, he was found not responsible.

PSC's vice president for enrollment management and student affairs testified that although Keadle could have been dismissed from PSC for failure to complete the sanctions, such action would have been out of line with PSC's general past practices. Instead, she testified that generally, when a student failed to complete a sanction, a hold was placed on the student's account so the student could not proceed beyond that semester.

In October 2010, Keadle was charged with a third violation of PSC's code of conduct, because he had damaged the door to his dormitory room. Keadle failed to attend a meeting regarding this incident, and the matter was turned over to the Nemaha County authorities. As of December 3, it was being processed in the court system.

On August 19, 2015, the district court filed its order regarding the parties' motions for summary judgment. The district court did not make specific rulings regarding the Board's objections to the exhibits; instead, the district court stated: "The court has excluded from its consideration all irrelevant facts submitted and any hearsay that was offered for the purpose of proving the truth of said facts." The district court first determined that, based on the admissible evidence, the Board did not owe a duty to Thomas to prevent Keadle's violent actions, because any such actions occurred off PSC's campus. The district court then determined that even if the court had determined there were inferences indicating that the crime or part of the crime had occurred on campus, the appellants failed to present evidence creating a material issue of fact whether the Board could have or should

have foreseen that Keadle would harm Thomas. The district court stated:

> While the [appellants'] counsel made a compassionate presentation for his clients by assembling various faults with Keadle[,] the totality of what is in the record known by the Board of Keadle prior to December 3, 2010, falls far short of what is necessary to present a factual issue of foreseeability to a fact finder. It would be a quantum leap in foreseeability.

Based on the foregoing, the district court granted summary judgment in favor of the Board and denied the appellants' motion for summary judgment. The district court dismissed the appellants' fifth amended complaint against the Board with prejudice.

Subsequently, the district court granted the appellants' motion for default judgment against Keadle and entered default judgment against him on the issue of liability. A jury trial was held regarding the issue of damages against Keadle, and the district court filed an order in which it entered a monetary judgment on the jury's verdict.

The appellants filed a timely appeal from the district court's August 19, 2015, order which granted summary judgment in favor of the Board.

## ASSIGNMENTS OF ERROR

The appellants claim, consolidated and restated, that the district court erred when it (1) granted the Board's motion for summary judgment, (2) determined that the Board did not owe a duty to protect Thomas, and (3) determined that Keadle's alleged abduction, assault, and murder of Thomas were not foreseeable.

## STANDARDS OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those

facts and that the moving party is entitled to judgment as a matter of law. *Bixenmann v. Dickinson Land Surveyors*, 294 Neb. 407, 882 N.W.2d 910 (2016), *modified on denial of rehearing* 295 Neb. 40, 886 N.W.2d 277. 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

The appellants generally claim that the district court erred when it granted summary judgment in favor of the Board. The appellants more specifically claim that the district court erred when it determined that the Board did not owe Thomas a duty of care and determined that even if the Board owed Thomas a duty, no reasonable person would find that it breached such duty, because Keadle's conduct in allegedly abducting, raping, and murdering Thomas was not foreseeable. Although our reasoning differs somewhat from that of the district court, for the reasons explained below, we reject the appellants' assignments of error.

[3,4] The principles regarding summary judgment are well established. On a motion for summary judgment, the question is not how the factual issue is to be decided but whether any real issue of material fact exists. *Cisneros v. Graham*, 294 Neb. 83, 881 N.W.2d 878 (2016). 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 such party the benefit of all reasonable inferences deducible from the evidence. *Strode v. City of Ashland*, 295 Neb. 44, 886 N.W.2d 293 (2016). Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Id*.

[5,6] 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. *Cisneros v. Graham, supra*. Once the moving party makes a prima facie case, the burden shifts to the party opposing the motion to produce admissible contradictory evidence showing the existence of a material issue of fact that prevents judgment as a matter of law. *Id*.

[7] To recover in a negligence action brought under the State Tort Claims Act, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages. *Ashby v. State*, 279 Neb. 509, 779 N.W.2d 343 (2010). To warrant summary judgment in its favor, a defendant must submit evidence showing the absence of at least one of these elements. Here, the Board contended, inter alia, that as a matter of law, the risk of the alleged abduction, rape, and murder of Thomas was not reasonably foreseeable, and therefore, the Board did not breach its duty. We agree.

[8-10] In the past, we used the risk-utility test to determine the existence of a tort duty. See *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010). But in *A.W.*, we abandoned the risk-utility test and adopted the duty analysis set forth in the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010). We generally held that foreseeable risk is an element of the determination of negligence, not legal duty. *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra.* After *A.W.*, the existence of a duty generally serves as a legal conclusion that an actor must exercise that degree of care as would be exercised by a reasonable person under the circumstances. Moreover, "[d]uty rules are meant to serve as broadly applicable guidelines for public behavior, i.e., rules of law applicable to a category of cases." *Id*. at 212-13, 784 N.W.2d at 914-15. Whether a duty exists is a policy question. *A.W. v. Lancaster Cty. Sch. Dist. 0001, surpa*. Whether a legal duty exists for actionable negligence is a question of law. See,

*Pittman v. Rivera*, 293 Neb. 569, 879 N.W.2d 12 (2016); *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra*.

We have previously recognized that schools owe their students a duty of reasonable care. See *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra*. Therefore, in this case, contrary to the district court's conclusion, the Board owed Thomas a duty of reasonable care.

Having determined that the Board owed a duty of reasonable care to Thomas, we must review the summary judgment evidence as it bears on the remaining elements of negligence. We turn first to the issue of what the evidence shows with respect to whether the Board breached its duty of reasonable care. In this regard, the appellants argue that because Keadle's actions were foreseeable, the Board breached its duty, or, at least, there is a question of fact as to whether the Board breached its duty. Because we conclude that the risk of Keadle's actions was not foreseeable as a matter of law, we reject this argument. Accordingly, there was no breach of duty by the Board.

[11-14] We have stated that in order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence. *Pittman v. Rivera, supra*; *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra*. Foreseeability is analyzed as a fact-specific inquiry. See, *Hodson v. Taylor*, 290 Neb. 348, 860 N.W.2d 162 (2015); *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra*. The foreseeability analysis requires us to ask what the defendants knew, when they knew it, and whether a reasonable person would infer from those facts that there was a danger. *Id*. Small changes in the facts may make a dramatic change in how much risk is foreseeable. *Id*. The law does not require precision in foreseeing the exact hazard or consequence which happens; it is sufficient if what occurs is one of the kinds of consequences which might reasonably be foreseen. *Hodson v. Taylor, supra*. See, also, *Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999).

[15-17] In this case, the appellants allege that Keadle violently attacked Thomas. In order to make a risk of attack foreseeable, the existing circumstances to be considered must have a direct relationship to the harm incurred. See, *Pittman v. Rivera, supra*; *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra*. We have stated that courts should leave determinations of foreseeable risk to the trier of fact unless no reasonable person could differ on the matter. See *Pittman v. Rivera, supra*. Although questions of foreseeable risk are ordinarily proper for a trier of fact, courts may reserve the right to determine that the defendant did not breach its duty, as a matter of law, if reasonable people could not disagree about the unforeseeability of the risk of the harm incurred. See *Hodson v. Taylor, supra*. Therefore, although foreseeability is a question of fact, there remain cases where foreseeability can be determined as a matter of law, such as by summary judgment. *Id*.

As stated above, in this case, the appellants argue that the evidence shows Keadle's conduct in allegedly abducting, raping, and murdering Thomas was reasonably foreseeable and that because such conduct was reasonably foreseeable, the Board breached its duty of reasonable care owed Thomas. The appellants further argue that at the very least, there is a question of fact as to whether the risk of Keadle's acts was reasonably foreseeable.

In order to determine whether the Board breached its duty of care, we must determine whether the Board, under the facts and circumstances of this case, conducted itself reasonably. We fully recognize that the record indicates that there were warning signs with respect to Keadle's conduct at PSC; however, nothing in the record amounts to a question of fact as to whether such conduct forecast a risk that Keadle might abduct, rape, and murder Thomas.

In support of their argument that the harm incurred by Thomas was reasonably foreseeable, the appellants point to various facts in the record which we have recited above regarding Keadle's past and his actions while a student living

in the dormitory at PSC. Even viewing the evidence in the light most favorable to the appellants as the nonmoving party, as we must on a review of summary judgment, and even assuming without deciding that the challenged evidence was admissible, we conclude as a matter of law that no reasonable fact finder could determine that Keadle's alleged abduction, rape, and murder of Thomas were a foreseeable risk.

The facts indicate that Keadle's behavior was seriously problematic for PSC and other students, but not reasonably indicative that he posed a risk of a violent assault on the person of another student. And although the Board might have anticipated continued problems with Keadle, no reasonable fact finder could find that the harm that occurred was a reasonably foreseeable risk based upon the circumstances present in this case. That is, nothing in the record indicates there was a risk that Keadle's conduct would result in the abduction, rape, and murder of another student. In order to make a risk of attack foreseeable, the circumstances to be considered must have a direct relationship to the harm incurred. See *Pittman v. Rivera*, 293 Neb. 569, 879 N.W.2d 12 (2016). Such direct relationship between the circumstances of the case and the harm allegedly incurred by Thomas is lacking. We agree with the underlying reasoning of the district court when it granted summary judgment in favor of the Board.

## CONCLUSION

Because we determine as a matter of law that Keadle's alleged abduction, rape, and murder of Thomas were not a foreseeable risk, we affirm the district court's order which granted summary judgment in favor of the Board.

Affirmed.

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

# State of Nebraska, appellee, v. Robyn J. Wood, appellant.

895 N.W.2d 701

Filed May 26, 2017. No. S-16-190.

1. **Motions for New Trial: Appeal and Error.** A trial court's order denying a motion for new trial is reviewed for an abuse of discretion.
2. **Criminal Law: Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
3. **Judgments: 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. **Criminal Law: Statutes: Legislature: Intent.** In reading a penal statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
5. **Statutes: Legislature: Intent: Appeal and Error.** An appellate court will not look beyond a statute to determine the legislative intent when the words are plain, direct, or unambiguous.
6. **Sexual Assault: Words and Phrases.** Under Neb. Rev. Stat. § 28-322.04 (Reissue 2008), the word "subject" means to cause to undergo the action of something specified.
7. **Jury Instructions: Appeal and Error.** Harmless error analysis applies to instructional errors so long as the error at issue does not categorically vitiate all the jury's findings.

8. **Verdicts: Juries: Appeal and Error.** In a criminal case tried to a jury, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
9. **Motions for New Trial: Proof.** In order for a new trial to be granted, it must be shown that a substantial right of the defendant was adversely affected and that the defendant was prejudiced thereby.
10. **Trial: Evidence: Appeal and Error.** Because overruling a motion in limine is not a final ruling on admissibility of evidence and, therefore, does not present a question for appellate review, a question concerning admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection to the evidence during trial.

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

Jim K. McGough, of McGough Law, P.C., L.L.O., for appellant.

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

Heavican, C.J., Wright, Miller-Lerman, Stacy, Kelch, and Funke, JJ.

Kelch, J.

## INTRODUCTION

Following a jury trial, Robyn J. Wood appeals her conviction of first degree sexual assault of a protected individual, a Class III felony under Neb. Rev. Stat. § 28-322.04(3) (Reissue 2008). The parties do not dispute the status of Wood and the victim under the statute or the extent of the sexual contact. Instead, Wood primarily argues that the evidence does not support the jury's finding that she "subjected" the victim to sexual penetration. We disagree, and we affirm.

## BACKGROUND

The State's information charged Wood with first degree sexual assault of a protected individual, in violation of

§ 28-322.04(2) and (3). It alleged that on or about May 1 through July 31, 2014, in Douglas County, Nebraska, Wood subjected T.Z., a protected individual, to sexual penetration, as defined in Neb. Rev. Stat. § 28-318 (Reissue 2016). The incident that gave rise to the charge occurred while Wood was an employee at Boys Town, a residential treatment center for troubled youth, in Omaha, Nebraska. Boys Town is a contractor of the Nebraska Department of Health and Human services, and on the date of the offense, T.Z., then 17 years old, resided there under the custody and the guardianship of the State.

Prior to trial, Wood filed a motion in limine. She sought to exclude "[a]ny testimony or evidence regarding any evaluations, treatment or therapy regarding [her] past sexual behavior and/or sexual proclivities, including but not limited to sexual addiction meetings, as such evidence violates Neb. Rev. Stats. §§ 27-608, 27-414, 27-404 and 27-403." This included her attendance at "Sexaholics Anonymous." The district court's ruling on the motion is not part of the record and was not requested by any praecipe, but the district court orally expressed an inclination to deny it, and the parties agree that the district court overruled the motion.

According to evidence at trial, when T.Z. arrived at Boys Town in January 2014, he suffered from emotional and mood dysregulation, and he was initially placed in a secured facility on the campus. At first, T.Z. displayed physical aggression toward staff and other youth, which required staff to restrain him. This behavior resulted in a standing order to call police if T.Z. became aggressive. There was also testimony that T.Z. had a history of being manipulative. After about a month, T.Z.'s aggressive behavior improved, due in part to a medication change, and he moved to a "Sudyka," a family-style house on campus, for juvenile boys. There, T.Z. had more freedom than the secured facility had allowed, and he had the opportunity to earn points to use toward certain privileges, including off-campus activities with family or Boys Town staff.

At the time of T.Z.'s arrival, Wood was a shift manager at the Sudyka. Wood had previously worked as a behavioral health technician for several years, dealing directly with the youth on a day-to-day basis to implement the behavioral and medical programming. As a shift manager, Wood was somewhat involved with the youth, but her primary role was to oversee the behavioral health technicians.

Wood and other employees received training to handle boundary issues with the youth. According to testimony at trial, during T.Z.'s stay at the Sudyka, from March to June 2014, other staff noticed that Wood gave preferential treatment to and had "poor boundaries" with T.Z. The jury heard testimony that Wood allowed T.Z. to stay up late, prepared special meals for him, and brought him cake and ice cream on her day off.

One of the staff members who worked at the Sudyka, Samantha Cartwright, testified that Wood and T.Z. were often alone together. She observed that Wood allowed T.Z. to be alone with her upstairs while all of his other peers were downstairs, which was unusual. Once, Cartwright entered a locked office and saw Wood and T.Z. alone; it appeared to Cartwright that T.Z. had just left Wood's lap as Cartwright came into the room. Cartwright testified that Wood and T.Z. often went on private walks together after nightfall, which was not part of T.Z.'s treatment plan. According to Cartwright, Wood also took T.Z. to exercise his off-campus privileges, which was unusual because typically a behavioral health technician took the youth off campus while the shift managers supervised the staff on campus. While it was not a rule violation for a shift manager to accompany a resident off campus, it was "not appropriate."

The program director tasked with overseeing all of the staff and the day-to-day operations of the campus testified that in approximately April 2014, Wood herself reported that T.Z. made her uncomfortable because he was always looking at her and often wanted to be where she was. The program

director advised Wood not to be alone with T.Z. and to report any future concerns. After that, Wood did not report any additional concerns. Cartwright testified that in May 2014, she shared her concerns about Wood's relationship with T.Z. with her immediate supervisor, who reported it to the program director. Cartwright testified that she was told that the matter would be addressed, but the boundary issues between Wood and T.Z. continued.

According to testimony at trial, Wood eventually confided in her roommate, Heather Hutchinson, who also worked at Boys Town, about her relationship with T.Z. Hutchinson testified that in June 2014, Wood texted her and wanted to talk about her "'first time,'" which Hutchinson understood to mean Wood's first time having sex, since Hutchinson believed that Wood had been a virgin. Hutchinson testified that later, in person, Wood told her that she had had sex with T.Z. According to Hutchinson, Wood told her that she and T.Z. were cleaning a house on campus when T.Z. took her keys and went into a bedroom, where Wood followed and where they began kissing and ended up having sex. Hutchinson testified that Wood never said, nor did she get the impression from Wood, that this sexual encounter occurred against Wood's will. Hutchinson opined that Wood presented the encounter to her as "consensual." Hutchinson also testified that Wood told her about two prior instances when Wood and T.Z. kissed in the Sudyka, once in the basement and once on the stairs.

Hutchinson testified that she reported the matter to Child Protective Services, which prompted an investigation. Wood's resulting interview with the Boys Town police was recorded, and an audio copy was received into evidence at trial, without objection, and played for the jury.

During her interview, Wood stated that on the evening of the sexual encounter, she and T.Z. went alone to an unoccupied building on campus to retrieve some items. T.Z. took her keys and went into a bedroom, where Wood followed him. Wood said that T.Z. kissed her on the lips and that she tried to push

him off. Wood recounted that T.Z. then pushed her onto the bed and got on top of her. Wood tried to push T.Z. off with her legs and arms, but she could not. Wood reported that she told him to stop and said, "I don't want to do that; leave me alone." However, T.Z. remained on top of Wood and grabbed at her clothing. Wood said that T.Z. took off her pants and underwear and his two sets of shorts. Wood states that after she unsuccessfully tried to push T.Z. off, she stopped fighting because she thought she could be either "a statistic or a willing participant." Wood said that T.Z. inserted his penis into her vagina while on top of her. She stated that during the encounter, which lasted about 30 minutes, she told T.Z., "I don't want to do it," and he responded, "You know you want to do it." The encounter ceased when Wood received a telephone call and T.Z. finally complied with her order to stop. Then, they both got dressed and returned to the Sudyka.

Wood stated that she had been confused about whether she had tacitly consented when she gave up "fighting not to be a statistic," but concluded that she had not consented. Later in the interview, she described the situation as "partial consent." Wood admitted that part of her did not care and did not want to try to stop after initially trying to push T.Z. off of her.

Wood admitted that her relationship with T.Z. leading up to the incident may have been viewed by others as flirtatious and involving favoritism. Wood further stated that she had rebuffed T.Z. on previous occasions when he had kissed her cheek and hugged her and that he had also tried to hold her hand. She admitted that she knew it was a bad idea to be alone with T.Z. and admitted that when he entered the bedroom where they had sex, she knew T.Z.'s possible motivation and the possible outcome. However, Wood maintained that she did not want or plan to have sex with T.Z., at least not under those circumstances. She said it would have been different if he had been 19 years old rather than "a kid" at Boys Town.

In the interview, which was received without objection, Wood volunteered that she attends Sexaholics Anonymous

for "this addiction." She described Sexaholics Anonymous as a 12-step program for addiction to lust and craving more of something. She stated that she attended the program because she knew what her "[rock] bottom" was and did not want to hit it, but that when she had the encounter with T.Z., she hit rock bottom. She expressed shame and guilt over being "play[ed]" by T.Z. She said that she did not report the incident because of the shame, guilt, and possible consequences.

At trial, T.Z. testified about his relationship with Wood and the events leading up to their sexual encounter. He stated that he and Wood spent a lot of time together after he moved into the Sudyka. T.Z. testified that a few weeks before they had sex, he and Wood kissed when they were alone in the basement at the Sudyka. He characterized the kissing as mutual and testified that Wood told him that "nobody could find out." T.Z. stated that a couple of days later, he and Wood went for a drive and parked behind a store, where they kissed for 5 to 10 minutes. Again, the kissing was mutual and Wood reminded T.Z. that nobody must find out.

T.Z. testified that on June 4, 2014, a few days before he left Boys Town, he and Wood went to an unoccupied house on the Boys Town campus and had sex. T.Z. explained that they went to the house to look for extra towels and that when they went upstairs, he jokingly grabbed Wood's keys and entered one of the bedrooms. According to T.Z., Wood followed him into the bedroom, they started kissing, he took off her clothes, she undid his pants, and then they had sexual intercourse on the bed.

T.Z. testified that when Wood received a text message, she asked him to stop and he complied. T.Z. testified that otherwise, Wood never told him to stop or in any way indicated that she did not want to have sex with him. He stated that afterward, Wood told him that nobody must find out. Then, T.Z. recounted, they went back to the Sudyka, where Wood came to T.Z.'s room, gave him her telephone number, and said he could call her anytime.

The jury instructions setting forth the elements of the offense required the jury to determine, among other things, whether Wood "subjected [T.Z.] to sexual penetration." The jury instructions further stated that "[s]ubject, or subjecting an individual to something, means 'to bring under control or dominion.'" Neither the State nor Wood objected to these instructions.

The jury found Wood guilty of the crime charged: first degree sexual abuse of a protected individual.

Following the verdict, Wood moved for a new trial on the basis that the verdict was not sustained by the evidence or was contrary to law. At a hearing on the motion, the district court received a transcript of T.Z.'s testimony. Wood's counsel argued in part that because T.Z. effectuated the sexual penetration, the evidence did not support a finding that Wood "subjected" T.Z. to sexual penetration, that is, a finding that the sexual penetration resulted from an exercise of control or dominion by Wood. The district court overruled the motion.

The district court subsequently sentenced Wood to a period of 5 years' probation, with various terms and conditions.

This appeal followed.

## ASSIGNMENTS OF ERROR

Wood assigns, summarized and restated, that (1) the district court erred in overruling her motion for new trial, (2) the evidence was insufficient to support the jury verdict that she had subjected T.Z. to sexual penetration, and (3) the district court erred in overruling her motion in limine and allowing the jury to consider evidence that she attended Sexaholics Anonymous.

## STANDARD OF REVIEW

[1] A trial court's order denying a motion for new trial is reviewed for an abuse of discretion. *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015).

[2] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination

thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Dominguez*, 290 Neb. 477, 860 N.W.2d 732 (2015).

## ANALYSIS

### Sufficiency of Evidence and Motion for New Trial

Wood assigns that the evidence was insufficient to support the jury verdict. Similarly, she also assigns that the district court erred in overruling her motion for new trial arguing that the verdict was not sustained by the evidence.

Wood was convicted of first degree sexual abuse of a protected individual pursuant to § 28-322.04, which provides, in relevant part:

> (1) For purposes of this section:
>
> (a) Person means an individual employed by the Department of Health and Human Services and includes, but is not limited to, any individual working in central administration or regional service areas or facilities of the department and any individual to whom the department has authorized or delegated control over a protected individual or a protected individual's activities, whether by contract or otherwise; and
>
> (b) Protected individual means an individual in the care or custody of the department.
>
> (2) A person commits the offense of sexual abuse of a protected individual if the person subjects a protected individual to sexual penetration or sexual contact as those terms are defined in section 28-318. It is not a defense to a charge under this section that the protected

> individual consented to such sexual penetration or sexual contact.
>
> (3) Any person who subjects a protected individual to sexual penetration is guilty of sexual abuse of a protected individual in the first degree.

Under § 28-318(6), sexual penetration means, among other things, "sexual intercourse in its ordinary meaning."

Wood does not dispute that she is a "person" under § 28-322.04(2) or that T.Z. was a "protected individual" thereunder. Nor does she deny that sexual penetration occurred. Instead, she argues that the State offered no evidence that she "'subject[ed]'" T.Z. to such sexual penetration as prohibited by § 28-322.04(2) because she did not exercise "control or dominion" over him. Brief for appellant at 11. To the contrary, Wood asserts that T.Z. was the "aggressor" and exercised control or dominion over her when he effectuated the sexual penetration without Wood's assistance or encouragement. *Id*. at 10. Wood contends that to find that she "subjected" T.Z. to sexual penetration would require an overly broad interpretation of the statute defining sexual penetration, not supported by the plain language of the statute. *Id.* at 12. We disagree.

[3-5] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *State v. Kolbjornsen*, 295 Neb. 231, 888 N.W.2d 153 (2016). In reading a penal statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *State v. Robbins*, 253 Neb. 146, 570 N.W.2d 185 (1997). We will not look beyond a statute to determine the legislative intent when the words are plain, direct, or unambiguous. *State v. Loyuk*, 289 Neb. 967, 857 N.W.2d 833 (2015).

In *State v. Loyuk, supra*, we applied the preceding rules of statutory construction to determine the plain meaning of

"subjects" in Neb. Rev. Stat. § 28-322.01 (Reissue 2016), which addresses sexual abuse of an inmate or parolee. That section, similar to the one at issue in this case, provides:

> A person commits the offense of sexual abuse of an inmate or parolee if such person subjects an inmate or parolee to sexual penetration or sexual contact as those terms are defined in section 28-318. It is not a defense to a charge under this section that the inmate or parolee consented to such sexual penetration or sexual contact.

§ 28-322.01. The appellant in *Loyuk* argued that he did not "subject" the victim to sexual penetration as set forth in § 28-322.01 because the victim was a voluntary participant. He proposed that in the context of § 28-322.01, "'subject'" means "'"bring under control or dominion"' or '"force to undergo or endure."'" *Loyuk*, 289 Neb. at 974, 857 N.W.2d at 842. We expressly rejected these definitions, reasoning that they could not be squared with the statement in § 28-322.01 that consent of the inmate or parolee is not a defense. Rather, we concluded, "The plain meaning of 'subject' is 'to cause to undergo the action of something specified.' Here, the thing specified is sexual penetration and [the appellant] caused [the victim] to undergo this action by participating in the sexual act." *Loyuk*, 289 Neb. at 974, 857 N.W.2d at 842.

[6] Both the statute at issue in *Loyuk* and the statute at issue here prohibit a person in authority from subjecting a person in his or her charge to sexual penetration or contact, and both preclude the defense that the victim consented to the sexual act. Given these similarities, we see no reason why the reasoning of *Loyuk* and its consideration of the definition of "subject" should not apply to § 28-322.04. Therefore, we hold that under § 28-322.04, the word "subject" means to cause to undergo the action of something specified.

Applying this definition of "subject" and viewing the evidence in the light most favorable to the prosecution, we conclude that the evidence supports a finding beyond a reasonable doubt that Wood, a person as defined in § 28-322.04(1)(a),

subjected T.Z., a protected individual, to sexual penetration. Testimony by T.Z. and Hutchinson, along with Wood's own police interview, provided evidence that Wood caused T.Z. to undergo sexual penetration by willingly participating in the sexual act. And like T.Z.'s consent, his role in effectuating the sexual penetration is immaterial. § 28-322.04(2).

[7,8] We acknowledge that the jury instructions in the instant case defined "subject" as "to bring under control or dominion," a definition that we expressly rejected in *State v. Loyuk*, 289 Neb. 967, 974, 857 N.W.2d 833, 842 (2015), in favor of the broader "'to cause to undergo the action of something specified.'" Harmless error analysis applies to instructional errors so long as the error at issue does not categorically vitiate all the jury's findings. *State v. Abram*, 284 Neb. 55, 815 N.W.2d 897 (2012). In a criminal case tried to a jury, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. See *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996). Although the district court should have used our definition from *Loyuk*, the jury, as the trier of fact, deliberated within the confines of the narrower definition of "subject" and still found Wood guilty of the essential elements of the crime charged. See *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010) (absent evidence to contrary, it is presumed that jury followed instructions given in arriving at its verdict). Thus, Wood suffered no harm as a result of the jury instruction given.

[9] Having rejected Wood's claim that the jury lacked sufficient evidence to convict her, we find no merit to her contention that the district court abused its discretion in denying her motion for new trial, which Wood based on the same grounds. In order for a new trial to be granted, it must be shown that a substantial right of the defendant was adversely affected and that the defendant was prejudiced thereby. *State v. Faust*, 269 Neb. 749, 696 N.W.2d 420 (2005). The evidence supported

Wood's conviction. She suffered no violation of any substantial right and no prejudice.

### Motion in Limine

[10] Finally, Wood assigns that the district court erred in overruling her motion in limine and allowing the jury to consider evidence that she attended Sexaholics Anonymous. Although the parties agree that the district court overruled the motion, the record does not contain any such ruling. However, because overruling a motion in limine is not a final ruling on admissibility of evidence and, therefore, does not present a question for appellate review, a question concerning admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection to the evidence during trial. *State v. Almasaudi*, 282 Neb. 162, 802 N.W.2d 110 (2011). Wood did not object at trial when the State presented evidence of her attendance at Sexaholics Anonymous. Therefore, she did not preserve this issue for our consideration on appeal.

### CONCLUSION

For the reasons set forth above, we affirm Wood's conviction.

Affirmed.

Cassel, J., participating on briefs.

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

# County of Webster, appellant, v. Nebraska Tax Equalization and Review Commission, appellee.

896 N.W.2d 887

Filed May 26, 2017. No. S-16-583.

1. **Taxation: Judgments: Appeal and Error.** By statute, an appellate court reviews an order from the Tax Equalization and Review Commission that is defined as a "final decision" under Neb. Rev. Stat. § 77-5019(5) (Cum. Supp. 2016) for error 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: Words and Phrases.** An administrative agency's decision is arbitrary when it is made in disregard of the facts or circumstances without some basis which would lead a reasonable person to the same conclusion.
4. **Administrative Law.** Agency action taken in disregard of the agency's own substantive rules is also arbitrary and capricious.
5. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.
6. **Administrative Law: Judgments.** Whether an agency decision conforms to the law is by definition a question of law.
7. **Statutes.** Statutory interpretation presents a question of law.
8. **Statutes: Legislature: Intent.** A court gives statutory language its plain and ordinary meaning and will not look beyond the statute to determine the legislative intent when the words are plain, direct, and unambiguous.
9. ____: ____: ____. Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of

the Legislature, so that different provisions are consistent, harmonious, and sensible.

10. **Taxation.** The procedures for a hearing to show cause why an adjustment should not be made to a county's valuation of a class or subclass of real property are not governed by Neb. Rev. Stat. § 77-5016(4) (Cum. Supp. 2016).
11. ____. Neb. Rev. Stat. § 77-5027(3) (Cum. Supp. 2016) does not require the Property Tax Administrator to set out every property sale that the assessment division has included in its statistical analyses.
12. **Taxation: Evidence.** The Property Tax Administrator's annual narrative and statistical reports are sufficient competent evidence to support the Tax Equalization and Review Commission's equalization orders without including the sales file information for each real property transaction.
13. ____: ____. If necessary to determine the level of value and quality of assessment in a county, the Property Tax Administrator may use sales of comparable real property in market areas similar to the county or area in question or from another county as indicators of the level of value and the quality of assessment in a county.
14. **Taxation: Words and Phrases.** A comparable real property is one that is similar to the property being assessed in significant physical, functional, and location characteristics and in its contribution to value.
15. **Taxation: Evidence.** Because the Property Tax Administrator's reports are sufficient competent evidence to support a change in valuation, Neb. Rev. Stat. § 77-5026 (Reissue 2009) requires a county to demonstrate that the Tax Equalization and Review Commission should not rely on the reports.
16. **Public Officers and Employees: Presumptions.** Absent contrary evidence, public officers are presumed to faithfully perform their official duties.

Appeal from the Tax Equalization and Review Commission. Affirmed.

Sara J. Bockstadter, Webster County Attorney, for appellant.

Douglas J. Peterson, Attorney General, and L. Jay Bartel for appellee.

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

Funke, J.

## NATURE OF CASE

Webster County appeals from a May 2016 order adjusting value issued by the Tax Equalization and Review Commission (TERC) which increased the "Majority Land Use Grass" subclass of the agricultural and horticultural land class of real property not receiving special value within Webster County in the amount of 6 percent. Webster County timely appealed. We affirm.

## BACKGROUND

Before discussing TERC's order, we explain the reporting requirements and equalization procedures that are relevant to the parties' dispute.

### Reporting and Compiling of Real Property Transactions

Every person who records a transfer of real property with a county register of deeds must file a real estate transfer statement prescribed by the Tax Commissioner.[1] The record shows that the transfer statement contains the type of transfer that was made and the type of property that was transferred. The register of deeds forwards the transfer statement to the county assessor, who processes it according to rules promulgated by Nebraska's Property Tax Administrator (Administrator) and sends the statement to the Tax Commissioner.[2] The Administrator is the chief administrative officer of the Department of Revenue's property assessment division.[3]

The record also shows that county assessors must use the transfer statements to provide the following information to the assessment division within 45 days of a recorded transfer: a nine-digit code that identifies the parcel of property, a sales

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[1] See Neb. Rev. Stat. § 76-214 (Cum. Supp. 2016).

[2] See *id.*

[3] See Neb. Rev. Stat. § 77-701(1) (Cum. Supp. 2016).

number that the county assigns to the transaction, and a code that indicates whether the assessor has qualified the transfer as an arm's-length transaction, with or without adjustments to the sales price. The Administrator uses the transfer statement information to maintain a "sales file" of all arm's-length real property transactions in the state.[4]

By statute, to overturn a county assessor's determination about a sale's qualification as an arm's-length transaction, the assessment division must review the sale and determine that the assessor is incorrect.[5] By regulation, if an assessor fails to provide any reason to adjust a sales price or disqualify a sale, the assessment division can include the sale in the sales file without adjustment.[6] If the assessor provides a reason for an adjustment or disqualification that complies with accepted mass appraisal techniques, the property assessment division cannot include or exclude the property until it verifies the sale and determines that it does not agree with the assessor.[7] When the assessment division disagrees with the assessor, it must notify the assessor within 7 days that it will include or exclude a property sale from the sales file.[8] The assessor then has 30 days to file a protest with the Tax Commissioner.[9]

The Administrator is required to make the sales file available to county assessors, as well as the data used to develop and maintain the sales file.[10] Twice a year, the assessment division provides county assessors with rosters that show real property transactions by county and by class and subclass

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[4] See Neb. Rev. Stat. § 77-1327(2) (Cum. Supp. 2016).

[5] See *id.*

[6] See 350 Neb. Admin. Code, ch. 12, § 003.04A (2014).

[7] See *id.*, § 003.04C.

[8] See *id.*, § 003.04D.

[9] See *id.*, § 003.04E.

[10] See, Neb. Rev. Stat. § 77-1377 (Reissue 2009); 350 Neb. Admin. Code, ch. 12, § 001.03 (2014).

of property.[11] An assessor can request additional rosters and additional information.[12] Upon request, the assessment division must also provide the sales file database to TERC, county boards of equalization, and county assessors for use in the assessment and equalization of property valuations.[13]

After an assessor receives a sales file roster, he or she can protest the assessment division's inclusion, exclusion, adjustment to a sale, or failure to adjust a property sale.[14] An assessor must file the protest within 30 days of receiving the roster and is entitled to a hearing before the Tax Commissioner.[15] The burden of proving that a sales roster should be altered is on the assessor.[16]

## Tax Assessment Reporting Requirements

Nebraska's property tax equalization laws require all county assessors to annually prepare and file "an abstract of the property assessment rolls of locally assessed real property" on forms prescribed by the Tax Commissioner.[17] The assessor must file the abstract with the Administrator,[18] and the form must include the county's assessed tax valuations for real property, by class and subclass.[19] Agricultural and horticultural land is a class that includes several subclasses, including irrigated cropland, dryland cropland, grassland, and wasteland.[20]

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[11] See 350 Neb. Admin. Code, ch. 12, § 003.05 (2014).

[12] See *id.*

[13] See, § 77-1377; 350 Neb. Admin. Code, ch. 12, § 003.08 (2014).

[14] See 350 Neb. Admin. Code, ch. 12, § 004.01 (2014).

[15] See *id.*, §§ 004.01C and 004.01D.

[16] See *id.*, § 004.02.

[17] Neb. Rev. Stat. § 77-1514(1) (Cum. Supp. 2016).

[18] See *id.*

[19] See, *id.*; 350 Neb. Admin. Code, ch. 60, § 002.02A (2014).

[20] See Neb. Rev. Stat. §§ 77-1359 and 77-1363 (Cum. Supp. 2016).

The Administrator files annual reports regarding these abstracts with TERC. The reports contain the assessment division's statistical analyses and the Administrator's opinion on the level of value and quality of assessment for each type of real property, by class and subclass, in each county.[21] For agricultural and horticultural land, the study period of each county's sales data is 3 years.[22] The assessment division performs assessment ratio studies, based on the sales file, of a county's average level of assessment, the degree of assessment uniformity, and the overall compliance with assessment requirements for each major class.[23] The Administrator can require tax assessors and other taxing authorities to report an assessed value and other features of property assessment.[24]

### Statutory Equalization Procedures

After receiving the Administrator's reports, TERC must annually equalize the value or special value of assessed real property as submitted by the county assessors.[25] For the purpose of assessing property taxes, nonexempt agricultural and horticultural land, "as defined in section 77-1359," is valued at 75 percent of its actual value.[26]

> Actual value of real property for purposes of taxation means the market value of real property in the ordinary course of trade. . . . Actual value is the most probable price . . . that a property will bring if exposed for sale in the open market, or in an arm's length transaction, between a willing buyer and willing seller, both of whom are knowledgeable concerning all the uses to which the

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[21] See, § 77-1327(3); Neb. Rev. Stat. § 77-5027(3) (Cum. Supp. 2016).

[22] See 350 Neb. Admin. Code, ch. 12, § 003.07A(3) (2014).

[23] § 77-1327(3).

[24] § 77-1327(5).

[25] Neb. Rev. Stat. § 77-5022 (Cum. Supp. 2016).

[26] Neb. Rev. Stat. § 77-201(2) (Cum. Supp. 2016).

real property is adapted and for which the real property is capable of being used.[27]

But under Neb. Rev. Stat. § 77-5023(1) (Reissue 2009), TERC can adjust the "value of a class or subclass of real property" in any county "so that all classes or subclasses of real property in all counties fall within an acceptable range." "An acceptable range is the percentage of variation from a standard for valuation as measured by an *established indicator of central tendency of assessment*."[28] TERC's regulations provide that "[i]ndicators of central tendency include the mean, median, and mode."[29]

TERC's final equalization order states that it uses an "assessment/sales ratio" to measure and evaluate the level and uniformity of assessed values and that the level of value for any class or subclass is indicated by the median ratio. Under regulations promulgated by TERC and the assessment division, an assessment/sales ratio is determined by dividing a property's assessed value by its selling price.[30] For example, a property that has a tax assessment value of $59,500 and sold for $85,000 is assessed at 70 percent of its selling price. The real property transactions that are analyzed for a class or subclass are collectively referred to as a "sample."[31] The assessment division's preferred measure of central tendency in a sample is the median (middle) ratio or average of the two median ratios, which ratio is also referred to as the "level of value" for a class or subclass.[32] The division defines "level of value" to mean the "most probable overall opinion of the relationship of assessed value to actual value

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[27] Neb. Rev. Stat. § 77-112 (Reissue 2009).

[28] § 77-5023(2) (emphasis supplied).

[29] 442 Neb. Admin. Code, ch. 9, § 002.10 (2011).

[30] See *id.*, § 002.02. See, also, 350 Neb. Admin. Code, ch. 12, § 002.04 (2014).

[31] See 350 Neb. Admin. Code, ch. 17, § 004.01 (2013).

[32] See, *id.*, § 004.01B; 350 Neb. Admin. Code, ch. 12, § 002.09 (2014).

for a political subdivision."[33] But "[i]f the sample of sales is not representative of the properties in the county or market area, the Division may expand its analysis to include sales in adjoining counties that share similar market and geographic characteristics."[34]

In sum, these regulations show that the "level of value" for a class or subclass operates as the "established indicator of central tendency of assessment."[35] The level of value for agricultural and horticultural land must reflect that the county valuates such property at 69 to 75 percent of actual value to fall within the acceptable range of variation.[36]

If TERC makes an initial determination that the level of value for a class or subclass does not fall within the acceptable range, then it must issue a notice to the county and set a date for a hearing.[37] "At the hearing the county assessor or other legal representatives of the county may appear and show cause why the value of a class or subclass of real property of the county should not be adjusted."[38] Under § 77-5023(3), any increase or decrease that TERC makes to a class or subclass must adjust its level of value to the midpoint of the acceptable range of variation. Under another subsection of that statute, any increase or decrease in property values that TERC makes to a subclass must result in the level of value for the entire class falling within the acceptable range of variation.[39]

With these simplified statistical methods and procedural requirements set out, we turn to the facts of this case.

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[33] 350 Neb. Admin. Code, ch. 12, § 002.03 (2014).

[34] 350 Neb. Admin. Code, ch. 17, § 004.01B(2) (2013); § 77-5027(5).

[35] § 77-5023(2).

[36] *Id.*

[37] See Neb. Rev. Stat. § 77-5026 (Reissue 2009).

[38] *Id.*

[39] See § 77-5023(4).

### Administrator's Reports for Webster County

After the Webster County assessor filed her assessment abstracts with the Administrator, the Administrator filed with TERC the assessment division's reports and her certified opinion that the assessed valuations for the subclass of grassland should be adjusted upward in Webster County by 9 percent. The report stated that in analyzing Webster County's agricultural assessments, the assessment division considered real property in the surrounding counties of Adams, Clay, Nuckolls, Kearney, and Franklin to be comparable. The report stated that because the sales of agricultural property within Webster County were inadequate to produce a reliable analysis, sales from these surrounding counties were also included in the sample.[40] Additionally, the assessment division included three Webster County grassland transactions in the sample that had sold as grassland but were later disqualified by the assessor.

The report concluded that "[w]ithin the statistical analysis, the 80% majority land use for each class contains a sufficient number of sales." It noted that grassland values in the region, like those in most of the state, had increased in recent years. But it concluded that Webster County's values for grassland were not equalized with the surrounding counties and that the level of value for grassland was below the acceptable range of variation and did not meet generally accepted mass appraisal practices. The administrator recommended a 9-percent upward adjustment to bring the level of value for the grassland subclass up to 72 percent and "result in an overall level of value for agricultural land of 69%."

### Show Cause Order

After receiving the Administrator's recommendation, TERC issued an order for Webster County to show cause why the

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[40] See § 77-5027(5).

proposed upward adjustment should not be made. The order set out the Administrator's conclusions that the level of value for grassland "by the median for the strata Majority Land Use > 80% Grass . . . is 66.07% of actual or fair market value." The order stated that the level of value for grassland was not within the acceptable range of variation to a reasonable degree of certainty and scheduled a hearing.

### Show Cause Hearing

On April 26, 2016, a hearing was held at which representatives of Webster County appeared to present evidence and argument as to why the proposed adjustments should not be made. The county assessor testified that using the State's database of property sales, she incorporated four grassland sales from other counties to determine the level of value for grassland in Webster County. She "borrowed" two grassland sales from Franklin County and two from Nuckolls County.

But the assessor disputed three other sales that the assessment division incorporated to assess the level of value for grassland in Webster County. She argued that one sale from Nuckolls County should not have been included, because part of the parcel contained tree cover. She stated that Webster County did not separate grassland from timberland; if a parcel was less than 80 percent grassland, she classified the property as wasteland.

Additionally, the assessor argued that the assessment division had improperly included two grassland sales from Webster County, sold in the first year of the 3-year study period, because the owners had substantially changed their use of the property. She stated that although the properties were grassland when purchased, within a couple of years, the owners started using the parcels as dry cropland. When she originally included these two sales as grassland in her 2016 abstracts, she concluded that the level of value for grassland in Webster County was 66.07, which is below the acceptable range of 69 to 75 percent of actual value. But she stated that

she contacted the owners before preparing her final abstracts and after concluding that they had purchased the grassland properties with the intent to use the land as dry cropland, she disqualified these sales for use in the 3-year study. For the same reason, she adjusted the sales price for other grassland property sales.

In sum, the assessor determined the level of value for grassland by excluding the two grassland sales from the first year of the study period, making adjustments to other sales, and incorporating four grassland sales from other counties into her study. She concluded that the level of value for 80 percent grassland property in Webster County was 69.93 percent, which was within the acceptable range of variation. She conceded that she had not increased the value of grassland in Webster County for 2016 despite increasing it in the previous 2 years. She stated that her goal for 2016 was to "leave the farmers alone" because "we've hit them so hard for so many years." She further stated that although her level of value for grassland was low, she knew she would have to increase those valuations in 2017 when she could no longer include the oldest and lowest sales prices in the 3-year study period.

Sarah Scott, an agricultural land specialist, testified for the assessment division. The Administrator's reports showed that the division used 17 sales of grassland to evaluate the level of value for that subclass in Webster County. Scott stated that the division had incorporated four of these sales from Nuckolls County and Franklin County. She said that the difference between the assessor's analysis and the assessment division's analysis was four property transactions that the division included and the assessor did not. One was an in-kind property exchange for which the assessor had not provided a reason to disqualify it. One was the sale of a parcel in Nuckolls County that contained a wooded portion. The final two were the grassland sales that the assessor had disqualified because the owners had substantially changed the property's use to dry cropland.

Scott explained that even if the assessor had changed the classification of the two Webster County properties, the assessment division could still use those sales in determining the value of grassland—because at the time those properties were sold, their sale price represented the value of grassland. She stated that this determination was not automatic; it is made after consulting with the assessor. But she believed that the assessor had earlier agreed with a field liaison that the two sales were representative of the value of grassland at the time of the sales. The assessor admitted that when Scott contacted her about these sales, she did not argue with her about including them in the analysis. And she admitted that she had included the in-kind property exchange in her analysis after discussing the transaction with Scott.

Most important, she agreed that her dispute with the Administrator boiled down to three property sales: the two Webster County sales she had disqualified and the partially wooded property sale from Nuckolls County that the assessment division had incorporated. She stated that she "didn't really have a problem" with incorporating sales from Nuckolls County but pointed out that a college professor had told her Nuckolls County was not really comparable, because Webster County did not get much rain. She admitted, however, that she had not been able to find any evidence to support that belief.

Regarding the Nuckolls County parcel, Scott stated that under the assessment division's regulations, timber cover over grassland is properly classified as grassland. She stated that the parcel would still be classified as grassland even if it contained 25 percent timber. And she testified that Nuckolls County had reported it as an 80-percent grassland sale.

Finally, Scott testified that in the area of the state where Webster County is located, grassland prices had increased by 15 to 20 percent—because high commodity prices had encouraged buyers to purchase grassland and convert it to dry cropland. Because the value of grassland in Webster County did

not reflect this market trend, she believed the assessed values should be increased.

After this testimony, TERC received valuation analyses that it had requested from the Administrator. These analyses excluded two agricultural sales, one of which was a grassland sale. Excluding these two sales resulted in a level of value of 67.82 percent for grassland and an overall level of value of 69 percent for agricultural property. After a recess, the commissioners voted to increase the assessed value of grassland by 6 percent. One of the two commissioners explained that he was motivated to depart from the Administrator's recommendation of a 9-percent increase because of the effect of high commodity prices on the grassland property market.

### Order Adjusting Value

TERC's May 2016 order stated that the level of value for grassland in Webster County was 66.07 percent, which was the same level of value that the assessment division reached without excluding any property sales from the sample. This statement indicates that TERC chose not to exclude any properties from the sample, and nothing in its order states otherwise. But consistent with TERC's vote at the hearing, it ordered the assessor to increase Webster County's assessment valuation of grassland by 6 percent. This increase caused the level of value for "Majority Land Use Grass" to be 72 percent of fair market value and the overall level of value for agricultural and horticultural land in Webster County to be 69 percent of fair market value.

## ASSIGNMENTS OF ERROR

Webster County assigns, restated, that in adjusting the level of value for grassland upward by 6 percent, TERC improperly relied on the Administrator's statistical reports and opinion, because they (1) were not supported by competent evidence and (2) incorporated noncomparable property sales, contrary to statutory requirements.

## STANDARD OF REVIEW

[1,2] By statute, we review a TERC order that is defined as a "final decision" under Neb. Rev. Stat. § 77-5019(5) (Cum. Supp. 2016) for error on the record.[41] 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.[42]

[3,4] An administrative agency's decision is arbitrary when it is made in disregard of the facts or circumstances without some basis which would lead a reasonable person to the same conclusion.[43] Agency action taken in disregard of the agency's own substantive rules is also arbitrary and capricious.[44]

[5-7] Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record.[45] Whether an agency decision conforms to the law is by definition a question of law.[46] Statutory interpretation presents a question of law.[47]

## ANALYSIS

Webster County contends TERC relied on a statistical analysis that was not supported by competent evidence and incorporated property sales from other counties that were not comparable to grassland in Webster County. Webster County further contends that the report did not set out information about

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[41] See *JQH La Vista Conf. Ctr. v. Sarpy Cty. Bd. of Equal.*, 285 Neb. 120, 825 N.W.2d 447 (2013).

[42] *Id.*

[43] *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 753 N.W.2d 802 (2008).

[44] *Blakely v. Lancaster County*, 284 Neb. 659, 825 N.W.2d 149 (2012).

[45] *Brenner, supra* note 43.

[46] *Blakely, supra* note 44.

[47] *In re Guardianship & Conservatorship of Kaiser*, 295 Neb. 532, 891 N.W.2d 84 (2017).

each real property transaction that was used for the statistical analysis.

### Assessment Division's Statistical and Narrative Reports Were Sufficient Competent Evidence to Support TERC's Adjustment Order

Webster County argues that under Neb. Rev. Stat. § 77-5016(4) (Cum. Supp. 2016), all records and documents on which TERC relies, apart from specified evidence, must be made part of the record, and that this statute precludes TERC from considering any other factual information or evidence. It argues that because the inclusion or exclusion of a property sale can affect the level of value analysis and require an adjustment, the assessment division must include the actual sales it relies on in the reports that it presents to TERC. Webster County further argues that TERC erred in relying on the Administrator's reports for Webster County, because those reports failed to show (1) the actual property sales that the Administrator relied on to support her opinion, (2) the selling price and assessed value of each property sale on which the Administrator relied, and (3) the geographic characteristics for each sold property on which the Administrator relied.

TERC counters that § 77-5027(3), which sets out the criteria for the Administrator's annual reports and opinions, does not require the level of specificity for which Webster County argues. TERC contends that such detail would be neither feasible nor desirable. Instead, it points to § 77-5026, under which a "county assessor or other legal representatives of the county may appear and show cause why the value of a class or subclass of real property . . . should not be adjusted" if TERC schedules an adjustment hearing.

We disagree with Webster County's interpretation of § 77-5016(4), and we agree with TERC's interpretation of §§ 77-5026 and 77-5027(3).

[8,9] A court gives statutory language its plain and ordinary meaning and will not look beyond the statute to determine the legislative intent when the words are plain, direct, and unambiguous.[48] Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.[49]

[10] First, the procedures for a hearing to show cause why an adjustment should not be made to a county's valuation of a class or subclass of real property are not governed by § 77-5016(4). Under Neb. Rev. Stat. § 77-5013 (Cum. Supp. 2016), TERC has exclusive jurisdiction over appeals and petitions regarding matters within its jurisdiction.[50] Section 77-5016 specifically refers to those types of hearings and sets out the procedural and evidentiary requirements for them. But a show cause hearing to determine the validity of an adjustment does not arise from a petition or appeal. Instead, it is part of TERC's equalization procedures pursuant to Neb. Rev. Stat. § 77-5022 et seq. (Reissue 2009 & Cum. Supp. 2016).

Under § 77-5022, TERC is required to "annually equalize the assessed value . . . of all real property as submitted by the county assessors on the abstracts of assessments." Section 77-5023(1) grants TERC the power to increase or decrease the value of a class or subclass of real property in any county or taxing authority or of real property valued by the state so that all classes or subclasses of real property in all counties fall within an acceptable range. Finally, § 77-5026 requires TERC to provide notice to the counties of any undervalued or overvalued class or subclass of real property and the right to request a hearing to contest TERC's determination. None of these statutes set forth evidentiary requirements for the process of changing valuations.

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[48] *In re Interest of Nizigiyimana R.*, 295 Neb. 324, 889 N.W.2d 362 (2016).

[49] *In re Interest of Tyrone K.*, 295 Neb. 193, 887 N.W.2d 489 (2016).

[50] See Neb. Rev. Stat. § 77-5007 (Cum. Supp. 2016).

[11] Second, TERC correctly argues that § 77-5027(3) does not require the Administrator to set out every property sale that the assessment division has included in its statistical analyses. It merely requires that the Administrator's annual report and opinion contain statistical and narrative reports sufficient to inform TERC of the level of value and the quality of assessments for the classes and subclasses of property within a county. If the Legislature had intended the reports to include this information, it would have specified that requirement.

Equally important, the reporting requirements and equalization procedures that we have set out above illustrate that including the data for every property sale is not a necessary requirement for TERC to rely on the Administrator's reports. To recap, each county assessor must inform the assessment division of the real property transfers in the county and classify those properties by class and subclass. The assessment division then provides all county assessors with biannual rosters of the individual property transactions in the sales file, by county and by class and subclass of property. If an assessor disagrees with the inclusion of a property in the roster, it can request more information from the assessment division and file a protest.

Similarly, the assessment division must notify an assessor if it disagrees with the assessor's disqualification or adjustment of a property sale in the assessor's annual abstracts. The assessor can then file a protest if he or she disagrees with the division's inclusion, exclusion, adjustment, or failure to adjust a property sale.

Additionally, upon request, the assessment division must provide the sales file database to TERC. So if TERC has concerns about the report, it has access to the same sale files information that a county assessor does. Another check against mistakes exists in the show cause hearing itself. That is, the Legislature has authorized county representatives to appear before TERC to show why it should not rely on the Administrator's reports.

[12] These procedural requirements ensure that a property is not included in the sales file without an opportunity for a county assessor to correct a perceived mistake.[51] Additionally, the county assessor appeared to know which properties that the assessment division had incorporated from other counties, because she argued that one of the sales was not comparable to grassland in Webster County. To require the assessment division to essentially restate the sales rosters in its annual reports to TERC would be unnecessarily duplicative and costly. Whether the Administrator's report should include that information is a decision for the Legislature to make, and it has chosen not to do so. We conclude that the Administrator's annual narrative and statistical reports are sufficient competent evidence to support TERC's equalization orders without including the sales file information for each real property transaction.

### County Assessor Failed to Demonstrate That Property Assessment Division Incorporated Property Sales From Other Counties That Were Not Comparable

Webster County argues that "at least some of the sales" from other counties used by the assessment division were not geographically comparable to grassland in Webster County.[52] However, the record indicates that it disputed only the one grassland property in Nuckolls County as not comparable.

[13] If necessary to determine the level of value and quality of assessment in a county, the Administrator may use sales of comparable real property in market areas similar to the county or area in question or from another county as indicators of the level of value and the quality of assessment in a county.[53]

[14] Webster County correctly argues that a comparable real property is one that is "similar to the property being assessed

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[51] § 77-1327.

[52] Brief for appellant at 12.

[53] § 77-5027(5).

in significant physical, functional, and location characteristics and in [its] contribution to value."[54] But the county assessor failed to show that any sales the assessment division incorporated from other counties were not comparable to grassland property in Webster County.

[15] As explained, under § 77-5026, a hearing arises from a TERC order to show cause why an assessment adjustment should not be made to a class or subclass of property. Because the Administrator's reports are sufficient competent evidence to support a change in valuation,[55] § 77-5026 requires a county to demonstrate that TERC should not rely on the reports. This burden is consistent with a county assessor's burden to demonstrate to the Tax Commissioner that a sales roster for the county should be adjusted.

The record shows that the Administrator used four borrowed grassland sales: two from Franklin County and two from Nuckolls County. The Administrator also used two sales within Webster County which the assessor had previously deemed not comparable because the use of the land had substantially changed from grassland to dry cropland.

The assessor testified that the Franklin County sales were comparable to Webster County, but that the Nuckolls County sales were not comparable, because Nuckolls County receives more rainfall than Webster County. However, Webster County provided no evidence to support the assessor's belief that Nuckolls County received more rainfall. Further, the assessor also testified that she "didn't really have a problem" with the Nuckolls County sales. In fact, she incorporated two property sales from Nuckolls County for her own analysis.

At the show cause hearing, the county assessor admitted that her dispute with the Administrator's reports involved three property sales: a parcel that contained tree cover in Nuckolls County and two parcels of grassland from Webster County that the assessor had disqualified as being substantially changed.

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[54] Neb. Rev. Stat. § 77-1371 (Cum. Supp. 2016).

[55] See § 77-5027(3) and (4).

The assessor agreed that she had not argued with Scott about the division's inclusion of the two sales from Webster County, and Webster County has not raised these property sales on appeal. Because the assessor stipulated as to which property sales she disputed, those were the only disputes properly before TERC. Further, the only disputed property which was raised in Webster County's brief is the one regarding the Nuckolls County parcel with tree cover. As a result, the Nuckolls County property is the only disputed parcel before us on appeal.

As previously mentioned, the disputed sale from Nuckolls County was partially covered with timber. The assessor testified that the parcel was 75-percent grassland and 25-percent timber. For this reason, Webster County argues that the property could not satisfy the 80-percent majority land use standard for property classifications. Webster County also contends that Scott, the division's agricultural land specialist, admitted this property comprised 75-percent grassland and 25-percent timber and that as a result it was not comparable.

The parties have not pointed to a statute or regulation that shows TERC or the assessment division imposes an 80-percent majority land use standard for property classifications. However, because the standard was mentioned in the Administrator's report, at the adjustment hearing, and in TERC's orders, we assume for this appeal that the standard exists. But Webster County's argument that the Nuckolls County parcel did not satisfy the 80-percent land use standard is refuted by the record and the assessment division's regulations.

The assessment division defines grassland as follows:

> Grassland is the state and condition of the range based on what it is naturally capable of producing. Grassland includes all types of grasses . . . used for grazing or mowed for hay. . . . Areas of wooded grazing land are classified as grassland not timberland or wasteland. When there are significant areas of trees or timber on a parcel, and it can no longer be grazed, consideration needs to be

> given to placing the affected acres in the forestland and timberland category.[56]

Consistent with its definition of grassland, the assessment division defines timberland and forestland to be "land which is wooded by nature or humans and consisting of a dense growth of trees and underbrush such that it is not suitable for grazing."[57]

Scott testified that under these regulations, timber cover over grassland is properly classified as grassland, even if this characteristic comprised 25 percent of a parcel. Equally important, she testified that Nuckolls County had reported the sale of this property as an 80-percent grassland sale.

[16] Absent contrary evidence, public officers are presumed to faithfully perform their official duties.[58] So just as we assume that the land use standard exists, we also assume that the county assessor for Nuckolls County properly applied it. The Webster County assessor presented no evidence to show that tree cover rendered 25 percent of the Nuckolls County parcel unusable for grazing. We conclude that Webster County failed to show that the Administrator's reports included property sales that were not comparable to grassland in Webster County.

## CONCLUSION

We conclude that the Administrator's required reports under § 77-1327 are competent evidence to support a TERC equalization order without including the sales file information for each real property transaction. We conclude that at a show cause hearing, a county has the burden to demonstrate that TERC should not rely on the Administrator's reports. Finally, we conclude that Webster County failed to meet that burden. Accordingly, we affirm.

Affirmed.

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[56] 350 Neb. Admin. Code, ch. 14, § 002.31 (2014).

[57] *Id.*, § 002.29.

[58] *Johnson v. Neth*, 276 Neb. 886, 758 N.W.2d 395 (2008).

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

# Elizabeth A. White, appellee, v. James F. White and James McGough, appellees, and Douglas County, Nebraska, intervenor-appellant.

896 N.W.2d 600

Filed May 26, 2017. No. S-16-865.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Attorney Fees: Appeal and Error.** A party may recover attorney fees and expenses in a civil action only when a statute permits recovery or when the Nebraska Supreme Court has recognized and accepted a uniform course of procedure for allowing attorney fees.
3. **Courts: Attorney Fees.** Courts have the inherent power to award attorney fees in certain unusual circumstances amounting to conduct during the course of litigation which is vexatious, unfounded, and dilatory, such that it amounts to bad faith.
4. **Judgments: Political Subdivisions.** Special considerations apply to court-ordered expenditures of public funds.
5. **Political Subdivisions: Counties: Legislature.** A county is a political subdivision of the state and has only that power delegated to it by the Legislature.
6. **Political Subdivisions: Counties.** Any grant of power to a political subdivision is to be strictly construed, and any reasonable doubt of the existence of a power is to be resolved against the county.
7. **Public Purpose: Legislature: Words and Phrases.** What constitutes a public purpose, as opposed to a private purpose, is primarily for the Legislature to determine.
8. **Divorce: Minors: Attorneys at Law: Parties: Public Purpose: Legislature.** Through Neb. Rev. Stat. § 42-358(1) (Reissue 2016), the Legislature has determined that the work of an attorney appointed to

represent the interests of the minor children in a dissolution action is for a public purpose only when a responsible party to the dissolution is indigent.

Appeal from the District Court for Douglas County: W. Mark Ashford, Judge. Reversed and remanded with directions.

Donald W. Kleine, Douglas County Attorney, Meghan M. Bothe, and Kristin M. Lynch for intervenor-appellant.

James McGough, of McGough Law, P.C., L.L.O., guardian ad litem.

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

Wright, J.

## NATURE OF CASE

Intervenor-appellant, Douglas County, Nebraska, claimed the district court lacked the power to order Douglas County to reimburse an attorney for his time defending an appeal by Douglas County. In its appeal, Douglas County successfully challenged the district court's order that required it to pay the appointed attorney's costs in the underlying divorce. In that appeal, we concluded the district court abused its discretion in ordering payment pursuant to Neb. Rev. Stat. § 42-358 (Reissue 2016), because the spouse who was responsible for the payment of the appointed attorney's fees was not indigent. Upon remand, the district court ordered Douglas County to pay attorney fees for the attorney's time in defending the above appeal by Douglas County. In awarding the attorney fees, the district court relied upon Neb. Ct. R. App. P. § 2-109(F) (rev. 2014), which provides in part: "A court-appointed attorney *in a criminal case*, appealed to the Supreme Court or the Court of Appeals, may, after issuance of a mandate by the appellate court, apply to the appointing court for an attorney fee

regarding services in the appeal." (Emphasis supplied.) We reverse, and remand with directions.

## BACKGROUND

In July 2012, Elizabeth A. White (White) filed a complaint against James F. White for dissolution of marriage. The district court appointed James McGough as an attorney for the couple's minor children. In a supplemental temporary order pending trial, the court discharged McGough.

In February 2014, the district court ordered that White and her husband each individually pay $2,073.12 in fees to McGough. In April 2014, the court entered the decree of dissolution. Not having been paid by White, McGough filed a motion for contempt, alleging that White had not paid any of the fees she owed to him under the February order.

White filed for bankruptcy, and McGough was notified and listed as a creditor in White's bankruptcy proceedings. McGough did not intervene in the bankruptcy proceedings. Instead, McGough filed another motion for attorney fees in the district court, this time requesting that the district court find White indigent and order Douglas County to pay the fees, pursuant to § 42-358(1).

The court stayed the hearing on McGough's motion until the conclusion of the bankruptcy proceedings. Eventually, White's debts, including the debt to McGough, were discharged. The district court resumed proceedings on McGough's motion for attorney fees. It found that White was indigent and ordered Douglas County to pay McGough's fees, which White had been ordered to pay in the divorce action.

Douglas County, as intervenor and appellant, appealed to this court the district court's order that it pay McGough's fees.[1] No briefs were filed in the appeal by White, her husband, or the minor children. McGough filed a brief as appellee, arguing that the district court was correct in determining White was indigent.

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[1] *White v. White*, 293 Neb. 439, 884 N.W.2d 1 (2016).

We held that the district court had abused its discretion in finding White indigent. Accordingly, we reversed the court's order requiring Douglas County to pay McGough's fees.[2]

Approximately 3 weeks after the mandate was received by the district court, McGough moved the court to require Douglas County to pay $1,719.87 in attorney fees for McGough's expenses and time spent defending Douglas County's appeal in *White v. White*.[3] The court sustained the motion and ordered Douglas County to pay McGough $1,719.87 for the costs and fees incurred during the appeal.

The court reasoned that the fees incurred for the time spent defending the appeal were distinct from the fees subject to our opinion in *White*. Operating under the erroneous assumption that McGough had not yet been removed as a court-appointed attorney for the children at the time of the appeal in *White*, the district court reasoned that McGough's involvement as appellee was required under his appointment as an attorney for the children. The court concluded that reimbursement was sufficiently encompassed by the last sentence of § 2-109(F): "A court-appointed attorney in a criminal case, appealed to the Supreme Court or the Court of Appeals, may, after issuance of a mandate by the appellate court, apply to the appointing court for an attorney fee regarding services in the appeal."

The court's order directing Douglas County to pay McGough's costs and fees for his appellate work in *White* is the subject of the current appeal.

## ASSIGNMENTS OF ERROR

Douglas County assigns that the district court erred in ordering it to pay McGough for his costs and fees incurred during the appeal in *White* because (1) McGough failed to file a timely motion for such fees with the Supreme Court

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[2] *Id.*

[3] *Id.*

clerk pursuant to § 2-109(F), (2) there is no statutory basis for awarding such reimbursement, and (3) awarding such reimbursement is contrary to the law of the case.

## STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[4]

## ANALYSIS

The issue presented is whether the district court had the authority to order Douglas County to reimburse McGough for the time and expense in Douglas County's appeal in *White*.[5]

The husband, wife, and minor children in the underlying dissolution action had no interest in the appeal in *White*, and they likewise have no interest in the present appeal. In *Brackhan v. Brackhan*,[6] we recognized that under § 42-358(6), a county ordered to pay fees for an appointed attorney in a dissolution action has standing to appeal such order. Section 42-358(6) states that "[a]ny person aggrieved by a determination of the court may appeal such decision to the Court of Appeals." Such appeals are to be docketed separately with the aggrieved persons listed as intervenors.[7]

Douglas County asserts several arguments why the district court erred in ordering that it pay McGough's appellate fees. Arguably the most fundamental of these is its argument that when neither party to a dissolution action is indigent, there is no statute that permits a district court to order the county to expend public funds to reimburse an appointed attorney for his

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[4] *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004).

[5] *White v. White, supra* note 1.

[6] *Brackhan v. Brackhan*, 3 Neb. App. 143, 524 N.W.2d 74 (1994).

[7] See *In re Interest of Antone C. et al.*, 12 Neb. App. 152, 669 N.W.2d 69 (2003).

time or expenses. Douglas County points out that as a statutory entity, it has no power to pay such costs absent a statute so providing. We agree.

[2,3] A party may recover attorney fees and expenses in a civil action only when a statute permits recovery or when the Nebraska Supreme Court has recognized and accepted a uniform course of procedure for allowing attorney fees.[8] Courts additionally have the inherent power to award attorney fees in certain unusual circumstances amounting to conduct during the course of litigation which is vexatious, unfounded, and dilatory, such that it amounts to bad faith.[9]

Neb. Rev. Stat. § 42-351(1) (Reissue 2016) provides that a court in a domestic relations action may award costs and attorney fees, and we have also said that a uniform course of procedure exists in Nebraska for the award of attorney fees in dissolution cases.[10] We have never addressed whether this power extends to appellate fees, which would normally be awarded by the appellate court. At issue is the district court's authority in a dissolution action to order the county to reimburse out of public funds an appointed attorney's fees and expenses.

[4-6] Special considerations apply to court-ordered expenditures of public funds. A county is a political subdivision of the state and has only that power delegated to it by the Legislature.[11] Any grant of power to a political subdivision is to be strictly construed, and any reasonable doubt of the existence of a power is to be resolved against the county.[12]

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[8] *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010).

[9] See, *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994); *State Farm Mut. Auto Ins. Co. v. Royal Ins. Co.*, 222 Neb. 13, 382 N.W.2d 2 (1986).

[10] *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014).

[11] *Guenzel-Handlos v. County of Lancaster*, 265 Neb. 125, 655 N.W.2d 384 (2003).

[12] *Id.*

[7] What constitutes a public purpose, as opposed to a private purpose, is primarily for the Legislature to determine.[13] Accordingly, in *Guenzel-Handlos v. County of Lancaster*,[14] we held that any rules governing whether the county should expend public funds reimbursing a county official who is not indigent for defense costs in a criminal action should be established by the Legislature, not by the courts.

The only exception to this rule is found in *Kovarik v. County of Banner*.[15] In *Kovarik*, we held that the judiciary could, in its inherent authority, order the county to reimburse attorney fees in matters "so fundamental as the indigent's right to appointed counsel in criminal matters."[16] We explained that such fundamental matters included fees incurred in a misdemeanor prosecution by the county, if it could result in imprisonment.[17] We reasoned that the county's authority to pay the fees in such cases derives from its duty to pay the expenses of the local administration of justice within the county, arising from the general system of county organization and by necessary implication from a statutory scheme that delegates criminal prosecution to the county level.[18] We also noted that certain levies contributing to the county general fund are by statute authorized to be used for indigent persons.[19]

But *Kovarik* has no applicability here. The appointment of an attorney in a civil action does not present such fundamental matters as defending against a county's prosecution that could lead to imprisonment. Further, there are no indigent persons involved in this civil action.

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[13] *Id.*

[14] *Id.*

[15] *Kovarik v. County of Banner*, 192 Neb. 816, 224 N.W.2d 761 (1975).

[16] *Id*. at 818, 224 N.W.2d at 763.

[17] *Kovarik v. County of Banner, supra* note 15.

[18] See *id*.

[19] See *id.*

Section 42-358(1) is the only statute that addresses the payment by a county for the services of an attorney appointed in a civil, dissolution action. Section 42-358(1) states:

> The court may appoint an attorney to protect the interests of any minor children of the parties. Such attorney shall be empowered to make independent investigations and to cause witnesses to appear and testify on matters pertinent to the welfare of the children. The court shall by order fix the fee, including disbursements, for such attorney, which amount shall be taxed as costs and paid by the parties as ordered. *If the court finds that the party responsible is indigent, the court may order the county to pay the costs.*

(Emphasis supplied.)

We need not decide if the costs referred to in § 42-358(1) could encompass those incurred on appeal, because we have repeatedly held that § 42-358(1) permits the district court to order the county to pay attorney fees and expenses only when a responsible party is indigent.[20] Again, no responsible party is indigent in this case.

[8] Through § 42-358(1), the Legislature has determined that the work of an attorney appointed to represent the interests of the minor children in a dissolution action is for a public purpose only when a responsible party to the dissolution is indigent. If such responsible party is not indigent, the appointed attorney has other means of pursuing payment of his or her fees and expenses. Alternatively, dissolution courts have the power to order that the underlying parties be jointly and severally liable for the payment of the court-appointed attorney's fees.

But currently no statute allows for the payment with public funds of an appointed attorney's fees and expenses in a dissolution action when neither party is indigent. Any rules governing

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[20] See, *Mitchell v. French*, 267 Neb. 656, 676 N.W.2d 361 (2004); *Brackhan v. Brackhan, supra* note 6.

whether the county should expend public funds reimbursing a court-appointed attorney in a dissolution action where none of the parties is indigent should be established by the Legislature, not by the courts.[21]

We held in *White*[22] that White was not indigent, and there was no finding by the district court that any party responsible for the fees and expenses incurred by McGough on appeal was indigent. Because there is no statute granting the district court the power to order Douglas County to pay fees in a dissolution action where neither party is indigent, we hold that the district court erred in ordering Douglas County to pay McGough for his appellate work in *White*. Having so concluded, we need not address Douglas County's remaining arguments that the district court erred.

## CONCLUSION

For the foregoing reasons, we reverse the order of the district court and remand the cause with directions to vacate its order granting attorney fees and costs to McGough.

Reversed and remanded with directions.

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[21] See *Guenzel-Handlos v. County of Lancaster, supra* note 11.

[22] *White v. White, supra* note 1.

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

# State of Nebraska, appellee, v. Roger Beitel, appellant.

895 N.W.2d 710

Filed June 2, 2017. No. S-16-098.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
3. ____: ____. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
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. **Statutes: Legislature: Intent.** In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
6. **Speedy Trial: Joinder: Statutes: Legislature: Intent.** The plain language of Neb. Rev. Stat. § 29-1207(4)(e) (Reissue 2016) and its legislative history both suggest that the Nebraska Legislature intended the statutory right to speedy trial to be a personal right which is not lost merely because a defendant is joined for trial with codefendants whose time for trial has not run.
7. **Speedy Trial: Statutes: Time.** Nebraska's speedy trial statute, Neb. Rev. Stat. § 29-1207(1) (Reissue 2016), provides that every person

indicted or informed against for any offense shall be brought to trial within 6 months and that such time shall be computed as provided in § 29-1207.

8. ____: ____: ____. To compute the 6-month speedy trial period, a court must exclude the day the State filed the information, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 2016).
9. **Speedy Trial.** The primary burden of bringing an accused person to trial within the time provided by law is upon the State.
10. **Speedy Trial: Dismissal and Nonsuit.** If the State does not bring a defendant to trial within the permitted time, as extended by any periods excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 2016), the defendant is entitled to absolute discharge from the offense charged.
11. **Speedy Trial: Proof.** The burden of proof is on the State to show, by a preponderance of the evidence, that one or more of the excluded periods under Neb. Rev. Stat. § 29-1207(4) (Reissue 2016) are applicable.
12. **Speedy Trial: Joinder.** The plain language of Neb. Rev. Stat. § 29-1207(4)(e) (Reissue 2016) contains three elements that must be satisfied for the codefendant exclusion to be applicable: (1) The defendant's case must be joined for trial with that of a codefendant as to whom the speedy trial time has not run, (2) the period of delay must be reasonable, and (3) there must be good cause for not granting a severance.
13. **Speedy Trial: Joinder: Pretrial Procedure: Waiver.** A joined codefendant's failure to request a severance before his or her speedy trial time expires has the practical effect of waiving the possibility of a severance, but does not result in a waiver of the right to speedy trial.
14. **Speedy Trial: Joinder: Motions to Dismiss: Time.** In cases where a joint trial is set for a date certain when the defendant files his or her motion for absolute discharge, the period of delay for purposes of Neb. Rev. Stat. § 29-1207(4)(e) (Reissue 2016) is determined by first calculating the defendant's speedy trial time absent the codefendant exclusion and then determining the number of days beyond that date that the joint trial is set to begin.
15. **Speedy Trial: Joinder: Words and Phrases.** For purposes of Neb. Rev. Stat. § 29-1207(4)(e) (Reissue 2016), "good cause" means a substantial reason; one that affords a legal excuse. Good cause is something that must be substantial, but is also a factual question dealt with on a case-by-case basis.

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

Robert O. Hippe and Kyle J. Long, of Robert Pahlke Law Group, P.C., L.L.O., for appellant.

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

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

Stacy, J.

Roger Beitel appeals from an order denying his motion for absolute discharge. He contends the district court misapplied the codefendant exclusion under Neb. Rev. Stat. § 29-1207(4)(e) (Reissue 2016) when computing time under Nebraska's speedy trial statutes.[1] Finding no clear error, we affirm.

## I. FACTS

Roger and his father Allen Beitel were both charged in the district court for Scotts Bluff County with criminal conspiracy to commit felony theft in an aggregate amount of more than $1,500. The information against Allen was filed July 1, 2015, and the information against Roger was filed July 15. At Allen's arraignment, his case was set to be tried during the jury term beginning October 5. At Roger's arraignment, his case was set to be tried during the jury term beginning November 2.

On September 21, 2015, Allen filed a motion to continue trial in his case because he was waiting on discovery materials from the State. The following day, the State moved to join Roger's and Allen's cases for trial.

On October 5, 2015, a hearing was held on Allen's motion to continue and the State's motion to join the cases for trial. Both Roger and Allen were present at the hearing and represented by counsel. During the hearing, Allen expressly waived his right to speedy trial, and trial in Allen's case was continued to a date to be determined. Roger's speedy trial time was not

[1] See Neb. Rev. Stat. §§ 29-1207 to 29-1209 (Reissue 2016).

addressed during the October 5 hearing. At the close of the hearing, the State's motion for joinder was taken under advisement. In an order entered November 18, the court granted the motion to join Roger's and Allen's cases for trial.

A joint pretrial conference was held January 5, 2016. At the outset of the pretrial conference, the court discussed trial scheduling. The attorneys advised the court they expected trial would last 5 days. The court indicated a preference for trying the case during the first week of February because there were "five [full] days available then" and the court was concerned the January jury pool was not large enough to accommodate the peremptory strikes of two defendants. The joint trial was set for the February 2016 jury term, with jury selection to begin on February 1.

At the conclusion of the pretrial conference, Roger's counsel revisited the trial scheduling issue, stating:

> Your Honor, just to put it on the record, and I know we discussed this beforehand if this is better handled in a motion, but . . . I believe that we have an objection to scheduling of the trial in February, as it exceeds the speedy trial date for [Roger].

Roger's counsel noted that the prosecutor had provided the court "with a memorandum specifying that [Roger's] speedy trial date runs on January 24th if he is not considered to be bound to [Allen's] speedy trial date." Counsel indicated he was raising the issue to give the court an opportunity "to consider a separation" of the cases before Roger filed a motion for discharge. The court declined to take up either severance or discharge during the pretrial conference, stating:

> Well, if you want me to hear a motion to [sever], you need to file it and if you want me to hear a motion for discharge, you need to file that, too. . . .
>
> . . . .
>
> . . . If you want motion hearings before the day of trial, get them on file and just schedule them . . . and we'll get them heard.

No motion to sever was filed. But on January 27, 2016, Roger filed a motion for absolute discharge alleging his speedy trial time had run on January 24. An evidentiary hearing on the motion was held the next day.

At the hearing on the motion to discharge, the court received 10 exhibits, including (1) the pleadings in Roger's and Allen's cases, (2) an affidavit from the court clerk listing the jury trials scheduled for the January 2016 term and showing that the only date without a scheduled jury trial was January 25, and (3) several exhibits showing that three of the cases set for the January 2016 jury term resulted in a plea or dismissal and ultimately were not tried. The court also took judicial notice of the exhibits received during the earlier hearing on the motion for joinder and took judicial notice of all the filings in Roger's and Allen's criminal cases.

In an order entered January 29, 2016, the court overruled Roger's motion for absolute discharge. It calculated that the 6-month statutory speedy trial time[2] for Roger would expire on January 24 unless the codefendant exclusion of § 29-1207(4)(e) applied to exclude additional time. Under that exclusion, a court shall exclude "[a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance."[3]

The court found the State had met its burden of proving each of the factors under § 29-1207(4)(e). Specifically, the court found that (1) Roger's case had been joined for trial with a codefendant whose speedy trial time had not run, (2) the period of delay was reasonable because the joint trial was set to begin just 8 days after Roger's speedy trial time would have run, and (3) "no good cause would exist for severance."

Roger timely appealed from the denial of his motion for absolute discharge. We granted his petition to bypass the Nebraska Court of Appeals.

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[2] § 29-1207(1).

[3] § 29-1207(4)(e).

## II. ASSIGNMENTS OF ERROR

Roger assigns, renumbered and restated, that the trial court erred in (1) construing § 29-1207(4)(e) to require that a joined codefendant must file a motion to sever in order to preserve his or her statutory right to speedy trial, (2) using the longer of the joint defendants' speedy trial calculations when § 29-1207(4)(e) suggests the shorter of the two should be used, (3) finding the period of delay reasonable when earlier trial dates were available, and (4) finding the State proved good cause for not granting a severance.

## III. STANDARD OF REVIEW

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.[4]

[2] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.[5]

## IV. ANALYSIS

[3-5] The codefendant exclusion in § 29-1207(4)(e) was enacted in 1971,[6] and although it has been referenced in reported opinions,[7] no Nebraska appellate court has yet been called upon to interpret or apply it. In construing the provisions of § 29-1207(4)(e), we are guided by familiar principles. Statutory language is to be given its plain and ordinary

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[4] *State v. Vela-Montes*, 287 Neb. 679, 844 N.W.2d 286 (2014); *State v. Brooks*, 285 Neb. 640, 828 N.W.2d 496 (2013).

[5] *State v. Covey*, 290 Neb. 257, 859 N.W.2d 558 (2015); *State v. Abdulkadir*, 286 Neb. 417, 837 N.W.2d 510 (2013).

[6] 1971 Neb. Laws, L.B. 436.

[7] *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987), *abrogated on other grounds, State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990); *State v. Alcaraz*, 8 Neb. App. 215, 590 N.W.2d 414 (1999).

meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[8] 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] In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[10]

### 1. No Unitary Speedy Trial Clock

As a preliminary matter, we note the State asks this court to interpret § 29-1207(4)(e) in a way that would impose a unitary speedy trial clock on all joined codefendants, measured by the codefendant with the most time remaining. We decline to adopt such a construction, because it is not supported by the plain language of the statute or the legislative history.

In *State v. Alvarez*,[11] we addressed the history of the adoption of the Nebraska speedy trial act and recognized that our act is "substantially similar to Standards 2.2 and 2.3 of the Standards Relating to Speedy Trial, recommended by the American Bar Association Project on Minimum Standards for Criminal Justice, Approved Draft, 1968" (ABA Standards). The legislative history of the Nebraska speedy trial act also indicates our Legislature intended to adopt the ABA Standards when it enacted the speedy trial act.[12]

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[8] *State v. Sikes*, 286 Neb. 38, 834 N.W.2d 609 (2013); *State v. Parks*, 282 Neb. 454, 803 N.W.2d 761 (2011).

[9] *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004); *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002).

[10] *State v. Mucia*, 292 Neb. 1, 871 N.W.2d 221 (2015); *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

[11] *State v. Alvarez*, 189 Neb. 281, 289, 202 N.W.2d 604, 609 (1972).

[12] Floor Debate, L.B. 436, 82d Leg., 1st Sess. (Apr. 15, 1971) (statement of Senator David Stahmer).

The ABA Standards included commentary related to the language used by our Legislature in § 29-1207(4)(e):

> "This standard emphasizes that the right to a speedy trial is a personal right which is not lost merely by the defendant being joined for trial with other defendants as to whom the running of the time limitations has been interrupted. Thus, if defendant A and defendant B are joined for trial, A's right to speedy trial should not ordinarily be impaired by the fact that B has requested or consented to a continuance, is not available for trial, etc. However, the standard would permit the trial judge, in his discretion, to extend the time for A's trial with B for a reasonable period of time for good cause. In such a case the question for the judge is whether the need to try A and B together is sufficiently great to justify some modest extension of the time limits applicable to A."[13]

In requesting that Nebraska's codefendant exclusion be construed to create a unitary speedy trial clock for all joined codefendants, the State relies extensively on cases interpreting the federal Speedy Trial Act of 1974. Like Nebraska's speedy trial act, the federal act contains a codefendant exclusion. However, the language used by Congress in its codefendant exclusion differs from that used by our Legislature.

In adopting the federal act, Congress intentionally changed the language of the codefendant exclusion from that promulgated by the ABA Standards.[14] The federal act contains no "good cause" requirement and instead provides that "[a] reasonable period of delay [may be excluded] when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted."[15] The U.S. Supreme Court has held the language of

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[13] *Miller v. State*, 706 P.2d 336, 340 (Alaska App. 1968) (quoting commentary to ABA Standard 2.3(g)).

[14] See *United States v. Payden*, 620 F. Supp. 1426 (1985).

[15] 18 U.S.C. § 3161(h)(6) (2012).

the federal codefendant exclusion imposes a general rule that all joined codefendants fall within the speedy trial computation of the latest codefendant.[16] A corollary of this federal "unitary '[s]peedy [t]rial [c]lock'" rule is that an exclusion of time that applies to one joined codefendant generally applies to all joined codefendants.[17]

[6] Because the federal codefendant exclusion is different in terms of both language and legislative history, we do not interpret § 29-1207(4)(e) to impose a unitary speedy trial clock on all joined codefendants. Instead, we find that the Nebraska Legislature intended the statutory right to speedy trial to be a personal right which is not lost merely because a defendant is joined for trial with a codefendant whose time for trial has not run.

### 2. Excluded Time Under § 29-1207(4)(e)

[7,8] Nebraska's speedy trial statute, § 29-1207(1), provides: "Every person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section." To compute the 6-month period, a court must exclude the day the State filed the information, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4).[18]

[9-11] The primary burden of bringing an accused person to trial within the time provided by law is upon the State.[19] If the State does not bring a defendant to trial within the permitted time, as extended by any periods excluded under § 29-1207(4), the defendant is entitled to absolute discharge from the offense

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[16] *Henderson v. United States*, 476 U.S. 321, 106 S. Ct. 1871, 90 L. Ed. 2d 299 (1986).

[17] *United States v. Payden, supra* note 14, 620 F. Supp. at 1427. Accord, *United States v. Piteo*, 726 F.2d 50 (2d Cir. 1983); *United States v. Campbell*, 706 F.2d 1138 (11th Cir. 1983).

[18] See *State v. Betancourt-Garcia*, 295 Neb. 170, 887 N.W.2d 296 (2016).

[19] *State v. Knudtson*, 262 Neb. 917, 636 N.W.2d 379 (2001).

charged.[20] The burden of proof is on the State to show, by a preponderance of the evidence, that one or more of the excluded periods under § 29-1207(4) are applicable.[21]

Section 29-1207(4) identifies the periods of time which "shall be excluded in computing the time for trial." In this appeal, we are concerned primarily with subsection (4)(e), the codefendant exclusion, which requires courts to exclude

> [a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases, the defendant shall be granted a severance so that he or she may be tried within the time limits applicable to him or her[.]

[12] The plain language of § 29-1207(4)(e) contains three factors that must be satisfied for the codefendant exclusion to be applicable: (1) The defendant's case must be joined for trial with that of a codefendant as to whom the speedy trial time has not run, (2) the period of delay must be reasonable, and (3) there must be good cause for not granting a severance.

(a) Filing Motion to Sever

Before we address whether the statutory factors were satisfied in the instant case, we pause to address whether a motion to sever must be filed to invoke the provisions of § 29-1207(4)(e). Both parties raise this issue. Roger assigns that the trial court erred by construing § 29-1207(4)(e) to require him to file a motion to sever in order to preserve his statutory right to a speedy trial. And the State argues Roger waived his right to a speedy trial by failing to make a motion to sever at a time that would have permitted his case to be tried within the time limits applicable to him. Both parties are incorrect.

Roger's assignment of error is not supported by the record, because the trial court neither held nor suggested that Roger

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[20] § 29-1208.

[21] See *State v. Knudtson, supra* note 19.

waived his right to a speedy trial by not filing a motion to sever. And the State's argument that a joined codefendant waives the right to a speedy trial by failing to request a severance is also flawed.

The plain language of § 29-1207(4)(e) references good cause for "granting a severance," and the term "granting" certainly connotes the need for a triggering request of some sort. Such a triggering request is particularly important if a defendant wants the relief afforded by the second portion of subsection (4)(e): "grant[ing] a severance so that he or she may be tried within the time limits applicable to him or her." Obviously, the severance remedy of § 29-1207(4)(e) is available only when the issue of severance is raised before the defendant's speedy trial time expires. Indeed, two other state courts that have addressed the applicability of language identical to that of § 29-1207(4)(e) have suggested that it is the defendant's burden to raise the speedy trial issue prior to the time when his or her speedy trial clock would otherwise expire.[22]

Here, Roger raised an objection to the trial date on the ground it was outside his statutory speedy trial time. But despite the court's direction that he file a motion to sever if he wanted the court to consider that issue before trial, Roger instead waited until the speedy trial time applicable to him expired, and then filed a motion for absolute discharge. By following this procedure, Roger made a calculated choice that left only two possible outcomes.

The first possible outcome was that the court would find the State had proved all the factors of § 29-1207(4)(e). If this occurred, the court would calculate Roger's speedy trial time, excluding time required by § 29-1207(4)(e), and overrule Roger's motion for discharge. The second possible outcome was that the court would find the State had not proved all the factors of § 29-1207(4)(e). If this occurred, it would

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[22] *Miller v. State, supra* note 13; *People v. Hernandez*, 829 P.2d 392 (Colo. App. 1991).

be too late to grant the relief referenced in the second sentence of § 29-1207(4)(e)—a severance to allow Roger to be tried "within the time limits applicable to him." So instead of a severance, the court would calculate Roger's speedy trial time without excluding any additional period of time under § 29-1207(4)(e), and Roger would be entitled to an absolute discharge under § 29-1208.

[13] As such, while it is correct that Roger's failure to request a severance before his speedy trial time expired had the practical effect of waiving the possibility of a severance, it is incorrect to say the procedure he used resulted in a waiver of his right to speedy trial.[23]

### (b) Factors of § 29-1207(4)(e) Were Satisfied

Here, the parties agree the trial court correctly found the first factor of § 29-1207(4)(e) was satisfied; Roger's case was joined for trial with Allen's case, and when Roger filed his motion for discharge, the speedy trial time for Allen had not run. The parties disagree on whether the State proved, by a preponderance of the evidence, the remaining two factors of § 29-1207(4)(e). We address each factor in turn.

#### *(i) Reasonableness of Delay*

In considering the reasonableness of the delay, the trial court began by identifying the period of time to be measured. The court concluded, and all parties agree, that without factoring in the codefendant exclusion, Roger's speedy trial time would have expired January 24, 2016, due to a pretrial discovery motion that extended the 6 months under § 29-1207(4)(a). The court thus concluded the critical period was the 8 days between January 24 and February 1 (the day the joint trial was set to begin).

[14] In a case such as this, where the joint trial was set for a date certain when the motion for absolute discharge

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[23] See *State v. Alvarez, supra* note 11.

was filed, we agree that the period of delay for purposes of § 29-1207(4)(e) is determined by first calculating the defendant's speedy trial time absent the codefendant exclusion and then determining the number of days beyond that date that the joint trial is set to begin. To the extent Roger's second assignment of error asserts, incorrectly, that the trial court measured the time period by using Allen's speedy trial calculation rather than Roger's, we find the assignment meritless.

The trial court expressly found the 8-day period of delay reasonable. It referenced exhibit 5, the affidavit of the court clerk, which showed that no "week-long" jury settings were available during the January 2016 jury term. During the pretrial conference, the court was advised it would take 5 days to try the joined cases. The court also expressed concern that the January jury pool was not large enough to accommodate the peremptory strikes of two defendants. On this record, we find no clear error in the court's finding that the 8-day delay was reasonable.

*(ii) Good Cause for Not Granting Severance*

In its order, the trial court expressly found that "no good cause would exist for severance." The phrasing of this finding does not precisely track the statutory language, which requires a finding that there be "good cause for not granting a severance."[24] While we emphasize that the statutory standard is the proper one, we conclude the trial court's articulation was not material to its analysis of the good cause issue. Our review will focus on whether it was clearly erroneous for the court to determine there was good cause for not granting a severance.

[15] We have not defined "good cause" for purposes of § 29-1207(4)(e), and the statute contains no definition. But in the related context of considering "good cause" under the

[24] § 29-1207(4)(e).

speedy trial provisions of Nebraska's detainer statute,[25] we have said "'[g]ood cause means a substantial reason; one that affords a legal excuse.'"[26] We have also recognized that good cause is "'something that must be substantial, but [is] also a factual question dealt with on a case-by-case basis.'"[27] While this definition of good cause is general, we conclude it is a fitting definition to apply to our analysis of speedy trial rights under § 29-1207(4)(e).

Roger argues the trial court's only reason for finding good cause not to grant a severance was the fact that he never filed a motion to sever. While we are persuaded that Roger's failure to request a severance, particularly after the court invited such a motion, is a relevant consideration when determining whether there was a sufficient legal excuse for "not granting a severance,"[28] our reading of the court's order is not as narrow as Roger suggests.[29] In discussing good cause for not granting a severance, the court's order provided:

> [Roger's] case was joined with [Allen's] case on November 18, 2015, before expiration of the statutory speedy trial time for either case. No severance has been requested by Roger since the cases were ordered consolidated. The [c]ourt has considered the evidence received today, exhibits 4-13, and also exhibits 1-3 received at the hearing on consolidation. The [c]ourt also takes judicial notice of all filed documents in [both criminal cases]. The [c]ourt finds that no good cause would exist for severance.

Here, the court considered more than just Roger's failure to request a severance. It also considered the evidence offered in

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[25] See Neb. Rev. Stat. § 29-3805 (Reissue 2016).

[26] *State v. Kolbjornsen*, 295 Neb. 231, 237, 888 N.W.2d 153, 157 (2016).

[27] *Id.*

[28] § 29-1207(4)(e).

[29] See *U.S. v. Maryea*, 704 F.3d 55 (1st Cir. 2013) (and cases cited therein). See, also, *State v. Alvarez, supra* note 11.

support of the original joinder, the exhibits offered by the parties during the hearing on the motion for discharge, and all the filings in each criminal case. This evidence supports the court's conclusion that there was a substantial reason for not granting a severance, sufficient to satisfy good cause. On this record, we find no clear error in the trial court's determination that there was good cause not to grant a severance just a few days before trial was set to begin.

In summary, we find the trial court correctly interpreted and applied the codefendant exclusion under § 29-1207(4)(e). It did not clearly err in finding that all three factors under § 29-1207(4)(e) were proved by a preponderance of the evidence or in computing Roger's speedy trial time by excluding the 8 days between January 24, 2016, and the start of trial on February 1. As such, the court correctly overruled Roger's motion for absolute discharge.

## V. CONCLUSION

For the foregoing reasons, we affirm the decision of the district court.

Affirmed.

Nebraska Supreme Court
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State of Nebraska, appellee, v.
Michael R. Schiesser, appellant.
896 N.W.2d 606

Filed June 2, 2017. No. S-16-115.

Petition for further review from the Court of Appeals, Inbody, Riedmann, and Bishop, Judges, on appeal thereto from the District Court for Lancaster County, Lori A. Maret, Judge. Judgment of Court of Appeals affirmed.

John S. Berry, of Berry Law Firm, for appellant.

Douglas J. Peterson, Attorney General, Melissa R. Vincent, and, on brief, George R. Love for appellee.

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

Per Curiam.

Having reviewed the briefs and record and having heard oral arguments, we conclude on further review that the decision of the Nebraska Court of Appeals in *State v. Schiesser*, 24 Neb. App. 407, 888 N.W.2d 736 (2016), is correct, and accordingly, we affirm the decision of the Court of Appeals which affirmed the judgment of the district court.

Affirmed.

Nebraska Supreme Court
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# Janice M. Anderson, Personal Representative of the Estate of Steven B. Anderson, deceased, appellee, v. Steve Finkle, appellant.

896 N.W.2d 606

Filed June 2, 2017. Nos. S-16-222, S-16-307.

1. **Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decision made by the lower court.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Actions: Abatement, Survival, and Revival.** A pending action must be revived in the manner provided by statute; a failure to do so means that the pending action has no force and effect with respect to any entity in whose name revivor was required.
4. **Actions: Parties: Death: Abatement, Survival, and Revival.** The death of a party to a legal proceeding, where the cause of action survives, suspends the action as to the decedent until someone is substituted for the decedent as a party.
5. **Judgments: Jurisdiction.** When a court lacks jurisdiction and nonetheless enters an order, such order is void.
6. **Judgments: Final Orders: Jurisdiction: Appeal and Error.** A void order is a nullity which cannot constitute a judgment or final order that confers appellate jurisdiction on a court.
7. **Appeal and Error.** The notice of appeal from a nonappealable order does not render void for lack of jurisdiction acts of the trial court taken in the interval between the filing of the notice and the dismissal of the appeal by the appellate court.
8. **Abatement, Survival, and Revival: Final Orders.** An order reviving an action is not a final order.

9. **Jurisdiction: Final Orders: Appeal and Error.** An appellate court is without jurisdiction to entertain appeals from nonfinal orders.

Appeals from the District Court for Douglas County: Shelly R. Stratman, Judge. Appeals dismissed.

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

John A. Kinney and Jill M. Mason, of Kinney Mason, P.C., L.L.O., for appellee.

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

Heavican, C.J.

## INTRODUCTION

This case involves two separate cases that were fully briefed and consolidated for oral argument.

Steven B. Anderson filed a complaint alleging breach of contract and quantum meruit or unjust enrichment after Steve Finkle failed to perform on a promissory note. Following trial, but prior to the court issuing its order, Anderson died. The district court subsequently issued an order awarding Anderson the amount of the promissory note, plus interest.

The court overruled Finkle's motion for new trial and granted Anderson's estate's motion for revivor to revive the matter. Finkle appeals. We dismiss the appeals in both cases Nos. S-16-222 and S-16-307.

## BACKGROUND

### Factual Background

Finkle and several other individuals formed a limited liability corporation, Summer Productions, LLC., to open and operate "Pauli's in the Outfield," a beer garden, which would be open during the College World Series in June 2013. To open the beer garden, Summer Productions needed $100,000 in capital.

In May 2013, Finkle signed a promissory note for $50,000, plus interest assessed at the rate of 5 percent per annum, payable to Anderson, due on or before August 1, 2013. Finkle claims that Anderson rejected the first promissory note and that Anderson received a new promissory note reflecting the terms of the agreement, but that the new note was not signed by Finkle. In any event, Anderson transferred the funds, $20,000 in a cashier's check and $30,300 in cash, to Summer Productions.

On June 12, 2013, the beer garden opened for business for the first weekend of the College World Series. The venture failed after 3½ days, and Summer Productions filed for bankruptcy. Finkle failed to perform on the promissory note.

## Procedural History

On November 21, 2013, Anderson filed a complaint, alleging breach of contract and quantum meruit or unjust enrichment.

The district court held a trial on August 25, 2015. Anderson died on October 2. On October 30, Janice M. Anderson was appointed in probate court to serve as Anderson's personal representative. On November 30, the court ordered Finkle to pay Anderson the amount of $50,000, plus interest and costs of the action. The record suggests that the trial court did not know of Anderson's death before entering the November 30 order. Further, at oral argument, Finkle's attorney confirmed that there was no suggestion of death filed with the trial court prior to the issuance of the November 30 order.

On December 4, 2015, Finkle filed a motion for new trial or to alter or amend the trial court's order entered on November 30. On January 25, 2016, the estate filed a motion for revivor. On January 29, the district court overruled Finkle's motion for new trial, and on February 25, Finkle filed a notice of appeal from the denial of his motion for new trial. On March 1, the court filed an order reviving the matter in the name of the personal representative of the estate. On March 22, Finkle filed a notice of appeal from the order of revivor.

## ASSIGNMENTS OF ERROR

In case No. S-16-307, Finkle assigns that the district court lacked jurisdiction to enter the November 30, 2015, judgment and its January 29, 2016, order denying Finkle's motion for new trial, which both occurred after the death of Anderson and prior to entering an order of revivor. Thus, Finkle argues, the judgment and orders entered by the trial court are null and void.

In case No. S-16-222, in addition to the errors listed above, Finkle assigns, restated and consolidated, that the district court erred in finding the promissory note was valid and enforceable because (1) the court misapplied the parol evidence rule to bar consideration of evidence outside the written terms of the promissory note, (2) the court failed to discredit, as a matter of law, the testimonial evidence of Anderson at trial after he changed his prior testimony on vital disputed issues including whether the promissory note formed an enforceable agreement, (3) the agreement lacked consideration, and (4) Finkle was intended to be personally liable under the promissory note.

## STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decision made by the lower court.[1]

[2] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[2]

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[1] *Platte Valley Nat. Bank v. Lasen*, 273 Neb. 602, 732 N.W.2d 347 (2007).

[2] *Fox v. Nick*, 265 Neb. 986, 660 N.W.2d 881 (2003). See *In re Conservatorship of Franke*, 292 Neb. 912, 875 N.W.2d 408 (2016).

## ANALYSIS

### Jurisdiction

Neb. Rev. Stat. § 25-1405 (Reissue 2016) provides that "[w]here one of the parties to an action dies, or his powers as a personal representative cease, before the judgment, if the right of action survives in favor of or against his representatives or successor, the action may be revived, and proceed in their names." And Neb. Rev. Stat. § 25-1406 (Reissue 2016) states:

> The revivor shall be, by a conditional order of the court if made in term, or by a judge thereof if made in vacation, that the action be revived in the names of the representatives or successor of the party who died, or whose powers ceased; and proceed in favor of or against them.

Neb. Rev. Stat. § 25-1407 (Reissue 2016) further provides:

> The order may be made on the motion of the adverse party, or of the representatives or successor of the party who died, or whose powers ceased, suggesting his death or the cessation of his powers, which, with the names and capacities of his representatives or successor, shall be stated in the order.

Neb. Rev. Stat. § 25-322 (Reissue 2016) also provides:

> An action does not abate by the death or other disability of a party, or by the transfer of any interest therein during its pendency, if the cause of action survives or continues. In the case of the death or other disability of a party, the court may allow the action to continue by or against his or her representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party or the court may allow the person to whom the transfer is made to be substituted in the action.

[3,4] A pending action must be revived in the manner provided by statute; a failure to do so means that the pending action has no force and effect with respect to any entity in whose

name revivor was required.[3] "'The death of a party to a legal proceeding, where the cause of action survives, suspends the action as to decedent until someone is substituted for decedent as a party.'"[4]

In this case, trial was held on August 25, 2015. Anderson, the sole plaintiff in this case, died on October 2. On October 30, the personal representative was appointed in probate court.

On November 30, 2015, the court entered judgment on the merits of the case. On January 29, 2016, the district court ruled on various posttrial motions, and on February 25, Finkle filed an otherwise timely notice of appeal from this judgment. Prior to the filing of that appeal, however, on January 25, the estate had filed a motion for revivor, and on March 1, the trial court revived the action in the name of the personal representative. On March 22, Finkle perfected a second appeal from the order of revivor and all underlying orders and judgments, including the trial order entered on November 30, 2015.

As of the time of Anderson's death, the only action the district court had jurisdiction to take was to revive the action in the name of the personal representative in response to a properly filed motion for revivor.[5] As such, the district court lacked jurisdiction to enter judgment for Anderson and lacked jurisdiction to deny Finkle's motion for new trial. Because the pending action was not revived, the court's issuance of these orders following Anderson's death had "no force and effect" as to Anderson.[6]

[5-7] When a court lacks jurisdiction and nonetheless enters an order, such order is void.[7] Furthermore, "[a] void order is a

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[3] See *Fox v. Nick, supra* note 2.

[4] *Id*. at 991, 660 N.W.2d at 886, quoting 1 C.J.S. *Abatement and Revival* § 155 (1985).

[5] See, *In re Conservatorship of Franke, supra* note 2; *Fox v. Nick, supra* note 2; *Street v. Smith*, 75 Neb. 434, 106 N.W. 472 (1906).

[6] See *Fox v. Nick, supra* note 2, 265 Neb. at 992, 660 N.W.2d at 886 (2003).

[7] See *State v. Bracey*, 261 Neb. 14, 621 N.W.2d 106 (2001).

nullity which cannot constitute a judgment or final order that confers appellate jurisdiction on [a] court."[8] We have held that "the notice of appeal from a nonappealable order does not render void for lack of jurisdiction acts of the trial court taken in the interval between the filing of the notice and the dismissal of the appeal by the appellate court."[9]

As discussed above, because of Anderson's death, the district court lacked jurisdiction to enter judgment and deny Finkle's motion for new trial. Thus, these orders were void. Finkle's purported appeal from such orders did not confer appellate jurisdiction upon this court. Therefore, Finkle's first appeal, filed on February 25, 2016, did not divest the district court of its jurisdiction.

## Order of Revivor

The one action the district court was permitted to take was to revive the proceedings in the name of Anderson's personal representative. The district court did so on March 1, 2016. Therefore, the order of revivor issued by the district court on March 1 effectively revived the matter in the name of the estate.

Hence, we turn to Finkle's second notice of appeal, filed on March 22, 2016, in which Finkle appealed the order of revivor and all underlying orders and judgments. The motion for revivor was made pursuant to § 25-1406. The district court granted the order of revivor "pursuant to Neb. Rev. Stat[.] § 25-322 (and not Neb. Rev. Stat[.] § 25-1410)."

[8,9] Although the order for revivor was made pursuant to § 25-322, this makes no difference in our analysis. We have held that "an order reviving an action, whether the order was entered in proceedings under § 25-322 or under [Neb. Rev. Stat.] §§ 25-1403 to 25-1420 [(Reissue 2016)], is not a final

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[8] *In re Interest of Trey H.*, 281 Neb. 760, 767, 798 N.W.2d 607, 613 (2011).

[9] *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 729, 592 N.W.2d 894, 906 (1999).

order from which an appeal may immediately be taken. The order may be reviewed after final judgment in the case."[10] We have therefore held that an order reviving an action is not a final order. An appellate court is without jurisdiction to entertain appeals from nonfinal orders.[11] As such, we must dismiss Finkle's second notice of appeal for lack of a final, appealable order.

In short, the district court's judgment order and order denying the motion for new trial or to alter or amend the trial court's order following Anderson's death on October 2, 2015, appealed as case No. S-16-222, is void and is accordingly dismissed. Because the district court was never divested of its jurisdiction, the order of revivor remains in effect. However, we are without jurisdiction to entertain Finkle's appeal of this order of revivor, appealed as case No. S-16-307, because it was not a final order. Therefore, case No. S-16-307 must also be dismissed.

## CONCLUSION

Because the case in the district court was suspended upon the death of Anderson, the judgment order and order denying the motion for new trial or to alter or amend the trial order that the district court issued subsequent to Anderson's death, which were appealed and docketed at case No. S-16-222, is dismissed. The appeal docketed at case No. S-16-307 is also dismissed for lack of a final order.

Appeals dismissed.

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[10] *Platte Valley Nat. Bank v. Lasen, supra* note 1, 273 Neb. at 611, 732 N.W.2d at 354.

[11] See *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006).

Nebraska Supreme Court
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# In re Interest of Carmelo G., a child under 18 years of age. State of Nebraska, appellee, v. Latika G., appellant.

896 N.W.2d 902

Filed June 2, 2017. No. S-16-981.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings.
2. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
3. **Appeal and Error.** On a question of law, an appellate court reaches a conclusion independently of the court below.
4. **Constitutional Law: Parental Rights.** The proper starting point for legal analysis when the State involves itself in family relations is always the fundamental constitutional rights of a parent.
5. **Parental Rights.** The interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the U.S. Supreme Court.
6. **Parental Rights: Due Process.** The fundamental liberty interest of natural parents in the care, custody, and management of their children is afforded due process protection.
7. **Juvenile Courts: Parental Rights.** Neb. Rev. Stat. § 43-248(2) (Cum. Supp. 2014) allows the State to take a juvenile into custody without a warrant or order of the court when it appears the juvenile is seriously endangered in his or her surroundings and immediate removal appears to be necessary for the juvenile's protection. However, the parent retains a liberty interest in the continuous custody of his or her child.
8. **Parental Rights: Notice.** The State may not, in exercising its parens patriae interest, unreasonably delay in notifying a parent that the State

has taken emergency action regarding that parent's child nor unreasonably delay in providing the parent a meaningful hearing.

9. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the Separate Juvenile Court of Douglas County: Vernon Daniels, Judge. Order vacated, and cause remanded for further proceedings.

Thomas C. Riley, Douglas County Public Defender, and Zoë R. Wade for appellant.

Donald W. Kleine, Douglas County Attorney, and Paulette Merrell for appellee.

Kate E. Placzek, of Law Office of Kate E. Placzek, guardian ad litem.

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

Miller-Lerman, J.

## NATURE OF CASE

On January 5, 2016, the State filed a petition in the separate juvenile court of Douglas County against Carmelo G.'s biological parents, Latika G. and Deontrae H. The State alleged that Carmelo lacked parental care by reason of the fault or habits of Latika and Deontrae. On that same day, January 5, the juvenile court filed an ex parte order in which it granted the State's motion for temporary custody of Carmelo with the Department of Health and Human Services (DHHS). A protective custody hearing was held on January 21, but it was continued over many dates until it was concluded on August 2. On September 19, the juvenile court filed an order in which it ordered that Carmelo remain in the temporary custody of DHHS until further order of the court. Latika appeals. Because we conclude that Latika's procedural due process rights were

violated, we vacate the September 19 order and remand the cause for further proceedings.

## STATEMENT OF FACTS

Carmelo was born in July 2015. Latika is Carmelo's biological mother, and Deontrae is Carmelo's biological father. Prior to the filing of the petition in the present case, Carmelo was under the jurisdiction of the juvenile court from July 2015 through December 2, 2015, in case No. JV 15-1285. In that earlier case, the State filed a petition against Latika pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2014). In its protective custody order filed July 15, the juvenile court noted that the State had requested continued protective custody of Carmelo by DHHS and that Latika did not resist continued protective custody. The court ordered that Carmelo was to remain in the temporary custody of DHHS, with placement to exclude the parental home. The court stated that returning Carmelo to Latika's care at that time would be contrary to his health and safety due to exigent circumstances, including the facts set forth in the affidavit for removal in that case, "as well as the mother's use of illegal drugs which impairs her ability to adequately provide for the child." It was also noted in case No. JV 15-1285 that Latika suffered from mental health issues, including bipolar disorder, schizophrenia, and depression.

On December 2, 2015, an adjudication hearing was held in case No. JV 15-1285. In an order filed on December 3, the juvenile court dismissed that case, stating that based on the evidence presented, it could not find that Carmelo was within the meaning of § 43-247(3)(a) as pled. Carmelo was returned to Latika's home on December 2.

Kathleen Aburumuh, an employee of Nebraska Families Collaborative (NFC), was the family permanency specialist assigned to work with Latika during the pendency of the initial filing against Latika in case No. JV 15-1285. During the pendency of that case, Aburumuh met with Latika a

minimum of once per month from August through December 2015 and Aburumuh worked with Latika on her case plan, which included addressing substance abuse and domestic violence issues.

Starting on December 3, 2015, following the dismissal of case No. JV 15-1285, Aburumuh continued to work with Latika through Aburumuh's position on the noncourt team at NFC. Aburumuh testified that a noncourt team consists of caseworkers "who primarily work with families where the safety threat is not large enough to remove the children, but there are still safety threats present." As a member of the noncourt team, Aburumuh would work with the family to resolve those safety threats.

Aburumuh testified that as of December 3, 2015, there were threats to the child present in Latika's home. Aburumuh testified that the threats to Carmelo's well-being were reflected in the facts that there had been two calls to law enforcement regarding domestic violence in October and November 2015 and that Latika had recently tested positive for cocaine. Aburumuh further testified that at that time, NFC felt that because Latika "was already involved in services and hadn't quite completed them, and this was a sudden turn in the case, that nobody was kind of expecting it, that it would be to her benefit to continue with services."

When Aburumuh met with Latika at Latika's home on December 3, 2015, Aburumuh presented Latika with a safety plan. Aburumuh testified that safety plans are put into place when it has been determined that without services, the child at issue is at risk of removal. The safety plan Aburumuh presented to Latika on December 3 included, inter alia, that Latika was to participate in random drug testing, to continue to participate in and complete outpatient treatment, to participate in domestic violence classes, and not to have contact with Deontrae. The December 3 safety plan further stated that Latika's brother would move into the home effective December 4 to help Latika. The plan provided

that Latika would allow random visits from her mother and her sister.

Latika's mother and Carmelo were present at the meeting on December 3, 2015. Latika's brother was briefly present, but Aburumuh did not discuss the safety plan with him or his involvement as a safety plan participant. Latika's sister, who was also identified as a safety plan participant, was not present at the meeting.

Aburumuh was the only person to sign the December 3, 2015, safety plan. Latika and the other safety plan participants did not sign it. Aburumuh testified that Latika verbally agreed to the December 3 safety plan. Aburumuh testified that the safety plan was not signed because she needed to correct the name of Latika's brother, who was a plan participant. Aburumuh testified that she later attempted to have Latika sign the correct safety plan but was unable to meet up with her.

On December 20, 2015, reports of domestic violence between Latika and Deontrae were made to law enforcement. On December 29, DHHS was made aware of the domestic violence report. As a result of learning of the domestic violence report, on December 31, Aburumuh and Kevin Peatrowsky, who is a child and family services specialist with DHHS, met with Latika in order to investigate the domestic violence allegation of December 20. Peatrowsky testified Latika told him that she and Deontrae had gotten into an argument that resulted in a physical fight and that during the argument, Deontrae had broken a picture frame over Latika's head and a bowl of cereal was spilled. Peatrowsky testified that he understood that there had been physical violence between Latika and Deontrae "[m]ore than two times in the past year . . . ."

On December 31, 2015, Peatrowsky presented Latika with an updated safety plan. The December 31 safety plan included the services and conditions outlined in the December 3 safety plan. The December 31 safety plan further stated that Carmelo was "not currently safe staying in the family home of Latika"

and that he would "now stay with the maternal aunt . . . in order to ensure that the safety of the child is secured." The December 31 safety plan was signed by all the safety plan participants.

On January 5, 2016, the State filed a petition against Latika pursuant to § 43-247(3)(a) (Supp. 2015) in which the State alleged that Carmelo lacked proper parental care by reason of the fault or habits of Latika. Specifically, the State alleged in the petition that (1) Latika's use of alcohol or drugs places Carmelo at risk; (2) Latika has participated in domestic violence with Deontrae; (3) Latika has failed to work with an agreed-upon NFC plan; (4) on or about December 20, 2015, Latika was involved in a domestic violence incident with Deontrae in which law enforcement was called to the home where Carmelo resides; (5) on December 31, Latika admitted to an NFC employee that she had willingly let Denotrae into her home on December 20; and (6) due to the above allegations, Carmelo is at risk.

On that same day, January 5, 2016, the juvenile court filed an ex parte order in which it granted immediate temporary custody of Carmelo to DHHS. The court stated that based upon its findings of drug use and domestic violence, Carmelo was seriously endangered in his surroundings. The court further stated that continuation of Carmelo in his home would be contrary to his health, safety, or welfare and that immediate removal appeared to be necessary for Carmelo's protection. The court further noted that reasonable efforts were made to prevent removal or that exigent circumstances precluded reasonable efforts from being made. Such reasonable efforts included a "[s]afety plan, drug testing, [i]nte[n]sive [o]utpatient [t]reatment, [and] IFP services." Based on the foregoing, the court ordered that DHHS was to take temporary custody of Carmelo, which DHHS did. The ex parte order set a protective custody hearing for January 12, 2016.

The State moved for Carmelo's continued detention, with placement to exclude the parental home. Carmelo's guardian

ad litem and DHHS joined in the motion. Latika and Deontrae resisted the continued detention. At some point during these proceedings, Deontrae no longer resisted the continued detention, and he is not a part of this appeal.

On January 7, 2016, the juvenile court judge recused himself because he was the judge who had presided over the proceedings in case No. JV 15-1285. The protective custody hearing was reset for January 21.

The protective custody hearing was held on January 21, 2016, but it was continued for a further evidentiary hearing. Continued evidentiary hearings were held on February 10 and 24, March 10, May 13, and August 2. Each continuance order stated that the hearing was continued "due to insufficient time," except for the order continuing the hearing from May 13 to August 2, in which the court stated that "the county attorney moved for a continuance for the reason that the witness is on vacation." The parties did not object to the continuances.

Aburumuh and Peatrowsky testified at the protective custody hearing. The juvenile court received eight exhibits, including the December 3, 2015, safety plan; the December 31, 2015, safety plan; certain certified copies of orders from case No. JV 15-1285; results of Latika's drug tests; and Aburumuh's affidavit for removal dated January 5, 2015.

The protective custody hearing was concluded on August 2, 2016, and the juvenile court filed a protective custody order on September 19, in which it sustained the State's motion for continued temporary custody. The court stated that by a preponderance of the evidence, it found that exigent circumstances existed, reasonable efforts were not required to prevent removal of Carmelo from the home of Latika, and it would be contrary to Carmelo's health and safety for Carmelo to be returned home. The court determined that it was in Carmelo's best interests, safety, and welfare to remain in the temporary custody of DHHS.

Latika appeals.

## ASSIGNMENTS OF ERROR

Latika assigns, restated, that (1) she was denied due process due to the unreasonable delay of more than 8 months between the issuance of the ex parte custody order and that of the protective custody order continuing Carmelo's detention outside the parental home pending adjudication and (2) she was denied due process when the juvenile court determined that continuing Carmelo's detention was necessary based on Latika's noncompliance with the December 3, 2015, safety plan because the plan was invalid and coercive.

## STANDARDS OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings. *In re Interest of Noah B. et al.*, 295 Neb. 764, 891 N.W.2d 109 (2017).

[2,3] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *In re Interest of Joseph S. et al.*, 288 Neb. 463, 849 N.W.2d 468 (2014). On a question of law, an appellate court reaches a conclusion independently of the court below. *In re Interest of Noah B. et al., supra*.

## ANALYSIS

In her first assignment of error, Latika claims that her procedural due process rights were violated by the unreasonable delay of more than 8 months between the issuance of the ex parte order for immediate temporary custody and that of the protective custody order, sometimes referred to as the "detention order." Although Latika's objections to the process tended to focus on the initial removal of Carmelo, the court recognized on the record that the duration of the proceedings had been prolonged. We find merit to Latika's assignment of error claiming a denial of due process.

[4-6] The proper starting point for legal analysis when the State involves itself in family relations is always the

fundamental constitutional rights of a parent. *In re Interest of Nicole M.*, 287 Neb. 685, 844 N.W.2d 65 (2014). The interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the U.S. Supreme Court. *Jeremiah J. v. Dakota D.*, 287 Neb. 617, 843 N.W.2d 820 (2014), citing *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). The fundamental liberty interest of natural parents in the care, custody, and management of their child is afforded due process protection. *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007); *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004). Such due process rights include the right to be free from an unreasonable delay in providing a parent a meaningful hearing after the entry of an ex parte temporary custody order. See *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), *disapproved on other grounds, O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998). We have previously described the three-stage analysis employed for a claim that one is being deprived of a liberty interest without due process of law. See, *Sherman T. v. Karyn N.*, 286 Neb. 468, 837 N.W.2d 746 (2013); *In re Interest of R.G., supra*. We have undertaken that analysis.

[7,8] Neb. Rev. Stat. § 43-248(2) (Cum. Supp. 2014) allows the State to take a juvenile into custody without a warrant or order of the court when it appears the juvenile "is seriously endangered in his or her surroundings and immediate removal appears to be necessary for the juvenile's protection." However, the parent retains a liberty interest in the continuous custody of his or her child. *In re Interest of Mainor T. & Estela T., supra*. An ex parte order authorizing temporary custody with DHHS is permitted because of its short duration and the requirement of further action by the State before custody can be continued. *Id*. See, also, *In re Interest of R.G., supra*. But "the State may not, in exercising its parens patriae interest, unreasonably delay in notifying a parent that the State has taken emergency action regarding that parent's child

*nor unreasonably delay in providing the parent a meaningful hearing*." *In re Interest of R.G.*, 238 Neb. at 419, 470 N.W.2d at 790 (emphasis supplied). Therefore, following the issuance of an ex parte order for temporary immediate custody, "[a] prompt detention hearing is required in order to protect the parent against the risk of an erroneous deprivation of his or her parental interests." *In re Interest of Mainor T. & Estela T.*, 267 Neb. at 246, 674 N.W.2d at 456. See, also, *In re Interest of R.G., supra*.

In the present case, the State filed its petition on January 5, 2016, and on that same day, the juvenile court filed the ex parte order for immediate custody. DHHS took custody of Carmelo. The State moved for Carmelo's continued detention. The protective custody hearing was set for January 12, which was 7 days after the filing of the ex parte order. The judge then recused himself, and the protective custody hearing was rescheduled for January 21. The hearing began on January 21, which was 16 days following the entry of the ex parte order. Receipt of evidence could not be completed in the time allotted for the hearing, and this hearing and several subsequent hearings were continued. Hearings were held on February 10 and 24, March 10, May 13, and August 2. The hearing concluded on August 2. The juvenile court filed its protective custody order on September 19, which was more than 8 months after the ex parte order for immediate custody was filed.

Latika argues that the more than 8-month delay between the entry of the ex parte order and that of the protective custody order was unreasonable and violated her due process rights. In contrast, Carmelo's guardian ad litem and the State contend that the delay between the issuance of the ex parte order and that of the protective custody order was not unreasonable, because Latika received notice for each of the hearings and received services and visitation with Carmelo during this period of time. The guardian ad litem and the State also assert that "the elapsed time was for the purpose of providing

[Latika] a meaningful opportunity to be heard." Brief for appellee guardian ad litem at 14.

We disagree with the argument of the guardian ad litem and the State to the effect that the period of delay was a benefit to Latika and Carmelo. Instead, we determine that the more than 8-month delay between the entry of the ex parte order and that of the protective custody order was unreasonable and resulted in a violation of Latika's procedural due process rights. As stated above, an ex parte order authorizing temporary custody with DHHS is permitted because of its short duration, and a prompt detention hearing is required in order to protect the parent against the risk of an erroneous deprivation of his or her parental interests. See *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004).

In *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), *disapproved on other grounds, O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998), we recognized that parents have due process rights to be free from an unreasonable delay in providing the parents a meaningful hearing after an ex parte order for immediate custody is filed. In *In re Interest of R.G.*, we concluded that the mother's due process rights were not violated by a 14-day delay between the entry of an ex parte order and that of a detention order when she was given an opportunity to be heard at the detention hearing and was allowed to visit her children in the interim. We cautioned, however, that "the 14 days elapsing between the entry of the ex parte order and the hearing poise the procedures employed in this case on the brink of unreasonableness." *Id.* at 423, 470 N.W.2d at 792.

In this case, the detention hearing commenced on January 21, 2016, which was 16 days after the ex parte order was filed. This is 2 days more than the time that elapsed between the entry of the ex parte order and the hearing in *In re Interest of R.G.*, and in that case, we cautioned that the 14-day period left the procedures employed "on the brink of unreasonableness." 238 Neb. at 423, 420 N.W.2d at 792. The protective custody

hearing in this case was continued over a period of several months, until it finally concluded on August 2. Thereafter, the juvenile court filed its protective custody order on September 19, which was more than 8 months after the ex parte order was filed. The allowance of such an ex parte temporary action is a reasonable reaction to a perceived emergency situation. See *In re Interest of R.G., supra*. However, in exercising its parens patriae interest and taking such ex parte temporary action, the State may not unreasonably delay in providing the parent a meaningful hearing. See *id*. This is because a parent has a liberty interest in raising his or her child, a concept which encompasses the child's custody, care, and control. See *Jeremiah J. v. Dakota D.*, 287 Neb. 617, 843 N.W.2d 820 (2014). The more than 8-month delay in this case between the filing of the ex parte order and that of the protective custody order is too long a duration and results in interference with Latika's liberty interest in raising Carmelo.

This court is well aware of the many challenges involved in scheduling and completing evidentiary hearings in jurisdictions with crowded dockets, including the reality that lawyers are sometimes unable to complete their evidence in the time allotted and continuances are necessary. But despite these challenges, we have recognized that the juvenile court is responsible for managing its docket. That responsibility includes providing prompt detention hearings on an ex parte protective custody order, and in this case, we cannot find that the protective custody hearing was initiated or resolved promptly. The delay in this case was unreasonable, and Latika's procedural due process rights were violated because of this unreasonable delay.

We note that the parties did not directly object to the continuances of the hearing. However, this does not impact our analysis. In *In re Interest of D.M.B.*, 240 Neb. 349, 355-56, 481 N.W.2d 905, 911 (1992), we stated that "[a] delay of 8 months between the time a child is 'temporarily' taken from the child's parent until the child and parent are given the

evidentiary safeguards of an adjudication hearing cannot be condoned, *even when, as here, the parties agreed to repeated continuances*." (Emphasis supplied.) We similarly agree in the instant case that the 8-month delay between the issuance of the ex parte order and that of the protective custody order cannot be condoned, even though the parties did not object to the repeated continuances of the protective custody hearing.

We determine that Latika's procedural due process rights were violated. Therefore, we vacate the September 19, 2016, order of the juvenile court and remand the cause for further proceedings.

[9] Because our determination of Latika's first assignment of error is dispositive, we do not reach her second assignment of error. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Medicine Creek v. Middle Republican NRD, ante* p. 1, 892 N.W.2d 74 (2017).

## CONCLUSION

We conclude that Latika's procedural due process rights were violated by the unreasonable delay of more than 8 months between the filing of the ex parte order for immediate temporary custody and the filing of the protective custody order. Therefore, we vacate the September 19, 2016, temporary protective order of the juvenile court and remand the cause for further proceedings.

Order vacated, and cause remanded for further proceedings.

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

# ACI Worldwide Corp., a Nebraska corporation, appellant, v. Baldwin Hackett & Meeks, Inc., et al., appellees.

896 N.W.2d 156

Filed June 9, 2017. No. S-16-358.

1. **Motions to Vacate: Proof: Appeal and Error.** An appellate court will reverse a decision on a motion to vacate or modify a judgment only if the litigant shows that the district court abused its discretion.
2. **Motions for New Trial: Appeal and Error.** An appellate court reviews a trial court's ruling on a motion for a new trial for abuse of discretion.
3. **Pretrial Procedure: Appeal and Error.** Decisions regarding discovery are directed to the discretion of the trial court and will be upheld in the absence of an abuse of discretion.
4. **Verdicts: Appeal and Error.** When reviewing a jury verdict, the appellate court considers the evidence and resolves evidentiary conflicts in favor of the successful party.
5. **Verdicts: Juries: Appeal and Error.** A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is competent evidence presented to the jury upon which it could find for the successful party.
6. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
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. **Attorney Fees: Appeal and Error.** When an attorney fee is authorized, the amount of the fee is addressed to the trial court's discretion, and its ruling will not be disturbed on appeal absent an abuse of discretion.
9. **Appeal and Error.** To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error.

10. **Trade Secrets: Pretrial Procedure.** There is no talismanic procedure for trade secret discovery that may be used to obtain the best results in any given case.
11. ____: ____. In determining whether a party's trade secret information should be discoverable, the moving party's need for the trade secret information must be weighed against the injury that disclosure might cause the party opposing the discovery.
12. **Torts: Parties.** Under the doctrine established by *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), and *Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965), a party is protected from tort liability for the act of filing a lawsuit.
13. **Torts.** The doctrine established by *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), and *Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965), does not protect a party from liability for the act of filing a "sham" lawsuit. A lawsuit is a "sham" if it is both (1) objectively baseless in the sense that no reasonable litigant could expect success on the merits and (2) subjectively motivated by bad faith.
14. **Pleadings.** An affirmative defense raises new matters which, assuming the allegations in the petition to be true, constitutes a defense to the merits of a claim asserted in the petition.
15. ____. The doctrine established by *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), and *Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965), is an affirmative defense.
16. **Vendor and Vendee.** For purposes of the Junkin Act, monopolization consists of two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.
17. ____. The existence of monopoly power ordinarily is inferred from the seller's possession of a predominant share of the market.
18. **Vendor and Vendee: Damages.** Despite the broad remedial language of the Junkin Act, not every person claiming an injury from a Junkin Act violation can recover damages.
19. **Vendor and Vendee: Damages: Proof.** To recover damages, a plaintiff must prove an antitrust injury. To constitute an antitrust injury, the injury must reflect the anticompetitive effect of the violation or the anticompetitive effects of anticompetitive acts made possible by the violation.
20. **Vendor and Vendee.** Actual anticompetitive effects include, but are not limited to, reduction of output, increase in price, or deterioration in quality.

21. **Contracts: Appeal and Error.** The interpretation of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
22. **Contracts.** When the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.
23. **Trial: Expert Witnesses: Appeal and Error.** There is no exact standard for fixing the qualifications of an expert witness, and a trial court is allowed discretion in determining whether a witness is qualified to testify as an expert. Unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal.
24. **Trial: Expert Witnesses.** Experts or skilled witnesses will be considered qualified if they possess special skill or knowledge respecting the subject matter involved superior to that of persons in general, so as to make the expert's formation of a judgment a fact of probative value.
25. **Trial: Rules of Evidence: Expert Witnesses.** A witness may qualify as an expert by virtue of either formal training or actual practical experience in the field.
26. **Damages: Evidence: Proof.** A plaintiff's burden of offering evidence sufficient to prove damages cannot be sustained by evidence which is speculative and conjectural, but proof of damages to a mathematical certainty is not required; the proof is sufficient if the evidence is such as to allow the trier of fact to estimate actual damages with a reasonable degree of certainty and exactness.
27. **Words and Phrases.** Overhead costs are business expenses that cannot be allocated to a particular service or product.
28. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is a factor only when the rules make such discretion a factor in determining admissibility.
29. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of the litigant complaining about evidence admitted or excluded.
30. **Trial: Presumptions: Waiver.** Generally, a motion which is never called to the attention of the court is presumed to have been waived or abandoned by the moving party, and, where no ruling appears to have been made on a motion, the presumption is, unless it otherwise appears, that the motion was waived or abandoned.
31. **Attorney Fees.** If an attorney seeks a statutory attorney fee, that attorney should introduce at least an affidavit showing a list of the services rendered, the time spent, and the charges made.

32. ____. An award of attorney fees involves consideration of such factors as the nature of the case, the services performed and results obtained, the length of time required for preparation and presentation of the case, the customary charges of the bar, and general equities of the case.

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

Gregory C. Scaglione, Patrice D. Ott, and John V. Matson, of Koley Jessen, P.C., L.L.O., and Eric J. Magnuson, Ryan W. Marth, and Christopher P. Sullivan, of Robins Kaplan, L.L.P., for appellant.

Michael F. Coyle, Timothy J. Thalken, and Robert W. Futhey, of Fraser Stryker, P.C., L.L.O., for appellees.

Heavican, C.J., Wright, Cassel, Stacy, Kelch, and Funke, JJ.

Kelch, J.

## I. NATURE OF CASE

In September 2012, ACI Worldwide Corp. (ACI) sued Baldwin Hackett & Meeks, Inc. (BHMI); its cofounders; and other BHMI principals. The primary claims involved in this case are ACI's claim that BHMI misappropriated its trade secrets and BHMI's counterclaims that ACI tortiously interfered with a business relationship, breached a nondisclosure agreement, and violated provisions of Nebraska's unlawful restraint of trade statutes (referred to as the "Junkin Act").[1] In a 2014 trial, a jury found that ACI had not met its burden of proof with respect to its misappropriation claim. In a 2015 trial, a jury found in favor of BHMI on all of its counterclaims and awarded BHMI $43,806,362.70. The district court awarded BHMI $2,732,962.50 in attorney fees and $7,657.93 in costs.

ACI filed motions to vacate the 2014 and 2015 judgments, reopen the evidence, and grant ACI a new trial on the basis

[1] See Neb. Rev. Stat. §§ 59-801 to 59-831 (Reissue 2010).

that it had discovered new evidence. This "new" evidence was trade secret information, which the district court had previously ruled could not be discovered until ACI conducted more non-trade-secret discovery to support its claims. However, ACI obtained the evidence in a federal action against one of BHMI's customers. The district court overruled ACI's posttrial motions, and ACI appeals.

## II. FACTS

### 1. Prelitigation

ACI and BHMI are competitors in the business of developing and licensing electronic payment processing software, including "middleware." Middleware is computer software that enables other software applications to communicate with one another by routing messages between them. Two different middleware programs are involved in this case: (1) ACI's middleware, "NET24-XPNET" (XPNET), and (2) BHMI's middleware, "Concourse - TMS" (TMS).

#### (a) Middleware Programs

##### *(i) XPNET*

ACI's XPNET software has been the primary middleware in the electronic payments market for the past 40 years, and it generates approximately $52 million in annual revenue for ACI. Of the approximately 350 worldwide customers in the market, approximately 300 customers use XPNET. One of those customers is MasterCard International, LLC (MasterCard).

By itself, XPNET does not do anything. In order for a customer like MasterCard to use XPNET, it must purchase or develop a program to "bolt onto" XPNET. To "bolt onto" XPNET, MasterCard purchased a program known as the MasterCard Debit Switch or MDS.

In a March 2008 letter, ACI announced to MasterCard and other customers that it intended to transition all customers from "BASE24," which XPNET is a part of, and which runs exclusively on Hewlett Packard (HP) NonStop hardware, to "BASE24-eps," which would run on IBM hardware. In the

letter, ACI advised its customers that it would no longer provide routine enhancements or support for BASE24.

After the March 2008 announcement, ACI's customers became concerned that they would have to license all new software and purchase new IBM hardware, resulting in the loss of their significant investment in the HP NonStop hardware. MasterCard representatives met with HP representatives to discuss the future of HP hardware. When the topic of middleware came up, HP recommended that MasterCard take a look at BHMI, who had previously worked for HP on a project.

*(ii) TMS*

In April 2008, a sales representative from HP contacted BHMI to see if BHMI would be interested in developing an XPNET replacement for MasterCard. BHMI indicated that it was interested, and in mid-April, HP, MasterCard, and BHMI had a preliminary conference call to discuss BHMI's capabilities and MasterCard's requirements and interest in replacing XPNET.

In April 2009, MasterCard entered into a contract with BHMI to develop the XPNET replacement. MasterCard wanted a middleware that could be used not only on HP NonStop hardware, but on other platforms as well. BHMI developed TMS, which was designed to run on all major types of hardware.

In June 2010, MasterCard sent ACI a notice that it would not renew its contract for XPNET. By May or June, TMS had been delivered to MasterCard, and MasterCard was testing it by running it on various components of its network. On August 20, MasterCard accepted TMS.

In December 2010, BHMI began to market TMS and issued a press release announcing that MasterCard had replaced XPNET with TMS and that TMS would be commercially available to other HP NonStop users.

(b) ACI Meets With BHMI

In late December 2010, ACI contacted BHMI and requested a meeting to discuss ACI's concerns that BHMI had used

ACI's proprietary information to develop TMS. BHMI denied ACI's accusation and agreed to meet so long as ACI provided an agenda prior to the meeting and signed a nondisclosure agreement. ACI and BHMI exchanged at least six versions of the nondisclosure agreement before agreeing on the final version. The final version of the nondisclosure agreement (NDA) contained a provision that ACI would not utilize the confidential information of BHMI in any manner, including in a legal action against BHMI or its customers.

After the NDA was signed, BHMI met with Charles Linberg, ACI's chief technology officer, and Alan Hoss, another ACI employee, to discuss how TMS operated. At the conclusion of the meeting, Linberg and Hoss requested to see the source code and manuals for TMS. After an internal discussion, BHMI agreed to allow Linberg and Hoss to review the technical manuals for TMS.

### 2. ACI's Complaint and BHMI's Countersuit

In September 2012, ACI filed a complaint against BHMI and its officers, alleging eight causes of action: breach of contract, misappropriation of trade secrets, fraud, unjust enrichment, tortious interference with business relations and expectations, conversion, trespass to chattels, and civil conspiracy. All of these claims, except for the claim of misappropriation of trade secrets against BHMI, were dismissed through pretrial motions. To support its claim of misappropriation of trade secrets, ACI alleged in its complaint that "BHMI agreed to allow ACI representatives to conduct an examination of the operations, configurations, and application programming manuals related to [TMS]" and that "[a]s a result of the inspection, ACI found a high degree of conceptual similarity . . . ."

BHMI countersued, alleging that ACI had (1) breached the NDA by utilizing BHMI's confidential information in a legal action against BHMI; (2) tortiously interfered with BHMI's prospective business relationships by falsely claiming that TMS was the product of infringment, which placed a cloud

over TMS and prevented BHMI from marketing or licensing it; and (3) violated the Junkin Act, which is Nebraska's counterpart to the federal antitrust laws, i.e., the Sherman Act and the Clayton Act.[2]

In November 2012, the first hearing was held. At the hearing, BHMI asked for expedited discovery because of the impact that the litigation was having on BHMI's ability to market TMS. Counsel for ACI stated that "we certainly welcome expedited discovery."

### 3. Discovery

#### (a) ACI's Motions to Compel BHMI to Produce Trade Secret Information

In December 2012, before ACI had even served written discovery on BHMI, ACI filed a motion to compel BHMI to produce trade secret information, including TMS' source code and manuals. In the same motion, ACI sought a protective order for its own trade secret information. In support of its motion to compel, ACI alleged that ACI employees had reviewed TMS manuals and found a high degree of similarity between XPNET and TMS. In the motion, ACI proposed that BHMI disclose its source code and manuals to an expert hired by ACI, who would review the information and provide to ACI an opinion as to whether misappropriation had occurred. ACI would then decide whether to continue its suit, and if it did, then ACI would submit its trade secret information to an expert hired by BHMI.

After three hearings on ACI's motion, which are described below, the district court overruled ACI's motion to compel, indicating that it would consider granting a similar motion in the future, provided that ACI conducted some non-trade-secret discovery.

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[2] *Credit Bureau Servs. v. Experian Info. Solutions*, 285 Neb. 526, 531, 828 N.W.2d 147, 151 (2013) (citing *Pierce Co. v. Century Indemnity Co.*, 136 Neb. 78, 285 N.W. 91 (1939)).

*(i) February 2013 Hearing*

The first hearing on ACI's motion to compel was held in February 2013. In opposition to the motion, BHMI argued that under Nebraska case law, before ACI could gain access to BHMI's trade secrets, ACI must set forth with particularity what trade secrets of XPNET it contends BHMI misappropriated. BHMI also expressed concern that under the plan proposed by ACI, BHMI's biggest competitor, ACI's expert would have access to its most sensitive information, and that if ACI decided not to continue the suit, then ACI would never have to disclose the information contained in the expert's report, nor would there be any "checks" on what ACI did with that information. ACI argued that it had pled its misappropriation claim with sufficient particularity when it pled that TMS and XPNET were similar in conception and implementation and that it needed BHMI's source code to prove its claims.

After hearing the parties' arguments, the district court told ACI:

> I want you to get what you need, but I understand completely [BHMI counsel's] need to protect his client, too, at the same time. So — these trade secret cases and confidential information cases are kind of tricky sometimes, and I understand both needs here. You can't be so handcuffed you can't prove your case; but, on the other hand, I just don't think because they get sued they have to turn over everything to you that could damage — potentially damage them far beyond just disclosing the limited amount of information.

The court stated, "I think the best thing to do would be to respond — to provide with particularity what it is you believe they have done and then we'll decide the most limited way that you can obtain the information that you believe you need." The court then decided to hold ACI's motions in abeyance until such time as ACI produced with particularity what it believed BHMI had misappropriated.

*(ii) April 2013 Hearing*

The second hearing on ACI's motion was held in April 2013. At this hearing, ACI offered exhibit 5, which was a response to interrogatories, in support of its motion. ACI asserted that exhibit 5 identified with particularity the trade secrets it contended BHMI misappropriated. However, BHMI argued that the characteristics identified in exhibit 5 were not ACI's trade secrets, but characteristics of every middleware program and were available in the public domain. BHMI argued that before ACI could gain access to its trade secret information, ACI must show that the information in exhibit 5 is a trade secret and that it was misappropriated by BHMI. The district court agreed and again held ACI's motion in abeyance.

*(iii) May 2013 Hearing*

In May 2013, another hearing was held on ACI's motion to compel. This time, ACI offered a document referred to as ACI's "trade secret statement." In the statement, ACI aimed to show what information it believed BHMI had misappropriated and that such information was a trade secret. To prove that the information was a trade secret, ACI illustrated the steps ACI had taken to keep the information a secret and the economic value that XPNET had to ACI.[3] ACI also alleged in the statement that it was convinced BHMI stole the information, but it did not know how.

In opposition to the motion, BHMI offered Linberg's deposition, which BHMI argued showed that ACI did not have a good faith basis for its lawsuit against BHMI and that therefore ACI was not entitled to trade secret discovery. ACI had identified Linberg as one of two people who had knowledge of BHMI's alleged improprieties. So, at the deposition, counsel for BHMI

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[3] See Neb. Rev. Stat. § 87-502(4)(a) (Reissue 2014) (defining "[t]rade secret" as information that "[d]erives independent economic value, actual or potential, from not being known to . . . other persons who can obtain economic value from its disclosure or use" and is "the subject of efforts that are reasonable under the circumstances to maintain its secrecy").

asked Linberg for all the bases Linberg had for believing that BHMI had misappropriated ACI's proprietary information. Linberg testified that he believed BHMI had misappropriated ACI's proprietary information after he saw BHMI's marketing materials and website, because "it would be impossible for any other company to develop a software system that does the same functions that [XPNET] does without stealing [ACI's] trade secrets." BHMI counsel asked Linberg, "So even if we were to come forward and produce all of our software code and it's completely different but it does the same thing [as XPNET], you still believe that it's a violation of your trade secrets?" Linberg replied, "[Y]es." Linberg testified that even if he had not met with BHMI and reviewed its manuals, ACI still would have sued BHMI.

After hearing both parties argue, the court reserved ruling until it received BHMI's brief.

*(iv) Order Overruling ACI's Motion to Compel*

On July 29, 2013, the district court issued an order overruling ACI's motion to compel BHMI to produce its source code and manuals. In the order, the court agreed with ACI that it was not "required at this stage of litigation to prove exactly how and when the trade secrets were allegedly misappropriated," but stated that ACI "should not be able to gain unfettered access to [BHMI's] own valuable trade secrets simply by making the allegation [that BHMI misappropriated ACI's proprietary information]."

The court noted its broad discretion under Neb. Ct. R. Disc. § 6-326 of the Nebraska Rules of Discovery to limit the time, place, and manner of discovery as required "'to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" Additionally, the court noted its "broad discretion to modify the timing and sequence of discovery 'for the convenience of the parties and witnesses and in the interests of justice.'" The court then stated:

> Under a properly crafted protection order, the Court would be inclined to allow discovery of the source code, if and when there is significantly more evidence to support [ACI's] allegations. At this juncture, there are the allegations contained in [ACI's] Complaint, denials in [BHMI's] Answer, and testimony of [ACI's] representative, [Linberg]. Short of ordering BHMI to produce its source code to [ACI's] expert, there would appear to be any number of means of discovery that may uncover evidence of plagiarizing, including depositions of MasterCard representatives, [BHMI], current and former employees of [BHMI], third-party contractors of BHMI, as well as subpoenas for documents from MasterCard and third-party contractors, and, of course, requests for production of documents from [BHMI].

(b) Further Discovery: MasterCard

In August 2013, ACI served MasterCard with a subpoena duces tecum. In the subpoena, ACI requested that MasterCard produce, among other documents, TMS' manuals and any documents showing MasterCard's requirements and specifications for TMS. After MasterCard indicated that it would not produce these documents, ACI filed a "Motion to Clarify Order Regarding Source Code and Notice of Hearing."

*(i) ACI's First Motion to Clarify*

At the hearing on ACI's motion to clarify, the district court stated that it did not intend "to just allow [ACI] to go to MasterCard and get what we're not disclosing yet from BHMI." ACI argued that it was not asking for all of BHMI's manuals, but for manuals that BHMI had given to MasterCard during the development of TMS. Counsel for BHMI agreed that any exchanges between MasterCard and BHMI made *before BHMI entered into a contract* with MasterCard were "fair game." But counsel for ACI clarified that ACI wanted all exchanges made before the *delivery* of TMS, including exchanges made after the parties entered into an agreement.

Because it seemed that the parties might be able to reach an agreement as to what ACI could discover from MasterCard, the court directed the parties to work together to draft a protective order to govern the MasterCard discovery. Although the parties agreed on a protected order, they did not reach an agreement as to whether postcontract, predelivery exchanges were discoverable.

After the hearing, MasterCard produced some of the documents requested by ACI. However, MasterCard did not produce "Requirements Documents" or "External Specification Documents," because it believed doing so would violate the district court's July 29, 2013, order. The "Requirements Documents" and "External Specification Documents" were sent to MasterCard as attachments in emails. MasterCard produced the emails to which the documents were attached, but not the attachments. After MasterCard refused to disclose those attachments, ACI filed a motion to compel MasterCard to produce the email attachments.

*(ii) September 2013 Hearing*

In September 2013, a hearing was held on ACI's motion to compel MasterCard to produce the email attachments. At the hearing, ACI argued that certain emails produced by MasterCard showed that the attachments at issue must have contained ACI's trade secrets. In support of its argument, ACI pointed to an email sent from MasterCard to BHMI, wherein MasterCard answered some questions that BHMI asked in the course of developing TMS. In the email, BHMI asked questions such as, "What is the MSG Transparent field in the header used for? I don't think TMS has any need for this." ACI claimed that "MSG Transparent" relates to XPNET and argued that MasterCard must have given BHMI information about XPNET in order for BHMI to ask this question. ACI also pointed to a document that contained an action list, which was sent from MasterCard employee Theresa LaRosa to other MasterCard employees. Under the name "Kim Hall," the document stated,

"Provide BHMI current setup of XPNet external processes and how these configurations are cycled in."

MasterCard argued that ACI was again seeking documents from MasterCard that it was precluded from getting from BHMI. MasterCard asserted that both the "Requirements Documents" and the "External Specification Documents" were sent to MasterCard from BHMI and contained BHMI's confidential trade secret information, including manuals and hundreds of pages describing the functionality and design of TMS. MasterCard also argued that it was precluded from producing the attachments because MasterCard had signed nondisclosure agreements with BHMI.

BHMI agreed that the email attachments were confidential trade secret information and asked the court to overrule the motion. BHMI also argued that even though the document with the action list suggested that MasterCard had planned to provide BHMI with XPNET information, ACI had not produced any evidence that such an action was ever taken. BHMI asserted that ACI was set to depose a MasterCard representative in October 2013 and argued that ACI had "more than adequate evidence and paperwork to go take the deposition." BHMI suggested that if ACI could produce additional evidence in support of its claims as a result of the deposition, then the court could reconsider its decision to allow ACI to discover the attachments.

After hearing the parties argue their positions, the district court asked ACI if it could proceed with the MasterCard deposition without the attachments and then report back to the court with more specific information regarding BHMI's alleged misappropriation. ACI indicated that it could not "take a meaningful deposition" without those documents.

The district court then suggested a number of questions that ACI could ask to solicit information about the email attachments. The court suggested for example that ACI could "depose any number of MasterCard authors of these e-mails [and ask them:] What did you mean by this? What did you

send?" The district court also suggested that ACI could "ask [BHMI's employees:] Why did you ask the question [about MSG Transparent field in the header]? Why did you use that term? Isn't that an XPNET header field?" The court stated that if the answers to the depositions were "not enough, they're guarded, they're deceptive, there is a lot of, I don't recall, I don't remember," then the court would entertain expanding the scope of discovery.

*(iii) MasterCard Deposition: Stephen Birge*

On October 2, 2013, ACI deposed Stephen Birge, a senior business leader at MasterCard. ACI asked Birge about the email attachments. Birge testified that one of the documents was "BHMI created" and was a "very high level proposal to MasterCard." Another document contained "some of the header fields that the MDS [MasterCard debit switch] application was using at that time," which was "produced by looking at the MDS source code." As stated above, MDS was an application that MasterCard had purchased to "bolt onto" XPNET. Birge testified that the MDS source code did not contain any components of XPNET and that MasterCard never provided BHMI with any of the ACI header layouts. When asked whether "bits of information in the MDS source code [were] only there because . . . MasterCard used XPNET for its middleware," Birge stated that he did not know the origin of particular lines of code.

Birge also testified that MasterCard never provided BHMI with a written list of MasterCard's requirements for TMS. According to Birge, "since TMS was already 80 percent [written]" when MasterCard met with BHMI, MasterCard and BHMI merely had a "back and forth dialogue" about what was already written and what MasterCard needed.

Birge was also asked about the action list, wherein "Kim Hall" was to "[p]rovide BHMI current setup of XPNET external processes . . . ." Birge testified that he did not know if Hall

ever provided that information to BHMI, but he did not see it upon his review of MasterCard documents. Birge believed that whoever created the action list was using the term "XPNET" as a generic term for middleware and that the intent was not to send BHMI the XPNET information, but to provide them with information about "processes that run outside of middleware control."

In the 3 months following Birge's deposition, ACI did not communicate with MasterCard and did not request any further information from MasterCard. Additionally, ACI did not and had not requested any depositions of BHMI or any of its employees.

### (c) BHMI's Motion for Summary Judgment and ACI's Motions to Compel MasterCard and BHMI

On December 27, 2013, BHMI filed a "Motion for Summary Judgment" in favor of BHMI on all issues. One week later, ACI filed a motion to continue BHMI's motion for summary judgment, as well as a motion to compel MasterCard to produce documentation of all the documents it was withholding pursuant to the July 29 protective order. On January 30, 2014, a hearing was held on BHMI's motion for summary judgment and ACI's motion for a continuance.

#### *(i) January 30, 2014, Hearing*

ACI argued that it needed a continuance for the motion for summary judgment because, without the email attachments, ACI could not yet prove its case. To persuade the district court to allow ACI to discover the email attachments, ACI pointed to Birge's deposition, wherein Birge was unable to recall, without referencing the attachments, exactly what information MasterCard sent to BHMI.

In opposition to ACI's motion to continue, BHMI reminded the district court of the parties' request for expedited discovery and argued that ACI was not actively pursuing discovery.

After hearing the parties' arguments, the district court offered ACI 30 days to submit evidence and any resistance, but indicated that BHMI's motion for summary judgment was not premature. ACI argued that to defend the motion for summary judgment within 30 days, ACI would need a ruling on its motion to compel production from MasterCard. Although ACI had not requested a hearing on that motion, the district court stated that it would do "everything in [its] power" to get ACI an expedited hearing on that matter. Additionally, although ACI had not previously requested a deposition of BHMI or any of its employees, counsel for BHMI offered to "make somebody available from [BHMI] for deposition in the next 30 days."

*(ii) February 7, 2014, Hearing*

One week later, the district court held a hearing on ACI's motion to compel production from MasterCard. In support of its motion to compel, ACI again argued that it was unable to properly depose Birge without the attachments. ACI argued that the documents were "crucial for [ACI] to examine the BHMI representatives . . . and to further examine MasterCard."

In opposition to ACI's motion, MasterCard argued that although counsel for ACI "would lead [the court to] believe that [Birge was] not prepared to testify" on the documents ACI was requesting, "the requirements document was the subject of over 20 pages of testimony in a seven-hour deposition." MasterCard argued that it had already produced over 19,000 pages of documents and that all of the documents that ACI sought were all within BHMI's possession. Thus, MasterCard argued, if ACI is entitled to the documents, it should get them from BHMI.

The district court agreed with MasterCard, stating, "I'm going to overrule the motion to compel as against MasterCard. I'm not saying you're not entitled to this information; but I think to the extent you're entitled to it, it needs to come from BHMI."

Later that day, ACI filed a motion to compel BHMI to produce the email attachments. A hearing on the motion was held on February 25, 2014.

*(iii) February 25, 2014, Hearing*

At the hearing, ACI argued that it should at least be able to discover the attachments that MasterCard had sent to BHMI, because those attachments were from MasterCard and therefore were not BHMI's proprietary information.

BHMI advised the court that on January 31, 2014, ACI had filed a suit against MasterCard in the U.S. District Court for the District of Nebraska.

After hearing both parties, the district court commented:

> [O]ne of the problems with . . . these type of cases, is that both sides are a little bit at a disadvantage, because you think something happened and you're trying to prove it. That's your burden. They say it didn't, and why would we have to turn stuff over when we don't think there's any evidence that says we did what you're alleging. You're both kind of handcuffed a little bit.
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> . . . I think I kind of discussed this a little bit in one of my first orders in this case . . . . Basically you're asking the defendants in this case to reveal everything they got from MasterCard, and you got MasterCard's trade secrets, you've got BHMI's trade secrets, you've got your trade secrets. You're trying to protect yours, they're trying to defend and protect theirs, yet you want them to disclose things that they shouldn't have to disclose if they didn't do anything wrong.

The court told counsel for ACI, "I'm very sympathetic to your plight," but added, "Basically what you're asking me to do is order BHMI to turn over the trade secrets, if you will, of MasterCard, while you're in the process of suing them for $40 million . . . ."

The district court suggested a number of ways that ACI could proceed with discovery without the email attachments. It asked counsel for ACI, "Did you depose [Theresa] LaRosa?"

ACI's counsel stated, "Not yet." The court asked, "When do you intend to do so? Because she's the one that wrote this [action list]." The court also asked ACI, "Did you depose Kim Hall? . . . She's on this as the person that's going to provide BHMI the current set of XPNET external processes . . . ." ACI responded, "I certainly will, Your Honor." The court also asked, "Did you depose the people who actually sent the [e]mails [with the attachments]?" Counsel for ACI responded, "No, not yet." The court then advised ACI that it should go take depositions. It told ACI, "I'm not precluding or pre-deciding any issue, but I think it's premature until these individuals are deposed. And once it's completed, if you want to spend more time on this issue, either party, I'd be more than happy to provide the time."

*(iv) Order on Motion for Summary Judgment*

After another hearing on BHMI's motion for summary judgment, the district court issued an order granting summary judgment in favor of BHMI as to all of ACI's claims, except the claim of misappropriation of trade secrets.

(d) ACI's Motions to Continue Trial and to Compel Production of BHMI's Trade Secrets

In April 2014, ACI filed a motion to continue the trial, which had been set for July 28. On the same day, ACI also filed a motion to compel the production of the email attachments and TMS' source code and manuals, as well as a motion to renew its prior motions to compel. A hearing on those motions was held on June 25.

*(i) June 25, 2014, Hearing*

In support of its motion to continue trial, ACI argued that just 5 days prior, BHMI had identified three new expert witnesses that were not previously disclosed and had claimed damages in excess of $20 million. ACI argued that it needed

to analyze the information relating to damages and to depose the newly identified witnesses.

In response, BHMI argued that ACI has been aware of the damages it was going to claim for months. In March 2014, a BHMI employee had testified that BHMI was estimating prospective damages in excess of $10 million and that First National Bank of Omaha had canceled a seven-figure contract based solely on ACI's lawsuit. BHMI also argued that it had been 2 years since ACI filed the lawsuit and "they've got nothing."

The court indicated that it did not want to delay the trial on ACI's claims, but that it was willing to bifurcate the case into two trials. It suggested that the first trial be on ACI's claims against BHMI and that the second trial be on BHMI's claims against ACI. ACI admitted that bifurcation would solve some of the "recent disclosure issues," but maintained that there were a lot of other reasons why the trial on ACI's claims should be delayed. For example, ACI asserted that MasterCard had refused to consent to depositions of its employees. But when asked whether ACI had subpoenaed those witnesses, ACI indicated that it had not.

In support of ACI's motion to compel, ACI argued that it had presented sufficient evidence for the district court to allow discovery of the trade secret information: It had produced a "trade secret statement"; it had produced BHMI's contract with MasterCard, wherein it referenced XPNET functionality; and it had produced MasterCard's action list, wherein it stated that Hall should "'[p]rovide BHMI current setup of XPNET external processes . . . .'"

After ACI referenced the action list, the district court asked ACI if it ever took the depositions of Hall and LaRosa. Counsel for ACI stated, "I want to, Your Honor," to which the court asked ACI, "Well, why haven't you?" Rather than explaining why ACI had not taken the depositions, counsel for ACI gave the court a history of its efforts to get access to BHMI's trade secrets.

ACI then told the court, "Your Honor, we need the e-mail attachments. I don't know how we try this case without them." After approximately 30 pages of argument, the district court indicated that without any new evidence, it was not going to change its previous rulings.

*(ii) District Court's July 14, 2014, Order*

On July 14, 2014, the district court issued an order, which, among other things, overruled ACI's motion to continue trial. In the order, the court noted that although the case was filed in September 2012, no depositions were taken until May 2013, when BHMI deposed ACI representative Linberg. The court wrote, "As of this writing in late June, 2014, so far as the Court can tell, only 4 other depositions have been taken": Birge, the MasterCard representative, and three BHMI employees.

The district court also noted that although ACI knew the trial date was approaching, ACI has "resisted to this point the Court's encouragement to engage in vigorous non trade secret discovery." The court stated that "the only significant evidence" that ACI presented of plagiarism was the affidavit of an ACI employee, stating that he reviewed emails transmitting information from MasterCard to BHMI and that based on his review, he strongly believed that MasterCard had provided BHMI with ACI's proprietary information. The district court noted that the emails referenced in the affidavit were between 11 different MasterCard employees and that ACI had not deposed any of them.

The district court ended its order stating:

> To be absolutely clear, the Court has never taken the position that [ACI] could not have access to the source codes under any circumstances. The Court has simply asked for evidence to be produced that supports a certain level of probability that plagiarism occurred before triggering the disclosure of the source code and related materials.

### 4. First Trial: ACI's Claims Against BHMI

ACI's claims against BHMI were tried in July and August 2014. At the trial, as ACI states in its brief on appeal, "ACI was forced to rely on circumstantial evidence as to what was disclosed to and used by BHMI," such as "the fact that communications were flowing back and forth" and "the necessity of XPNET trade secrets being incorporated into TMS for the MDS to function properly in the manner BHMI claimed."[4]

Although the district court denied BHMI's motion for directed verdict, concluding "there's enough evidence for the jury to consider the misappropriation of trade secrets," the jury ultimately returned general verdicts that ACI had not met its burden of proof on any of its claims.

### 5. Between Trials

On March 6, 2015, pursuant to ACI's federal action against MasterCard, ACI was able to obtain the attachments to the emails from MasterCard to BHMI. In June or July, the federal court granted ACI's motion to amend the protective order to allow ACI to use the email attachments in the state court case.

#### (a) July 2015 Motions

In July 2015, a series of motions were filed by both parties. On July 13, ACI filed a motion for summary judgment as to all BHMI's counterclaims, and on July 17, it filed a motion to vacate the 2014 verdicts and associated judgments, reopen discovery, and grant a new trial. On July 26, BHMI filed a motion to continue the hearings on ACI's motions, and ACI filed another motion to continue trial. On July 31, a hearing was held on (1) ACI's motion for summary judgment, (2) ACI's motion to vacate the 2014 judgment, and (3) BHMI's motion to continue the hearings for ACI's motion for summary judgment and motion to vacate the 2014 judgment.

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[4] Brief for appellant at 17.

*(i) Motion for Summary Judgment*

In support of its motion for summary judgment, ACI argued, among other things, that BHMI's damages evidence was impermissibly speculative and that the breach of contract claim based on the NDA was inadequate "as a matter of law." ACI also argued that the *Noerr-Pennington* doctrine immunized ACI from claims relating to the filing of its lawsuit.[5] According to the record on appeal, this hearing was the first time ACI ever raised the *Noerr-Pennington* defense. ACI's motion for summary judgment was overruled.

*(ii) ACI's Motion to Vacate 2014 Judgment*

In support of ACI's motion to vacate the 2014 judgment, ACI advised the district court of the documents it obtained during federal discovery. It also represented to the district court that the attachments had been given to Mark Newsom, a principal software engineer from ACI who works on XPNET. Newsom created a report, which, according to ACI, showed that the email attachments contained both paraphrased information as well as "direct quotes" from XPNET's manuals.

BHMI sought to continue this motion until after the second trial, arguing that ACI had not produced to BHMI the email attachments, any portions of the XPNET manuals, or Newsom's report. BHMI also argued that only 6 weeks remained until the second trial. The district court agreed that there was no reason to "mess with it right now."

There was also some discussion as to whether the email attachments could be produced at the second trial. ACI argued that the attachments were relevant to the breach of the NDA claim, because per the NDA, BHMI's "Confidential Information" did not include information that was independently developed by ACI.

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[5] See *Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), and *Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965).

ACI then offered the email attachments "in support of the motion to reopen discovery, vacate orders, grant and set a new trial, and the other relief set forth in the motion." The "other relief" included a continuation of the second trial, but did not include allowing ACI to present the email attachments at the second trial.

ACI also asked the court to review the email attachments in camera. The district court indicated that it would not do so prior to the second trial; instead, it sealed the documents and stated that it would consider them after the second trial, if necessary.

(b) ACI's Motion in Limine

In August 2015, ACI filed a motion for an order that the email attachments and Newsom's testimony about the email attachments were admissible in the second trial. A hearing was set for September 14 at 9 a.m. However, on appeal, there is no record of the hearing or the court's ruling on the motion.

6. Second Trial: BHMI's Counterclaims

The second trial on BHMI's counterclaims against ACI was held in mid-September 2015. Because ACI assigns that there was insufficient evidence to support BHMI's claims of breach of contract and violation of the Junkin Act, and because ACI assigns that there was "no cognizable evidence of damages to support any claim," we review the evidence presented on these issues in detail.

(a) Evidence of Breach of NDA

Most of the evidence concerning BHMI's claims of breach of contract came from the testimony of Lynne Baldwin.

*(i) History of BHMI*

Lynne testified that she and her husband, Jack Baldwin, formed BHMI in 1986, and in 1987, they were joined by Michael Meeks, who now serves as BHMI's vice president of development.

BHMI started as a custom software company that would write specific software from customer's specifications. Its customers included large transportation and communications corporations.

In the early 2000's, BHMI began to develop "Concourse Financial Software Suite" (Concourse), a software for companies that exchange transactions among different parties, referred to as "switches," such as companies that track when one bank's customer uses another bank's automated teller machine. Lynne explained that if a customer uses its "Bank A" debit card at "Bank B's" automated teller machine, Concourse can help switch companies route the transactions to "Bank A," so that "Bank B" will dispense cash to the customer, all the while keeping track of the amounts that different financial institutions owe each other for the service. Lynne testified that a number of switches have licensed Concourse, including a debit switch in Canada, the New York Cash Exchange, and "Pulse," the third largest debit switch in the United States.

*(ii) Development of TMS*

According to Lynne, BHMI had a close, working relationship with HP. In April 2008, HP contacted BHMI to ask if it was interested in doing a project with MasterCard. BHMI indicated that it was. In April 2009, BHMI entered into an agreement with MasterCard to create a replacement for XPNET.

MasterCard and BHMI entered into a "Software License and Maintenance Agreement." Per the agreement, MasterCard agreed to pay BHMI $1.3 million to license TMS for 5 years.

Lynne testified that because of BHMI's development of Concourse, BHMI already had a certain level of TMS developed. Nevertheless, according to Lynne, TMS took "thousands of hours" and over a year to create. In August 2010, MasterCard accepted TMS, and BHMI then had a proprietary product that it could license and sell on the market.

*(iii) Marketing TMS*

To advertise its new product, BHMI's marketing director, Casey Scheer, began a series of activities to market TMS, including adding a YouTube video about TMS on BHMI's website and releasing a press statement about TMS and how MasterCard was using it to replace XPNET. BHMI also hired a marketing consultant to tell them how large the market for TMS would be.

The marketing consultant advised BHMI that in order to market the software, it needed to secure as a customer a premier bank (as opposed to a switch like MasterCard) to show other banks that they could replace XPNET and the BASE24 system with TMS. Lynne explained that this would require finding a bank that was willing to create its own application around TMS, because "if you write any logical software that hooks into [XPNET or BASE24], ACI also owns that software even though [ACI] didn't write it, because that's the term of [its] contract."

*(iv) First National Bank of Omaha Expresses Interest in TMS*

According to Lynne, after BHMI issued its press release, it started to get responses from customers around the globe. One such customer was First National Bank of Omaha (hereinafter FNBO), one of the largest credit card processing banks in the United States. A representative from FNBO emailed BHMI's marketing support person expressing interest in using TMS for its credit card processing. BHMI then met with FNBO to discuss replacing the BASE24 system with TMS.

Lynne testified that FNBO was not happy with XPNET, because it did not like ACI's transaction-based pricing. Under ACI's transaction-based pricing, customers like FNBO had to pay a certain amount per transaction in addition to the license and maintenance fees. Additionally, FNBO had financial concerns about the cost of transitioning to IBM hardware. Accordingly, BHMI started to negotiate with FNBO for the installation and licensing of TMS.

*(v) ACI Contacts BHMI*

In early January 2011, 1 month after BHMI issued its press release, BHMI received a call from Dennis Byrnes, ACI's legal counsel. Byrnes requested a meeting, and Lynne met with him. Byrnes told Lynne that ACI's upper management and technical support personnel had heard about TMS and had concerns that it infringed on XPNET. Lynne responded that she "'didn't know how it could infringe on XPNET'" and explained to him that BHMI had used all of its own software to create TMS.

Byrnes told Lynne that ACI staff would like to talk to BHMI and have BHMI answer some questions. Lynne agreed to talk to ACI and answer general questions, but because ACI was now one of BHMI's competitors, BHMI asked that ACI sign a nondisclosure agreement and provide BHMI with a written list of questions ahead of time. ACI agreed. Lynne testified that Byrnes never said anything about filing a lawsuit; he wanted only to "allay the fears of [ACI's] upper management."

Lynne testified that when she received the nondisclosure agreement and list of questions from ACI, she was shocked by the list of questions. She explained that she expected the questions to be related to the marketing materials that BHMI had released. Instead, ACI asked "how [TMS] worked, how everything inside of it worked, what are your algorithms?" Lynne described these questions as "truly invasive," because they went to the "very essence of [BHMI's] intellectual property."

After receiving the nondisclosure agreement and questions, Lynne wrote a letter to Byrnes, stating, "With regard to the nondisclosure, BHMI does not see any language that would restrict ACI from using information about [TMS] in its own products. . . . Until we can mutually come to some agreement on the nondisclosure, we cannot provide any substantive information to ACI." Lynne also expressed to Byrnes that ACI's question about "'[i]dentify[ing] all interfaces providing XPNET compatibility'" made Lynne believe that ACI had incorrect information about TMS. Lynne explained to Byrnes that TMS is "'not compatible with XPNET since it provides

no interfaces with any part of XPNET,'" and "'a TMS node only communicates with other TMS nodes [and] cannot communicate with XPNET.'" Lynne suggested to Byrnes that perhaps with this new information, ACI might be assuaged and wish to withdraw its questions.

But ACI did not withdraw its questions, and instead continued to negotiate the NDA with BHMI. The final version of the NDA provided that ACI would not use any confidential information of BHMI's in a legal action against BHMI. The NDA provided, in relevant part:

> **1. CONFIDENTIAL INFORMATION AND AUTHORIZED USE**
>
> a. "**Confidential Information**" means all non-public information which [BHMI] furnishes to [ACI] . . . .
>
> b. [ACI] wishes to receive [BHMI's] Confidential Information for the sole purpose of facilitating discussions between management of each party regarding information related to each party's proprietary products (the "**Authorized Use**"). . . .
>
> c. Confidential Information shall not include any information that (i) is or subsequently becomes publicly available without [ACI's] breach of any obligation owed [BHMI], (ii) became known to [ACI] prior to [BHMI's] disclosure of such information to [ACI], (iii) became known to [ACI] from a source other than [BHMI] other than by breach of an obligation of confidentiality owed to [BHMI] or (iv) is independently developed by [ACI].
>
> **2. RESTRICTIONS**
>
> . . . .
>
> c. Confidential Information may only be disclosed, reproduced, summarized or distributed (i) as strictly necessary for the Authorized Use, and (ii) only as otherwise provided hereunder. For the avoidance of doubt, [ACI] understands and agrees that in no event shall [ACI] utilize the Confidential Information of [BHMI] in any manner whatsoever (i) in the development of its respective products; . . . (iii) in any legal action directed toward

> [BHMI] or its vendors, representatives, agents, or customers . . . .

After the NDA was executed by both parties, Lynne and Meeks met with Linberg and Hoss of ACI. Although Lynne expected that ACI would have some general questions about TMS, ACI again wanted to know how TMS, its routing algorithms, and its protocols all worked. According to Lynne, Linberg was very adamant about seeing BHMI's source code and manuals. Lynne testified that she and Meeks did not show Linberg or Hoss their source code or manuals and did not answer all of ACI's questions, and the meeting was adjourned.

Lynne then met with Byrnes to express her frustrations about the questions she received from ACI. The questions, she explained, were not what she and Byrnes agreed to. According to Lynne, Byrnes looked at the questions and said, "'Oh, I guess there's some mistake. I'll take it back,'" and then he left. Lynne testified that again Byrnes did not say anything about ACI's taking any legal action against BHMI.

BHMI held an internal meeting to discuss ACI's concerns, and it was decided that because BHMI "'ha[d] nothing to hide,'" maybe BHMI could let ACI "'look at a couple of manuals.'" Lynne testified that BHMI believed there was nothing in the manuals that would be a problem, so ACI could come over, look at the manuals, and then "'be happy.'"

On July 21, 2011, Linberg and Hoss came back to BHMI to look at the manuals. BHMI allowed Linberg and Hoss to look at the manuals in an office by themselves for as long as they wanted, but restricted them from making any copies. In addition, if Linberg and Hoss took any notes, BHMI wanted to be able to see what they had written before they left. Lynne believed that Linberg and Hoss spent "an hour and a half, maybe two hours" looking at the manuals.

After Linberg and Hoss finished looking at the manuals, they did not show Lynne any notes, and Lynne did not notice any. Linberg told Lynne that BHMI would hear from ACI within 2 weeks, but in the following months, BHMI did not hear anything from ACI.

*(vi) Development Agreement With FNBO*

In the meantime, BHMI had entered into a development license agreement with FNBO for $125,000 per year. The development license allowed FNBO to start looking at how TMS worked so that it could develop and install its own hardware. The development license also contained all of the commercial terms to upgrade to a 5-year full operating license for $1.25 million, plus an 18-percent annual maintenance fee. Under the agreement, BHMI would receive a total of $1.525 million over 5 years. FNBO planned to "go live" with TMS in August 2012.

As part of the agreement, BHMI agreed to indemnify FNBO against any claims that its use of TMS violated a third-party's intellectual property rights. The agreement also required BHMI to let FNBO know if it believed that TMS was going to become the subject of an infringement claim. It also allowed FNBO to terminate the agreement and receive a full refund if TMS became the subject of an infringement claim. Lynne testified that these indemnification provisions were standard provisions in its agreements.

*(vii) ACI Sues BHMI*

In March 2012, ACI notified BHMI of its intent to sue the company. According to Lynne, this was the first time that ACI had ever stated its intention "out loud."

Lynne testified that ACI's lawsuit threat was a "huge deal." She explained that a claim of infringement "is very serious in the marketplace" and that the "threat alone casts doubt on your capabilities, on how responsible you are as a company, and a lot of other areas."

Both ACI's chief executive officer and former HP executive Steven Saltwick testified that a company would not be able to license software that was alleged to be the product of infringement. Saltwick testified he would never even propose that an HP NonStop customer consider a software solution if there was a claim it had been misappropriated.

In response to ACI's lawsuit threat, BHMI told its marketing director to concentrate on marketing Concourse, instead of TMS. BHMI also disclosed ACI's threat to FNBO. FNBO wanted the TMS solution to work and told BHMI that it would work with BHMI as long as it could.

In July 2012, ACI and BHMI met again to discuss the issue, but no resolution was reached. Lynne testified that at the conclusion of the meeting, Linberg told BHMI that if it kept going forward with TMS, then ACI would sue BHMI and any customer that licensed TMS. Lynne testified that she could not in good faith market the software when ACI had threatened to sue anyone who licensed it.

Because the threat of litigation persisted, FNBO eventually terminated its license with BHMI and demanded a refund, which BHMI provided. Michael O'Neil, FNBO's vice president of technology, testified that "but for" ACI's lawsuit and threats, it would have entered into the 5-year production license for TMS under the terms to which the parties had already agreed and it would have renewed that license for an additional 5-year term.

At the trial, counsel for BHMI questioned Lynne, over ACI's objections, about all of the different claims ACI alleged against BHMI and against officers of BHMI in their personal capacity. Lynne was then asked about the first trial and whether BHMI "won on every one of [ACI's claims]." Over ACI's objection, Lynne testified that ACI did not win any of its claims.

#### (b) Evidence Relating to Junkin Act Claim

BHMI also sought to prove that ACI had violated the Junkin Act by engaging in predatory or anticompetitive conduct to acquire or maintain its monopoly power. Its theory was that ACI sought to acquire or maintain monopoly power by asserting, without good faith, that TMS was the product of infringement so as to put a cloud over TMS and prevent BHMI from marketing it. Most of the evidence about the relevant market

and ACI's role within that market came from the testimony of Saltwick.

As part of his role at HP, Saltwick had been responsible for marketing HP NonStop hardware on a global basis and had worked with HP NonStop customers and advised them regarding software solutions. Because of this role, Saltwick was familiar with the worldwide market for retail financial payments software running on the HP NonStop platform. Of the 350 companies in this market, 300 of them used ACI's software.

(c) Evidence Relating to Damages

Jack was the main witness to testify about BHMI's lost profits. BHMI does not use an outside public accounting firm; instead, Jack handles BHMI's finances, preparing documents such as BHMI's profit and loss statements, cashflow reports, and tax returns. To calculate BHMI's lost profits, Jack subtracted BHMI's estimated costs from its estimated revenue.

*(i) Estimated Costs*

Jack testified that in his lost profits analysis, he accounted for certain estimated costs. Although BHMI did not accrue much in additional costs after it had already developed TMS for MasterCard, Jack explained BHMI would incur costs associated with the installation, consulting, and educating of customers as to how to use TMS. Jack estimated that these costs added up to about 160 hours of labor. But for purposes of his analysis, he "rounded up" to a "one-man month" of labor. To calculate the cost of a "one-man month" of labor, he used the $95,000 salary of an actual employee and added all the costs associated with the employee's employment, including unemployment insurance fees, family medical insurance premiums, and Social Security. Jack testified that BHMI paid a total of $121,000 per year to employ the employee. Dividing that cost by 12 for each month, Jack arrived at a cost of $10,113 per month for the employee's labor. This is the cost Jack attributed to each licensing agreement.

Jack testified that he did not account for BHMI's general overhead costs, because those costs would be incurred regardless of TMS. For example, BHMI's costs for rent, telephones, insurance, office supplies, and electricity would not have varied based on whether BHMI licensed TMS to additional customers. Jack also testified that if customers had a problem with TMS, they would call BHMI's general help desk, which BHMI paid to operate regardless of TMS. Because BHMI did not have a help desk dedicated to TMS, Jack did not attribute any costs to those calls. Jack testified that he considered the marketing costs for TMS, but explained that these costs were minimal, because marketing TMS typically consisted of Scheer's attending conferences to market all of BHMI's products, not just TMS.

*(ii) Net Lost Profits*

a. FNBO

For the FNBO contract, Jack estimated that BHMI lost a total of $3,103,793.24 as a result of FNBO's backing out after ACI's lawsuit. For purposes of his lost profits analysis, Jack assumed that FNBO would have licensed TMS for 5 years and would have then renewed its license for another 5 years. As for the fees under a 5-year licensing agreement, Jack used the fees set forth in the development license, which shows a licensing fee of $1.25 million and a maintenance fee of $225,000. To calculate BHMI's lost profits in relation to the FNBO contract, Jack added the amount that BHMI refunded FNBO for the development license and professional fees ($163,906.24) to the amount in fees that FNBO would have paid under two 5-year licensing agreements ($2,950,000) for a total of $3,113,906.24. Jack then subtracted the costs associated with those agreements ($10,113) to reach a net profit of $3,103,793.24.

b. Other Lost Contracts

Jack also estimated lost profits incurred as a result of being unable to market TMS to other companies during the course

of the litigation. Jack assumed that BHMI would be able to secure two customers per year. This assumption was supported by Scheer's testimony that, based on the interest she received from the TMS marketing campaign, she felt "'very confident [BHMI could] close at least two contracts a year.'"

Jack also assumed that each company would renew their 5-year contracts for another 5-year term. This assumption was based on O'Neil's testimony that FNBO would have "continued with the [licensing] agreement another five years" and other testimony that installing TMS is a significant investment for a company.

To determine the fees that BHMI would have charged under the licensing agreements, Jack based the fees off the existing contracts with MasterCard and FNBO. Jack testified that BHMI had negotiated two different licensing fees for different pricing structures used by MasterCard and FNBO. Because Jack was unsure of which pricing structure most companies would want, Jack averaged the net profit that each structure would bring in his lost profits calculation.

Jack testified that because securing MasterCard and FNBO as customers would help BHMI secure other customers, BHMI offered MasterCard and FNBO discounted rates of one-third the retail price for those pricing structures. Rather than using the discounted rates, Jack used the retail prices to project the profit that BHMI would have generated if it had been able to enter into two 5-year license agreements per year for years 2012, 2013, and 2014. For these six licensing agreements, Jack projected that TMS would have generated $17,703,072 in net profit. Assuming each of those companies renewed for another 5-year licensing agreement, Jack projected a net profit of $35,016,822.

### 7. Conclusion of Second Trial

At the end of BHMI's case in chief and at the close of the evidence, ACI moved for a directed verdict on multiple grounds, including that BHMI failed to produce sufficient

evidence of its antitrust claims, damages, and causation. The district court denied ACI's motion.

The evidence was submitted to the jury, and the jury returned a verdict in favor of BHMI on all three claims, awarding damages of $43,806,362.70.

### 8. Attorney Fees

Having prevailed on its Junkin Act claim, BHMI petitioned for attorney fees in the amount of $2,732,962.50 and costs in the amount of $7,657.93. In support of its petition, BHMI submitted the affidavit of Steven Davidson, the chair of a local law firm's litigation section, regarding the reasonableness of BHMI's fee application. Davidson reviewed a detailed summary of the work performed and concluded that both the numbers of hours expended and the hourly rates were reasonable. ACI did not offer any expert evidence rebutting Davidson's opinion.

The district court applied the factors set forth in our case law in determining the amount of a reasonable attorney fee. Well aware of the nature of the proceedings and the novelty and difficulty of the questions raised, the district court concluded that under the totality of the circumstances, the fee requested by BHMI was reasonable. Additional facts about the district court's reasoning are set forth in the analysis section below.

### 9. Posttrial Motions

After the second trial, ACI filed a number of motions, including a motion for remittitur, motions to vacate the judgments associated with the 2014 and 2015 trials, and motions for new trials. These motions were overruled.

## III. ASSIGNMENTS OF ERROR

ACI assigns, reordered and restated, that the district court erred (1) in overruling ACI's motions to dismiss BHMI's counterclaims because the *Noerr-Pennington* doctrine precludes BHMI's antitrust and tortious interference claims; (2) in overruling its motion to vacate the dismissal of ACI's claims

against BHMI on the basis of denied discovery; (3) in refusing to vacate the 2014 verdicts and associated judgment because ACI was denied discovery of BHMI trade secret information; and (4) in refusing to vacate the 2015 verdicts and associated judgment because (a) the *Noerr-Pennington* doctrine precludes BHMI's antitrust and tortious interference claims, (b) BHMI presented insufficient evidence to support any of its claims, (c) BHMI presented no cognizable evidence of damages to support any claim, (d) ACI was denied discovery of BHMI's trade secret information, and (e) the email attachments were erroneously excluded from evidence.

ACI further assigns that the district court abused its discretion in granting BHMI's application for attorney fees and costs.

## IV. STANDARD OF REVIEW

[1] An appellate court will reverse a decision on a motion to vacate or modify a judgment only if the litigant shows that the district court abused its discretion.[6]

[2] An appellate court reviews a trial court's ruling on a motion for a new trial for abuse of discretion.[7]

[3] Decisions regarding discovery are directed to the discretion of the trial court and will be upheld in the absence of an abuse of discretion.[8]

[4,5] When reviewing a jury verdict, the appellate court considers the evidence and resolves evidentiary conflicts in favor of the successful party.[9] A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is competent evidence presented to the jury upon which it could find for the successful party.[10]

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[6] *Destiny 98 TD v. Miodowski*, 269 Neb. 427, 693 N.W.2d 278 (2005).

[7] *Balames v. Ginn*, 290 Neb. 682, 861 N.W.2d 684 (2015).

[8] *Moreno v. City of Gering*, 293 Neb. 320, 878 N.W.2d 529 (2016).

[9] See *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990).

[10] *Koster v. P & P Enters.*, 248 Neb. 759, 539 N.W.2d 274 (1995).

[6,7] Generally, a trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.[11] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[12]

[8] When an attorney fee is authorized, the amount of the fee is addressed to the trial court's discretion, and its ruling will not be disturbed on appeal absent an abuse of discretion.[13]

## V. ANALYSIS

[9] We first note that a number of ACI's assignments of error and arguments will not be addressed on this appeal. To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error.[14]

First, ACI assigned a number of errors that it failed to argue. ACI assigned that the district court erred in overruling both ACI's motions to dismiss BHMI's counterclaims and ACI's motions to vacate the dismissal of ACI's claims against BHMI. However, in its argument section, ACI failed to alert this court as to why ACI believes these rulings are in error. Not only were we unable to locate any reference to these motions in the body of ACI's brief, but we were unable to locate within the appellate record the district court's orders overruling these motions. For these reasons, we do not address the first two assignments of error.

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

[12] *Hartman v. Hartman*, 265 Neb. 515, 657 N.W.2d 646 (2003).

[13] *Gonzalez v. Union Pacific RR. Co.*, 282 Neb. 47, 803 N.W.2d 424 (2011); *Lamar Co. v. City of Fremont*, 278 Neb. 485, 771 N.W.2d 894 (2009); *In re Estate of Chrisp*, 276 Neb. 966, 759 N.W.2d 87 (2009).

[14] *In re Claims Against Pierce Elevator*, 291 Neb. 798, 868 N.W.2d 781 (2015).

ACI also assigns that the 2015 judgment should be vacated, because BHMI failed to present sufficient evidence to support any of its counterclaims. However, ACI did not argue in its brief that BHMI failed to present sufficient evidence as to its tortious interference claim. Therefore, we only address the sufficiency of the evidence as to BHMI's Junkin Act and breach of contract claims.

Second, ACI argues that several of the court's rulings were in error, but failed to assign those rulings as error. For example, ACI argues that the district court erroneously allowed BHMI to "taint the jury" with (1) evidence that ACI lost the 2014 trial, (2) "the irrelevant fact" that ACI initially sued BHMI principals individually along with the company, and (3) evidence of the Department of Justice's second request for information.[15] Because ACI failed to assign these rulings as error, we do not consider them on appeal.

### 1. Motion to Vacate 2014 Judgment

The first issue is whether the district court abused its discretion in overruling ACI's motion to vacate the 2014 judgment on the basis of denied discovery. In summary, ACI contends that the district court should have vacated the 2014 judgment and granted a new trial because it erroneously denied ACI access to BHMI's source code and manuals, thereby prohibiting ACI from presenting the evidence needed to prevail on its misappropriation claim.

Thus, in order to determine whether the district court abused its discretion in overruling ACI's motion to vacate the 2014 judgment, we must determine whether the district court erred in denying ACI's requested discovery. Decisions regarding discovery are directed to the discretion of the trial court and will be upheld in the absence of an abuse of discretion.[16] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly

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[15] Brief for appellant at 47.

[16] *Moreno v. City of Gering, supra* note 8.

depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[17]

Parties are generally entitled to discovery regarding any nonprivileged matter that is relevant to any claim or defense.[18] However, under discovery rule § 6-326(c), the court has broad discretion to limit the time, place, and manner of discovery as required "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." The court also has broad discretion to modify the timing and sequence of discovery "for the convenience of parties and witnesses and in the interests of justice."[19]

With regard to discovery of trade secret information, § 6-326(c)(7) specifically authorizes a trial court to enter a protective order requiring that "a trade secret . . . not be disclosed or be disclosed only in a designated way." It appears that we have not discussed this specific section as it relates to discovery of trade secret information, such as source code. But because § 6-326(c)(7) is modeled after Fed. R. Civ. P. 26(c)(1)(G), we look to the federal decisions for guidance.[20]

[10,11] A review of federal decisions governing trade secret discovery reveals that there is no talismanic procedure that may be used to obtain the best results in any given case.[21] Federal courts have taken different approaches, depending on the facts

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[17] *Arens v. NEBCO, Inc.*, 291 Neb. 834, 870 N.W.2d 1 (2015); *Kercher v. Board of Regents*, 290 Neb. 428, 860 N.W.2d 398 (2015); *Richards v. McClure*, 290 Neb. 124, 858 N.W.2d 841 (2015); *Despain v. Despain*, 290 Neb. 32, 858 N.W.2d 566 (2015); *Fox v. Whitbeck*, 286 Neb. 134, 835 N.W.2d 638 (2013).

[18] § 6-326(b)(1).

[19] § 6-326(d).

[20] See *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005).

[21] *Vesta Corp. v. Amdocs Management Ltd.*, 147 F. Supp. 3d 1147 (D. Or. 2015); *DeRubeis v. Witten Technologies, Inc.*, 244 F.R.D. 676 (N.D. Ga. 2007); *Microwave Research Corp. v. Sanders Associates*, 110 F.R.D. 669 (D. Mass. 1986).

of a specific case.[22] In fact, one article on trade secret discovery identifies nine different approaches.[23] However, despite all the various approaches, an overarching theme emerges; i.e., the moving party's need for the trade secret information must be weighed against the injury that disclosure might cause the party opposing the discovery.[24] Here, the district court attempted to balance these competing interests by requiring ACI to first engage in non-trade-secret discovery to provide a factual basis for its claim before risking harm to BHMI's interest in TMS. This approach is commonly used by federal courts,[25] and we do not find it to be untenable in the context of this case.

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[22] See Kevin R. Casey, *Identification of Trade Secrets During Discovery: Timing and Specificity*, 24 AIPLA Q.J. 191 (1996).

[23] *Id.*

[24] *In re Remington Arms Co., Inc.*, 952 F.2d 1029 (8th Cir. 1991); Casey, *supra* note 22.

[25] See, *Vesta Corp. v. Amdocs Management Ltd., supra* note 21, 147 F. Supp. 3d at 1154 (D. Or. 2015) ("[p]laintiff is required to identify the trade secrets it claims Defendants misappropriated with reasonable particularity before Defendants are required to produce their confidential information and trade secrets to Plaintiff in discovery"); *Puritan-Bennett Corp. v. Pruitt*, 142 F.R.D. 306, 308-09 (S.D. Iowa 1992) ("it is first incumbent upon [the plaintiff] to make a showing that there is a substantial basis for its claim"); *Microwave Research Corp. v. Sanders Associates, supra* note 21, 110 F.R.D. at 674 (D. Mass. 1986) (stating that "before a plaintiff is entitled to the type of broad discovery into a defendant's trade secrets, it must show that other evidence which it has gathered through discovery provides a substantial factual basis for its claim"); *Xerox Corp. v. International Business Machines Corp.*, 64 F.R.D. 367, 371-72 (S.D.N.Y. 1974) ("[a]t the very least, a defendant is entitled to know the bases for plaintiff's charges against it. The burden is upon the plaintiff to specify those charges, not upon the defendant to guess at what they are. Thus, after nearly a year of pre-trial discovery, [the plaintiff] should be able to identify in detail the trade secrets and confidential information alleged to have been misappropriated by [the defendant]"); *Storagecraft Technology Corp. v. Symantec Corp.*, No. 2:07cv856CW, 2009 WL 361282 at *2 (D. Utah Feb. 11, 2009) (unpublished opinion) ("regardless of the approach, it is apparent that '[t]he reasonable particularity standard requires that the alleged trade secret be described "with adequate specificity to inform the defendants what it is alleged to have misappropriated"'").

The course of discovery leading up to the first trial is perhaps best summarized in the district court's order overruling ACI's motion to continue the first trial:

> The Court has held numerous discovery hearings as well as hearings on the Motion for Summary Judgment.
>
> With regard to discovery, particularly [ACI's] efforts to obtain BHMI's source code, the Court has repeatedly urged the parties to engage in discovery in order to determine whether there exists sufficient evidence to order the disclosure of BHMI's source code. The Court has repeatedly told the parties that it would strongly consider some type of disclosure of BHMI's source code provided something more than "strong suspicions" is used to support the disclosure. . . .
>
> . . . .
>
> Though this case was filed in September, 2012, no depositions were taken at all in this case until May, 2013 when [ACI's] representative, . . . Linberg, was deposed. As of this writing in late June, 2014, so far as the Court can tell, only 4 other depositions have been taken—those of [d]efendants . . . Meeks, Karen Furst-Meeks, Jack . . . and MasterCard representative . . . Birge.
>
> Since the Court's July 26, 2013 Order on discovery, the only significant evidence presented to the Court by [ACI] as to possible plagiarism is the affidavit of [ACI's] employee, . . . Newsom. In . . . Newsom's affidavit (Ex. 33) he states that he reviewed the emails transmitting information from MasterCard to BHMI (Deposition exhibits 24C-D, 25, 26-A-C, 27A-M, 32, 37, 38, 41,49,50, 52, 55, 69, 73,74) which reference attachments or materials by name or description and concludes: "30. Based on my review of the documents detailed above, it is my strongly held opinion that some of the materials and documents provided by MasterCard to BHMI were never in the MDS source code or configurations files. The only source for these materials and documents are ACI's [intellectual property]."

The emails referenced by . . . Newsom are from and between some of the following individuals at MasterCard: Larry Kjellberg, Glenn Leach, John Lovgren, Tom Wolak, . . . LaRosa, [Hall], George Spies, Diane Dobleske, Mike Obeidi, James Perkins and Ken Vagt—none of these people have been deposed to find out what they actually sent, received or attached to the correspondence.

[ACI] has repeatedly argued that . . . BHMI made references to [MasterCard regarding] the intent and need for MasterCard to produce XPNET materials to BHMI so that it could develop TMS and that representations have been made that XPNET and TMS are compatible or can interface. One of the individuals that [ACI] believes asked for such materials or made statements about compatibility with XPNET, is . . . Lynne . . . yet she has never been deposed to see if she even received such materials or why she may have made such representations. . . .

. . . .

. . . The Court believes that its approach to discovery in this case is also quite orthodox and [ACI] has resisted to this point the Court's encouragement to engage in vigorous non trade secret discovery in preference to its own method of discovery knowing that the trial date was approaching. The Court notes that according to counsel for [BHMI] and MasterCard, their clients have disclosed some 5,000 and 19,000 pages of documents, respectively, to [ACI] during the course of this case. It is not as if this Court has set an insurmountable bar to further discovery.

To be absolutely clear, the Court has never taken the position that [ACI] could not have access to the source codes under any circumstances. The Court has simply asked for evidence to be produced that supports a certain level of probability that plagiarism occurred before triggering the disclosure of the source code and related materials.

Given that ACI conducted little non-trade-secret discovery, its need for trade secret discovery was much less than it would have been had it exhausted all of its non-trade-secret resources. In contrast, BHMI's need to protect its trade secrets from ACI was high, given that ACI is BHMI's competitor and could incorporate BHMI's trade secrets into its own products. Accordingly, we conclude that the district court did not abuse its discretion in overruling ACI's motions to compel production of BHMI's trade secrets, nor did it abuse its discretion in overruling ACI's motion to vacate the 2014 judgment. Therefore, this assignment of error is without merit.

### 2. ACI's Motion to Vacate 2015 Judgment

The next issue is whether the district court abused its discretion in overruling ACI's motions to vacate the 2015 judgment for any of the following reasons: (a) the *Noerr-Pennington* doctrine precludes BHMI's antitrust and tortious interference claims, (b) BHMI presented insufficient evidence to support its antitrust and breach of contract claims, (c) BHMI presented no cognizable evidence of damages to support any claim, (d) ACI was denied discovery of BHMI's trade secret information, and (e) the email attachments were erroneously excluded from evidence. We address each of these proposed reasons in turn.

#### (a) *Noerr-Pennington* Doctrine

First, ACI argues that the 2015 judgment should have been vacated because BHMI's antitrust and tortious interference claims were precluded by the *Noerr-Pennington* doctrine. BHMI argues that *Noerr-Pennington* does not apply to those claims and that even if it did, ACI waived the protection of *Noerr-Pennington* by failing to raise it as an affirmative defense. Before addressing whether ACI waived the protection of *Noerr-Pennington*, we first set forth the principle known as the *Noerr-Pennington* doctrine.

[12] Under the *Noerr-Pennington* doctrine, a party is protected from tort liability for the act of filing a lawsuit.[26] This doctrine was named after the two U.S. Supreme Court cases from which it originated: *Eastern R. Conf. v. Noerr Motors*[27] and *Mine Workers v. Pennington*.[28] Originally, the doctrine exempted *from antitrust laws* certain petitioning of the courts and administrative agencies that resulted in anticompetitive effects.[29] However, the doctrine was later extended to provide a defense to other kinds of claims where the filing of a lawsuit is identified as the wrongful conduct, such as a claim of malicious prosecution or tortious interference with a business relationship.[30]

[13] No matter the context, however, *Noerr-Pennington* does not protect a party from liability for the act of filing a "sham" lawsuit.[31] A lawsuit is a "sham" if it is both (1) objectively baseless in the sense that no reasonable litigant could expect success on the merits and (2) subjectively motivated by bad faith.[32]

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[26] *International Motor Contest Ass'n, Inc. v. Staley*, 434 F. Supp. 2d 650 (N.D. Iowa 2006) (citing *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077 (8th Cir. 1999); *Eastern R. Conf. v. Noerr Motors, supra* note 5; and *Mine Workers v. Pennington, supra* note 5).

[27] *Eastern R. Conf. v. Noerr Motors, supra* note 5.

[28] *Mine Workers v. Pennington, supra* note 5.

[29] *International Motor Contest Ass'n, Inc. v. Staley, supra* note 26.

[30] *Id.* (citing *State of S.D. v. Kansas City Southern Industries*, 880 F.2d 40 (8th Cir. 1989), and *Hufsmith v. Weaver*, 817 F.2d 455 (8th Cir. 1987)). See *IGEN Intern., Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303 (4th Cir. 2003).

[31] *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 61, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993).

[32] *International Motor Contest Ass'n, Inc. v. Staley, supra* note 26 (citing *Porous Media Corp. v. Pall Corp., supra* note 26, and *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., supra* note 31).

We now turn to consider whether ACI waived any protection *Noerr-Pennington* may have provided by failing to reference it in its answer to BHMI's second amended counterclaim. Because an affirmative defense must be pleaded to be considered at the trial court level and on appeal,[33] the issue is whether the *Noerr-Pennington* doctrine is an affirmative defense.

ACI argues that *Noerr-Pennington* is not an affirmative defense and that BHMI "has the burden to prove that immunity does not attach to the challenged activity."[34] In support of its argument, ACI cites a footnote from the 11th Circuit's opinion in *McGuire Oil Co. v. Mapco, Inc.*[35] The footnote states, "Under the Sherman Act, *Noerr-Pennington* immunity is not merely an affirmative defense. Rather, 'the antitrust plaintiff has the burden of establishing that the defendant restrained trade unreasonably, which cannot be done when the restraining action is that of the government.'"[36] We do not read this statement to mean that *Noerr-Pennington* is not an affirmative defense; instead, we read it to mean that *although Noerr-Pennington* is an affirmative defense, the antitrust plaintiff still has the burden to prove the elements of an antitrust case. In other words, the statement dealt with burdens of proof and not with the status of *Noerr-Pennington* as an affirmative defense.

In contrast to ACI's contention, the Fourth and Fifth Circuits, as well as several state appellate courts, have all held that the *Noerr-Pennington* doctrine is an affirmative

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[33] Neb. Ct. R. Pldg. § 6-1108(c). See *Funk v. Lincoln-Lancaster Cty. Crime Stoppers*, 294 Neb. 715, 885 N.W.2d 1 (2016).

[34] Reply brief for appellant at 1.

[35] *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552 (1lth Cir. 1992).

[36] *Id.* at 1558 n.9 (quoting Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, An Analysis of Antitrust Principles and Their Application § 203.4c (Supp. 1990)).

defense.[37] The Fifth Circuit held, for example, that "the *Noerr-Pennington* doctrine should be raised as an affirmative defense" and explained that generally, "a party's failure to raise an affirmative defense in its first responsive pleading results in waiver."[38] We agree with these courts.

[14,15] An affirmative defense raises new matters which, assuming the allegations in the petition to be true, constitutes a defense to the merits of a claim asserted in the petition.[39] Here, ACI's claim of *Noerr-Pennington* immunity raised a new matter, which if established, would constitute a defense to the merits of, at least, BHMI's antitrust counterclaim. Accordingly, the *Noerr-Pennington* defense is an affirmative defense.

Nevertheless, ACI contends that even if *Noerr-Pennington* is an affirmative defense, its failure to raise that defense in the pleadings did not constitute waiver for two reasons. First, ACI contends that the failure to plead the *Noerr-Pennington* defense does not result in waiver because "[c]onstitutional rights are presumed not to be waived," and *Noerr-Pennington* is rooted in the First Amendment's right to petition the government.[40] We find this argument unpersuasive, however, because other affirmative defenses that are rooted in the Constitution are waived if not pled. For example, "truth" is an affirmative defense in a defamation action, and despite the fact that it is

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[37] See, *Waugh Chapel South v. United Food and Commercial*, 728 F.3d 354 (4th Cir. 2013); *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852 (5th Cir. 2000); *Lanzer v. Louisville*, 2016 Ohio 8071, 75 N.E.3d 752 (2016); *Bauldau v. Jonkers*, 229 W. Va. 1, 725 S.E.2d 170 (2011); *Astoria Entertainment, Inc. v. Debartolo*, 12 So. 3d 956 (La. 2009); *RRR Farms, Ltd v. American Horse Protection*, 957 S.W.2d 121 (Tex. App. 1997). Contra *Las Vegas Sands v. Culinary Local # 226*, 82 Fed. Appx. 580, 585 (9th Cir. 2003) ("[f]or a plaintiff to succeed in invoking the sham exception to defeat *Noerr-Pennington* immunity, a plaintiff must plead with specificity the 'sham-ful' nature of the alleged interference").

[38] *Bayou Fleet, Inc. v. Alexander, supra* note 37, 234 F.3d at 860.

[39] See *Funk v. Lincoln-Lancaster Cty. Crime Stoppers, supra* note 33.

[40] Reply brief for appellant at 1.

rooted in the First Amendment,[41] it is waived if not pled.[42] Additionally, we have held that sovereign immunity, which is rooted in the 11th Amendment,[43] is an affirmative defense that is waived if not pled.[44]

Second, ACI suggests that we should adopt the rule set forth in *Bayou Fleet, Inc. v. Alexander*[45] that an "affirmative defense is not waived if it is raised at a 'pragmatically sufficient time, and the plaintiff was not prejudiced in its ability to respond.'" However, even if we adopted such a rule, we find that ACI did not raise the *Noerr-Pennington* defense at a pragmatically sufficient time. In *Bayou Fleet, Inc.*, the motion for summary judgment setting forth the defense of the *Noerr-Pennington* doctrine had been filed 1 year before trial. Here, ACI did not mention the *Noerr-Pennington* defense until the summary judgment hearing on July 31, 2015, which occurred less than 2 months prior to the second trial and nearly 3 years after the case began. And ACI did not attempt to amend its pleadings to add the defense at that time.

Although prejudice to the plaintiff may be avoided in some cases by a continuation of trial, such was not the case here. Importantly, both parties in this case requested expedited discovery, and at multiple hearings, BHMI expressed that the litigation was having a negative effect on its ability to market TMS and that continuation of the trial was not a favorable option. The court also indicated that it was unwilling to continue trial. In light of these facts, we conclude that even if we

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[41] See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 490, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975) ("the defense of truth is constitutionally required where the subject of the publication is a public official or public figure").

[42] *McCune v. Neitzel*, 235 Neb. 754, 457 N.W.2d 803 (1990).

[43] See *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010).

[44] *Fuhrman v. State*, 265 Neb. 176, 182, 655 N.W.2d 866, 873 (2003) ("sovereign and qualified immunity are affirmative defenses which should be affirmatively pleaded or are considered waived").

[45] *Bayou Fleet, Inc. v. Alexander, supra* note 37, 234 F.3d at 860.

adopted an exception to the rule that affirmative defenses are required to be plead, such exception would not apply here.

We note that on September 11, 2015, 3 days before the second trial, ACI filed a motion requesting leave to file an amended answer to add the *Noerr-Pennington* defense. Because ACI took the position that *Noerr-Pennington* was not an affirmative defense, the district court overruled the motion, reasoning that the pleadings need only set forth affirmative defenses. Because ACI did not assign or argue that this ruling was in error, we do not address on appeal whether the district court erred in overruling ACI's motion to amend its pleadings.[46]

Because we find that ACI waived the *Noerr-Pennington* defense by failing to raise it as an affirmative defense, the district court did not abuse its discretion in overruling ACI's motion to vacate the 2015 judgment for this reason.

(b) Sufficiency of Evidence

ACI next assigns that the 2015 judgment should have been vacated, because BHMI did not present sufficient evidence to support the jury's verdict on the Junkin Act and breach of contract claims. When reviewing a jury verdict, the appellate court considers the evidence and resolves evidentiary conflicts in favor of the successful party.[47] A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is competent evidence presented to the jury upon which it could find for the successful party.[48]

*(i) Junkin Act*

We first consider the sufficiency of the evidence to support BHMI's Junkin Act claim. The Junkin Act makes it illegal to "monopolize, or attempt to monopolize, or combine or

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[46] *In re Claims Against Pierce Elevator, supra* note 14.

[47] *Chadron Energy Corp. v. First Nat. Bank, supra* note 9.

[48] *Koster v. P & P Enters., supra* note 10.

conspire with any other person or persons, to monopolize any part of the trade or commerce."[49] The Junkin Act allows "[a]ny person who is injured in his or her business or property" by a violation of the Junkin Act to recover damages and costs of suit, including a reasonable attorney fees.[50]

[16,17] For purposes of the Junkin Act, monopolization consists of two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[51] The existence of monopoly power ordinarily is inferred from the seller's possession of a predominant share of the market.[52]

[18-20] Despite the broad remedial language of the Junkin Act, not every person claiming an injury from a Junkin Act violation can recover damages.[53] To recover damages, a plaintiff must prove an antitrust injury.[54] To constitute an antitrust injury, the injury must reflect the anticompetitive effect of the violation or the anticompetitive effects of anticompetitive acts made possible by the violation.[55] As noted by the 11th Circuit in *Jacobs v. Tempur-Pedic Intern., Inc.*,[56] "Actual anticompetitive effects include, but are not limited

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[49] § 59-802.

[50] § 59-821.

[51] *Health Consultants v. Precision Instruments*, 247 Neb. 267, 527 N.W.2d 596 (1995) (citing *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)).

[52] *Eastman Kodak Co. v. Image Technical Services, Inc., supra* note 51.

[53] See *Kanne v. Visa U.S.A.*, 272 Neb. 489, 723 N.W.2d 293 (2006).

[54] See, § 59-821; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977).

[55] *Id.*

[56] *Jacobs v. Tempur-Pedic Intern., Inc.*, 626 F.3d 1327, 1339 (11th Cir. 2010).

to, reduction of output, increase in price, or deterioration in quality."

With respect to BHMI's Junkin Act claim, ACI argues only that there was insufficient evidence of an "antitrust injury"; it does not argue that there was insufficient evidence to establish any other element of BHMI's Junkin Act claim.

ACI argues that BHMI did not present evidence of an antitrust injury because it did not show any anticompetitive effects of ACI's Junkin Act violation. In support of that argument, ACI cites *Cobb Theatres III v. AMC Entertainment Holdings*,[57] for the proposition that to support an award of damages, "competition must be shown not through harm to the plaintiff, but though market-wide impact such as increased prices, reduced output, or reduced product quality resulting from the defendant's conduct."[58] ACI argues that BHMI failed to prove increased prices, reduced output, or reduced product quality; therefore, ACI claims, BHMI has not shown an antitrust injury.

Although we note that the court in *Cobb Theatres III* did not limit evidence of an antitrust injury to those three factors,[59] we conclude that BHMI did submit evidence of those factors. For example, BHMI presented evidence of a reduced output and an increased price when it showed that, by keeping TMS out of the market, ACI deprived consumers and the market of a more affordable option. In fact, multiple witnesses testified that TMS could not be marketed because of ACI's lawsuit, and

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[57] *Cobb Theatres III v. AMC Entertainment Holdings*, 101 F. Supp. 3d 1319 (N.D. Ga. 2015).

[58] Brief for appellant at 34.

[59] See *Cobb Theatres III v. AMC Entertainment Holdings, supra* note 57 (quoting *Jacobs v. Tempur-Pedic Intern., Inc., supra* note 56, 626 F.3d at 1339, for proposition that "[a]ctual anticompetitive effects include, *but are not limited to*, reduction of output, increase in price, or deterioration in quality" (emphasis supplied)).

O'Neil testified that TMS was approximately half the price of XPNET. BHMI also presented evidence of reduced product quality. Specifically, BHMI presented evidence that TMS was capable of running on multiple platforms, while XPNET could run only on HP NonStop hardware. Thus, the jury could infer that the market was deprived of higher quality software with additional features.

Based on the evidence set forth above, we conclude that BHMI presented competent evidence upon which the jury could find that BHMI sustained an antitrust injury. Therefore, the jury was not clearly wrong in finding in favor of BHMI on its Junkin Act claim, and the district court did not abuse its discretion in overruling ACI's motion to vacate the 2015 judgment for this reason.

*(ii) Breach of Contract*

ACI also claims that BHMI presented insufficient evidence to support the jury's finding that ACI violated the NDA. In this regard, ACI sets forth two arguments. First, ACI contends that because the NDA protected only "non-public information," ACI could not have breached the agreement, because the allegations in ACI's complaint are public.[60] Second, ACI suggests that the jury misinterpreted the NDA to be a "'never sue agreement.'"[61] We address both of these arguments in turn and find neither to have any merit.

[21,22] The interpretation of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.[62] When the terms of a contract are clear, they are to be accorded their plain and ordinary

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[60] Brief for appellant at 33.

[61] *Id.*

[62] *Fitzgerald v. Community Redevelopment Corp.*, 283 Neb. 428, 811 N.W.2d 178 (2012).

meaning.[63] As noted above, paragraph 2(c) of the NDA provides, in relevant part: "For the avoidance of doubt, [ACI] understands and agrees that in no event shall [ACI] utilize the Confidential Information of [BHMI] *in any manner whatsoever* . . . (iii) in any legal action directed toward [BHMI] or its vendors, representatives, agents, or customers . . . ." (Emphasis supplied.)

The terms of the NDA are clear: ACI was not to use BHMI's confidential information "in any manner whatsoever," including to form the basis of ACI's lawsuit against BHMI. In ACI's complaint against BHMI, ACI alleged that "BHMI agreed to allow ACI representatives to conduct an examination of the operations, configurations, and application programming manuals related to [TMS]" and that "[a]s a result of the inspection, ACI found a high degree of conceptual similarity . . . ."

Although ACI did not disclose the specifics of the confidential information within the complaint, the NDA did not prohibit ACI from merely *disclosing* the information; it prohibited ACI from *utilizing* the information *in any manner whatsoever*, including in a legal action directed toward BHMI or its customers. Based on these allegations, we conclude that the jury did not commit clear error in finding that ACI utilized BHMI's confidential information to form the basis of its lawsuit in direct violation of the NDA.

Turning to ACI's second argument, we disagree that the NDA was misinterpreted as a "never sue agreement." The language of the NDA does not preclude a legal action against BHMI. It simply precluded ACI from using in a legal action the information that BHMI provided to it during the course of

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[63] *Pavers, Inc. v. Board of Regents*, 276 Neb. 559, 755 N.W.2d 400 (2008); *Katherine R. Napleton Trust v. Vatterott Ed. Ctrs.*, 275 Neb. 182, 745 N.W.2d 325 (2008); *Sayah v. Metropolitan Prop. & Cas. Ins. Co.*, 273 Neb. 744, 733 N.W.2d 192 (2007).

the meetings. The same information could have been obtained and used against BHMI through proper methods such as traditional discovery.

Accordingly, we find sufficient competent evidence to support the jury verdict that ACI violated the NDA. Therefore, the district court did not abuse its discretion in overruling ACI's motion to vacate the 2015 judgment for this reason.

(c) Evidence of Damages

ACI next assigns that the district court erred in overruling its motion to vacate the 2015 judgment, because BHMI presented "no cognizable evidence of damages to support any claim." In this regard, ACI sets forth two arguments. First, ACI argues that Jack's opinion about BHMI's lost profits should not have been admitted because he was not qualified to testify as an expert. Second, ACI argues that even if Jack was qualified to testify, the evidence he presented was insufficient to support the jury's award of $43,806,362.70. We address each of these arguments in turn and find neither to have any merit.

*(i) Jack's Qualification as Expert Witness*

Generally, a trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.[64] 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.[65]

An expert's opinion is ordinarily admissible under Neb. Rev. Stat. § 27-702 (Reissue 2016) if the witness (1) qualifies as an expert, (2) has an opinion that will assist the trier of fact,

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[64] *Robb v. Robb, supra* note 11.

[65] *Hartman v. Hartman, supra* note 12.

(3) states his or her opinion, and (4) is prepared to disclose the basis of that opinion on cross-examination.[66]

ACI argues that the district court erred in finding that Jack was qualified to testify about BHMI's future lost profits, because Jack was not formally trained in performing a lost profits analysis and did not have an accounting degree.

[23-25] However, there is no exact standard for fixing the qualifications of an expert witness, and a trial court is allowed discretion in determining whether a witness is qualified to testify as an expert. Unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal.[67] Experts or skilled witnesses will be considered qualified if they possess special skill or knowledge respecting the subject matter involved superior to that of persons in general, so as to make the expert's formation of a judgment a fact of probative value.[68] And a witness may qualify as an expert by virtue of either formal training or actual practical experience in the field.[69]

As BHMI points out, we have previously allowed principals of businesses to opine regarding lost profits suffered by their businesses. For example, we found that the owner of farmland had sufficient basis to opine on lost profits resulting from a decrease in crop yields,[70] that a principal stockholder of a manufacturing business was qualified to testify about lost profits of that business,[71] and that the owner of a distributorship was qualified to testify regarding lost profits suffered by his business.[72] Although we allowed owners to testify on lost

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[66] *Heistand v. Heistand*, 267 Neb. 300, 673 N.W.2d 541 (2004).

[67] *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009).

[68] *Id.*

[69] *Id.*

[70] *Lesiak v. Central Valley Ag Co-op*, 283 Neb. 103, 808 N.W.2d 67 (2012).

[71] *Alliance Tractor & Implement Co. v. Lukens Tool & Die Co.*, 204 Neb. 248, 281 N.W.2d 778 (1979).

[72] *Diesel Service, Inc. v. Accessory Sales, Inc.*, 210 Neb. 797, 317 N.W.2d 719 (1982).

profits, we note that in each case, it was the practical experience of the owner as it relates to that particular business which established the foundation for the opinion, not just ownership. The same is true here.

Jack's knowledge about BHMI's lost profits is clearly superior to that of persons in general. Jack handles all of BHMI's finances and has had 30 years' practical experience running BHMI. Jack is knowledgeable about the costs incurred to develop and license TMS. He is aware of BHMI's current and potential customers and the prices BHMI charges for its licensing. For these reasons, we find the district court did not commit clear error in finding that Jack was qualified to testify, did not abuse its discretion in allowing Jack to opine on BHMI's lost profits, and did not abuse its discretion in overruling ACI's motion to vacate the 2015 judgment due to the qualifications of Jack.

*(ii) Sufficiency of Damages Evidence*

ACI also contends that BHMI's damages evidence was insufficient, because Jack failed to account for certain costs in his future lost profits calculation and because BHMI failed to offer business records to support his calculation.

[26] A plaintiff's burden of offering evidence sufficient to prove damages cannot be sustained by evidence which is speculative and conjectural, but proof of damages to a mathematical certainty is not required; the proof is sufficient if the evidence is such as to allow the trier of fact to estimate actual damages with a reasonable degree of certainty and exactness.[73]

a. Costs

ACI argues that BHMI's damages evidence was insufficient, because Jack failed to take into account (1) costs of developing new versions of TMS, (2) maintenance costs, and (3) general overhead costs.

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[73] *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003).

As for costs of developing new versions of TMS, ACI asserts that Jack "admitted that, although BHMI would expect to release subsequent versions of TMS during the twelve-year period of his damages model, his model did not include the costs of developing those new versions."[74] However, Jack's testimony in this regard is as follows:

> Q. . . . [T]here certainly would have been new versions developed of TMS over a 12-year period? Can we agree with that?
>
> A. No, sir, I don't necessarily agree with that.
>
> Q. All right. So software companies don't routinely come up with version 1.0 and 1.2? That would never happen with your software, right?
>
> . . . .
>
> A. They may or may not, sir.
>
> Q. But you didn't figure that in. You just figured for 12 straight years TMS — there would be no new versions whatsoever, correct?
>
> A. I extrapolated costs and revenue based on what we had seen and what I knew.
>
> Q. That's not my question. You said you did not believe that there would be any new versions over a 12-year period for TMS, correct?
>
> A. I'm not sure I said that. I'm saying that I don't know, but there may or may not be.

Whether or not new versions of TMS would have been developed is a question of fact for the jury. Resolving this evidentiary conflict in favor of BHMI, we conclude that it would be speculative to attribute costs to the development of new versions of TMS, because it is unknown whether new versions of TMS would be released.

We turn now to the "maintenance costs" and "general overhead costs" which ACI asserts BHMI was required to account

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[74] Brief for appellant at 39.

for but failed to do so.[75] To support its assertion that Jack failed to account for "maintenance costs," ACI points to the following testimony:

> Q. Isn't there a cost to your company to provide the maintenance?
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> A. Not really. Not in the case of TMS. We have not seen that cost. For example, if people call and say, "I've got a problem" or "I need to do something," we don't have a separate help desk facility. Certainly not one that's dedicated to TMS.
>
> Essentially, if somebody calls in for any reason for any of our products, we will assign the question or the issue or the problem to one of our staff members who's doing that along with other duties. So essentially that is what is considered to be a fixed cost to deal with those kinds of issues. So it's not really a cost that comes out of our pocket as such because we're already paying that individual for doing that kind of work plus others. So it's not a particular cost allocated specifically against TMS.

[27] Based on Jack's testimony, it is clear that the above "maintenance costs" are overhead costs. Overhead costs are business expenses that cannot be allocated to a particular service or product.[76] BHMI's cost of employees to run the help desk is an overhead cost because it cannot be allocated specifically to TMS or any other product or service. Accordingly, ACI's arguments about "maintenance costs" and "general overhead costs" run together and present the same issue.

In support of ACI's argument that Jack should have taken BHMI's general overhead costs into account, ACI cites *Home Pride Foods v. Johnson*.[77] ACI argues that this case shows

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[75] *Id.*

[76] Black's Law Dictionary 1278 (10th ed. 2014). See, also, 177 Neb. Admin. Code, ch. 5, § 003 (2006).

[77] *Home Pride Foods v. Johnson*, 262 Neb. 701, 634 N.W.2d 774 (2001).

that Nebraska law requires that overhead costs be taken into account in lost profits analyses. However, we do not find such a requirement in our reading of *Home Pride Foods*.

In *Home Pride Foods*, we held that a plaintiff has not presented sufficient evidence of lost profits where he or she presents only evidence of gross profits and does not present evidence of *any* costs. In that case, the plaintiff had not presented any evidence of any costs, including overhead costs. But we never held that the plaintiff was required to subtract overhead costs from its revenue in calculating its lost profits. Instead, we concluded that the plaintiff failed to present sufficient evidence to support an award of damages, because only net profits are recoverable, and that the plaintiff's net profits could not be calculated where there was no evidence of costs.

Contrary to ACI's argument on appeal, "'[t]he weight of authority holds that fixed overhead expenses need not be deducted from gross income to arrive at the net profit properly recoverable.'"[78] This rule has been explained:

> "The true rule seems to be that the prospective profits should be diminished by charges composing an essential element in the cost to manufacture . . . . Essential elements in such cost do not include remote costs, overhead or otherwise, but are confined to expenditures that would necessarily have been made in the performance of the contract. The only matter of concern is the detriment suffered or benefit lost as a result of the breach. If the fixed expenses neither increased nor decreased as a consequence of the nonperformance of the contract, there would be no loss or benefit arising from that factor."[79]

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[78] *Vanwyk Textile Systems v. Zimmer Mach. Amer., Inc.*, 994 F. Supp. 350, 383 (W.D.N.C. 1997).

[79] 1 Robert L. Dunn, Recovery of Damages for Lost Profits § 6.5 at 487-88 (6th ed. 2005) (quoting *Oakland Cal. Towel Co. v. Sivils*, 52 Cal. App. 2d 517, 126 P.2d 651 (1942)). Accord *Vanwyk Textile Systems v. Zimmer Mach. Amer., Inc., supra* note 78.

Here, consistent with the rule in *Home Pride Foods*, BHMI presented evidence of its lost net profits by presenting evidence of lost revenue and evidence of the expenses attributable to TMS. We therefore conclude that BHMI presented sufficient evidence upon which the jury could reasonably estimate BHMI's lost net profits.

b. Supporting Financial Data

ACI also argues that BHMI's evidence of damages was insufficient because BHMI "failed to offer any quantifiable business records (income tax return, proft/loss statements or business records) to support its future lost profits calculation."[80]

In support of its argument, ACI cites *Evergreen Farms v. First Nat. Bank & Trust*[81] and *World Radio Labs. v. Coopers & Lybrand*.[82] In *Evergreen Farms*, we held that a claim for lost profits must be supported by "some financial data which permit an estimate of the actual loss to be made with reasonable certitude and exactness."[83] In that case, we found that the plaintiff had not submitted sufficient evidence to sustain the jury's award of damages where the only evidence of damages was the testimony of one of the partners of Evergreen Farms (Evergreen). In calculating Evergreen's lost profits, the partner assumed that Evergreen would be paid to feed an additional 2,000 head of cattle at a rate of 10 cents per head. Not only were these numbers not supported by any of Evergreen's financial documents, but the numbers were not based on any reliable evidence. The partner provided no basis for his assumption that Evergreen would have made 10 cents

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[80] Brief for appellant at 38.

[81] *Evergreen Farms v. First Nat. Bank & Trust*, 250 Neb. 860, 553 N.W.2d 728 (1996).

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

[83] *Evergreen Farms v. First Nat. Bank & Trust, supra* note 81, 250 Neb. at 868, 553 N.W.2d at 734.

per head of cattle, and the partner's assumption that Evergreen would have had an additional 2,000 head of cattle was based on "the fact that Evergreen was feeding 3,500 to 4,000 head of cattle and 'all of a sudden we dropped down to from 1,500 to 2,000 for two years.'"[84] Because we determined that this evidence was too speculative and conjectural, we held that Evergreen's damages evidence was insufficient to support the jury's award.

In *World Radio Labs.*, we also found that the damages evidence was insufficient. In that case, the plaintiff's chief financial officer estimated lost profits by assuming that the plaintiff would have made the same amount of profit that it did during another time period. We concluded that the chief financial officer's testimony was too speculative and conjectural because his estimation "failed to account for the many differences in the business between [the] time periods [being compared]."[85]

Even if we interpreted these two cases, as ACI urges, to require a plaintiff to submit business records to support its claim for lost profits, we conclude that BHMI did submit business records to support its claim. The prices Jack used in his lost profits analysis were based on actual contracts that he negotiated with MasterCard and FNBO for BHMI, which were received into evidence.

We further note that Jack's lost profits analysis was not solely supported by his own testimony, but also by the testimony of Scheer and Saltwick. Scheer testified that given the level of interest expressed by target customers, it was reasonable for BHMI to expect to license TMS to two customers per year. Saltwick testified that he agreed there was "significant market demand for solutions . . . to replace ACI software." In a market of 300 customers, a "significant market demand"

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[84] *Id.* at 867, 553 N.W.2d at 734.

[85] *World Radio Labs. v. Coopers & Lybrand, supra* note 82, 251 Neb. at 281, 557 N.W.2d at 14.

would surely encompass two customers per year, which is less than 1 percent of the market.

For the foregoing reasons, we conclude that BHMI presented sufficient evidence to allow the jury to estimate actual damages with a reasonable degree of certainty and exactness. We therefore find that the district court did not abuse its discretion in overruling ACI's motion to vacate the 2015 judgment for this reason.

(d) Denied Discovery

ACI next assigns that the district court erred in overruling its motion to vacate the 2015 judgment because ACI was denied discovery of BHMI's trade secrets. We have previously addressed this issue with regard to the 2014 judgment. A review of the record reveals that after the first trial and before the second trial, ACI never filed a motion to compel the discovery of BHMI's trade secrets. Thus, for the same reasons set forth in the section on the 2014 judgment, we conclude that the district court did not abuse its discretion in overruling ACI's motion to vacate the 2015 judgment.

(e) Exclusion of Email Attachments

Next, ACI assigns that the district court erred in overruling its motion to vacate the 2015 judgment because it excluded evidence that would allow ACI to show that it filed the original lawsuit with good faith. The only evidence that ACI argues was improperly excluded was the evidence that ACI obtained in the federal litigation and evidence that ACI survived motions to dismiss and motions for summary judgment.

[28,29] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is a factor only when the rules make such discretion a factor in determining admissibility.[86] To constitute reversible error in a civil case,

[86] *Nickell v. Russell*, 260 Neb. 1, 614 N.W.2d 349 (2000).

the admission or exclusion of evidence must unfairly prejudice a substantial right of the litigant complaining about evidence admitted or excluded.[87]

We first address ACI's claim that the district court erroneously excluded the evidence obtained in the federal litigation. After reviewing the record, we conclude that the district court did not make a ruling on the admissibility of such evidence because that evidence was never offered during the trial. The record reflects that at a hearing on July 31, 2015, ACI first offered exhibit 314, which was the emails and attachments obtained in the federal litigation, in support of its motion to vacate the 2014 judgment.

On August 26, 2015, ACI filed a motion requesting that the court rule on the admissibility of exhibit 314 for purposes of the second trial, and it set the motion for hearing on September 14, which was the first day of the trial. However, we have no record of that hearing, no record of the district court's ruling on its admissibility, and no record that ACI ever offered exhibit 314 during the trial.

[30] Generally, a motion which is never called to the attention of the court is presumed to have been waived or abandoned by the moving party, and, where no ruling appears to have been made on a motion, the presumption is, unless it otherwise appears, that the motion was waived or abandoned.[88] Because no ruling appears to have been made on the motion, we find that the motion was either waived or abandoned. And because we find no evidence that ACI ever offered exhibit 314 at the trial, we cannot say that the district court abused its discretion in not admitting it where it was never given the opportunity to do so.

Even if the evidence obtained in the federal trial had been improperly excluded, we fail to see how such exclusion would

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[87] *Id.*

[88] *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 235 Neb. 207, 454 N.W.2d 671 (1990).

have unfairly prejudiced ACI. In other words, we fail to see how the evidence obtained during the federal trial would have showed that ACI's claim was filed with good faith and not with the purpose of interfering with BHMI's business expectations. It is undisputed that ACI did not have the materials contained within exhibit 314 at the time it filed the initial lawsuit against BHMI and thus these materials could not have formed the basis of its suit.

We now turn to ACI's argument that the district court erroneously excluded testimony that ACI survived motions to dismiss and motions for summary judgment. ACI argues that the district court should have allowed the testimony, because it would have showed that ACI's lawsuit was not a "'sham exception'" for purposes of the *Noerr-Pennington* defense.[89] However, because we held that ACI waived *Noerr-Pennington* by failing to plead it as a defense, we cannot find that the district court abused its discretion in excluding this evidence where it had no prejudicial effect on ACI.

Because there is no record that ACI ever offered exhibit 314 at the trial and because the testimony at issue would have had no prejudicial effect on ACI, we cannot find that the district court erroneously excluded this evidence. We therefore conclude that the district court did not abuse its discretion in overruling ACI's motion to vacate the 2015 judgment for this reason, and we find this error is without merit.

### 3. Attorney Fees

Lastly, ACI assigns that the district court abused its discretion in awarding BHMI $2,732,962.50 in attorney fees and costs. We note that ACI does not argue that BHMI was not entitled to costs and attorney fees; § 59-821 allows a party injured by a violation of the Junkin Act to recover the costs of suit, including a "reasonable attorney's fee." Instead, ACI

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[89] Brief for appellant at 47 (citing *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., supra* note 31).

argues that the amount of the award was an abuse of discretion for two reasons. First, ACI argues that the district court could not have applied the factors set forth in our case law for determining a reasonable attorney fee, because BHMI did not offer legal invoices into evidence. Second, ACI argues that the district court had no basis for multiplying BHMI's rate.

[31] We have generally said that if an attorney seeks a statutory attorney fee, that attorney should introduce at least an affidavit showing a list of the services rendered, the time spent, and the charges made.[90] Here, BHMI submitted into evidence an affidavit executed by Davidson, the chair of a local law firm's litigation section, attesting to the reasonableness of the fees submitted by the law firm representing BHMI. In the affidavit, Davidson set forth the hours and rates of the attorneys and professional staff who worked on the case, which was based upon a detailed summary of work provided by counsel for BHMI. We note that ACI did not submit any evidence to dispute the contents of the affidavit. Although BHMI did not submit any legal invoices into evidence, we are unaware of any relevant information that would have been contained in the legal invoice that was not also in Davidson's affidavit. Based on our review of the affidavit, we conclude that it provided sufficient information upon which the district court could determine proper and reasonable attorney fees.

[32] We now turn to ACI's argument that the district court abused its discretion in applying a multiplier to the fee. When an attorney fee is authorized, the amount of the fee is addressed to the trial court's discretion, and its ruling will not be disturbed on appeal absent an abuse of discretion.[91] An award of attorney fees involves consideration of such factors as the nature of the case, the services performed and results obtained,

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[90] *Black v. Brooks*, 285 Neb. 440, 827 N.W.2d 256 (2013).

[91] See cases cited *supra* note 13.

the length of time required for preparation and presentation of the case, the customary charges of the bar, and general equities of the case.[92]

Here, the district court found that the high risk and complex nature of the case warranted significant attorney fees, explaining that antitrust actions are one of the most difficult actions to litigate. Moreover, the court noted that the subject matter of the case involved highly technical issues relating to software and concepts such as source code, object code, application programming interfaces, "wrappers, literals, defines, and other technical concepts that are not generally understood by laypeople." The court further noted that the case was vigorously contested by both parties and involved two protracted jury trials.

As for the services performed, the district court found that claims under the Junkin Act have rarely been litigated in Nebraska and that prosecuting such a claim required skill, care, and diligence. Moreover, the work involved extensive discovery and research, working with experts, and strategizing for and attending trial, among other tasks. The parties exchanged "tens of thousands" of pages of documents during the course of discovery and were required to review "tens of thousands" of other documents from nonparties. Additionally, the case involved numerous depositions, which required the parties to travel out of state to St. Louis, Missouri, and Chicago, Illinois.

As for the results obtained, the district court found that BHMI's case was the only case within the last 100 years where a party successfully proved a Junkin Act claim. The court further noted that counsel for BHMI obtained an "excellent result" for BHMI, which warranted an enhancement of the attorney fees. As for the length of time required to prepare the case, the district court found that the case involved extended litigation, which required BHMI's attorneys,

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[92] See *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008).

paralegals, and technical support staff to devote over 2,800 hours to the case.

After reviewing the district court's detailed explanation for its award of attorney fees, we agree that the above factors support a significant attorney fee. We therefore find that the district court did not abuse its discretion in awarding BHMI $2,732,962.50.

## VI. CONCLUSION

For the reasons set forth above, we conclude that the district court did not abuse its discretion in overruling ACI's motions to vacate the 2014 and 2015 judgments and did not abuse its discretion in awarding BHMI $2,732,962.50 in attorney fees. We therefore affirm.

Affirmed.

Miller-Lerman, J., not participating.

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

# Jeffry L. Strohmyer, M.D., appellant and cross-appellee, v. Papillion Family Medicine, P.C., a Nebraska professional corporation, et al., appellees and cross-appellants.

896 N.W.2d 612

Filed June 9, 2017. No. S-16-381.

1. **Equity: Appeal and Error.** In an appeal of an equitable 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 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.
2. **Fraud: Judgments.** The existence of a fiduciary duty and the scope of that duty are questions of law for a court to decide.
3. **Corporations.** An officer or a director of a corporation occupies a fiduciary relation toward the corporation, and must comply with the applicable fiduciary duties in his or her dealings with the corporation and its shareholders.
4. **Corporations: Liability: Damages.** A violation by a trustee of a duty required by law, whether willful, fraudulent, or resulting from neglect, is a breach of trust, and the trustee is liable for any damages proximately caused by the breach.
5. **Corporations.** An officer or a director of a corporation occupies a fiduciary relation toward the corporation and its stockholders and should refrain from all acts inconsistent with his or her corporate duties.
6. **Partnerships.** Partners must exercise the utmost good faith in all their dealings with the members of the firm and must always act for the common benefit of all.

Appeal from the District Court for Sarpy County: William B. Zastera, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Russell S. Daub, and W. Eric Wood, of Downing, Alexander & Wood, for appellant.

Larry R. Forman, of Hillman, Forman, Childers & McCormack, for appellees.

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

Heavican, C.J.

## I. INTRODUCTION

Dr. Jeffry L. Strohmyer, Dr. Robert G. Naegele, and Dr. Edward M. Mantler formed Papillion Family Medicine, P.C. (PFM), located in Papillion, Nebraska. On December 31, 2013, Strohmyer provided notice that he was leaving PFM to start his own medical practice, effective March 31, 2014.

Strohmyer filed suit against PFM, Naegele, and Mantler due to PFM's failure to "buy out" Strohmyer and pay associated director fees following his departure. Strohmyer also contests PFM's calculation of the value of its stock, assets, and goodwill. PFM, Naegele, and Mantler counterclaimed.

The district court found that PFM was not a corporation under the laws of Nebraska. It further (1) held that the value of Strohmyer's stock was $104,220, (2) awarded Strohmyer $9,389.27 in unpaid compensation, and (3) awarded PFM damages in the amount of $30,673 on its cross-complaint. Strohmyer appeals. We affirm in part, and in part reverse and remand for further proceedings not inconsistent with this opinion.

## II. BACKGROUND

### 1. Factual History

#### (a) Formation of PFM

In 2000, Strohmyer, Naegele, and Mantler incorporated PFM, a Nebraska professional corporation conducting a medical and surgical practice, with its principal place of business in Papillion.

The articles of incorporation were filed on September 15, 2000. The three doctors were listed as the sole directors and shareholders of PFM. Naegele was elected to serve as president, Strohmeyer as vice president, and Mantler as secretary and treasurer. A document entitled "By-Laws of the Papillion Family Medicine, P.C. As of October 16, 2000" contains a "Buy Out" section outlining payment due to a doctor after death or departure, but it was not signed by any of the doctors. Naegele testified that he drafted this document and viewed it only as a draft for discussion at a directors' meeting.

A second document, entitled "Bylaws of Papillion Family Medicine, P.C.," was signed only by Mantler in his role as secretary of PFM. With his signature, Mantler certified that the bylaws were adopted by the board of directors on December 4, 2000. The bylaws stated that "the majority of the shares represented at the meeting and entitled to vote on the subject matter shall be the act of the shareholders, unless the vote of a greater number is required by law." These bylaws did not include any process for a director's departure from PFM, as a "buy out" or otherwise.

A third document, entitled "By-Laws of the Papillion Family Medicine, P.C. As of October 16, 2000," is identical to the first bylaws, but was signed by Mantler on April 2, 2012. With his signature, Mantler certified that the bylaws were adopted by the board of directors on October 16, 2000.

### (b) Relevant Portions of Articles of Incorporation and Bylaws

The relevant portion of the October 16, 2000, bylaws states the following under the "Buy Out" section:

> Upon death or departure the doctor or his estate will be paid every two weeks at the usual time, a pay check, which is the actual accounts receivable that are collected, less 1/3 expenses of the corporation. These payments

> will continue for 6 months regardless of the remaining accounts receivable. . . .
>
> . . . .
>
> . . . For 2nd 6 months of the year after leaving, the doctor or his estate is paid 1/3 of the total assets at the time of departure, d[i]vided by 1/3, pai[d] in equal amounts over 6 months.

The October 16, 2000, bylaws also describe physician compensation:

> 1. The basis for physician compensation shall be calculated on the amount collected from a set of physician charges, not on the amount billed.
>
> a. To this amount collected, one third of the common charges collected will be added. The common charges are all bills submitted by the physician assistants and all lab and x-ray charges.
>
> b. From the collections shall be subtracted one third of the common expenses, including but not limited to common expenses, equipment, and supplies.
>
> c. Also subtracted will be any expenses peculiar to the physician himself . . . .
>
> d. Once the final amount is reconciled for a given pay period, the physician will draw money equal to 90% of an average of the . . . amount of money collect[ed] in the last 4 pay periods (a period of roughly 2 months).

As relevant, article V of PFM's articles of incorporation provides:

> A director of the corporation shall not be personally liable to the Corporation or its shareholders for monetary damages for any action taken, or any failure to take action as a director except for liability (i) for the amount of financial benefit received by a director to which he or she is not entitled; (ii) for intentional infliction of harm on the corporation or its shareholders; (iii) for a violation of Neb. Rev. Stat. §21-2096; and (iv) for an intentional violation of criminal law.

And article X provides in part:

> Any shareholder who ceases to be eligible to be a shareholder as herein provided shall be obligated forthwith to dispose of all of his shares to the Corporation or to some other person qualified to be a shareholder, all on such terms and conditions as the shareholders and the Board of Directors shall determine.

### (c) Agreement to Work 4 Days Per Week

Naegele and Mantler claim that in forming the corporation, they had a verbal agreement to each work 4 days per week at PFM, but that this agreement was never recorded in writing. Naegele testified that prior to this lawsuit, he never provided Strohmyer anything in writing that stated Strohmyer had to work 4 days per week. In addition, the directors did not sign a noncompete document or any other document that might establish liability to each other or to PFM for starting another practice.

Strohmyer testified that prior to and following the formation of PFM, he worked as an associate medical director for Uninet Healthcare Network. From 2001 to 2007, Strohmyer served in various medical staff leadership positions for Alegent Health (Alegent). In 2008, Strohmyer began working as the "Campus Medical Director and Quality Officer" at Alegent, requiring him to work 1½ days per week.

In 2009, Strohmyer became "Medical Director" at Alegent, which required that Strohmyer work "two full days" per week. Throughout that time, Strohmyer also worked as a hospitalist at Alegent. This limited his time at the clinic to 3 days per week. Naegele testified that prior to this lawsuit, he never provided Strohmyer anything in writing that said that he objected to Strohmyer's involvement with Alegent or the outside work Strohmyer was doing.

### (d) Nebraska Wage Payment and Collection Act

In his prayer for relief, Strohmyer sought his wages and attorney fees pursuant to the Nebraska Wage Payment and Collection Act (the Act).[1]

Section 48-1229 states in relevant part:

> (1) Employee means any individual permitted to work by an employer pursuant to an employment relationship or who has contracted to sell the goods or services of an employer and to be compensated by commission. Services performed by an individual for an employer shall be deemed to be employment, unless it is shown that (a) such individual has been and will continue to be free from control or direction over the performance of such services, both under his or her contract of service and in fact . . . and (c) such individual is customarily engaged in an independently established trade, occupation, profession, or business. . . .
>
> . . . .
>
> (6) Wages means compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been met by the employee, whether the amount is determined on a time, task, fee, commission, or other basis.

Section § 48-1231 states in relevant part:

> (1) An employee having a claim for wages which are not paid within thirty days of the regular payday designated or agreed upon may institute suit for such unpaid wages in the proper court. If an employee establishes a claim and secures judgment on the claim, such employee shall be entitled to recover (a) the full amount of the judgment and all costs of such suit and (b) if such employee has employed an attorney in the case, an

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[1] See Neb. Rev. Stat. § 48-1228 et seq. (Reissue 2010 & Cum. Supp. 2016).

amount for attorney's fees assessed by the court, which fees shall not be less than twenty-five percent of the unpaid wages.

(e) Medicaid Patients

A portion of Strohmyer's practice was devoted to Medicaid patients. In an April 18, 2005, memorandum from Naegele to all clinic staff, Naegele stated that "Mantler's patient list is now closed to all Medicaid patients" and that "Strohmyer and . . . Naegele will continue for the moment to see current Medicaid patients, and will evaluate new Medicaid patients on a case-by-case basis." The directors' meeting minutes for January 27, 2006, state that all three doctors were in attendance and discussed that "Naegele chooses to leave Medicaid" and that "Strohmyer and PA Gilroy will continue to serve Medicaid population. Much of this will be in . . . Strohmyer's nursing home rounds. No other providers at PFM will see Medicaid patients." However, Naegele testified that in 2006, he verbally instructed Strohmyer and Mantler to close their practice to Medicaid patients. Strohmyer testified that he was never told that he could not take Medicaid patients.

(f) Strohmyer's Departure From PFM

In late 2012 or early 2013, Strohmyer stopped talking to Naegele and Mantler. On April 19, 2013, Strohmyer sent Naegele a letter requesting that the directors "define exit strategies" for PFM. He requested that the directors have the "office attorney formalize these documents over the next few weeks." On April 24, Naegele sent Strohmyer a letter referencing the bylaws and explaining the "Buy Out" provisions set forth in the bylaws of October 16, 2000.

On December 31, 2013, Strohmyer gave Naegele and Mantler notice that he was leaving PFM, effective March 31, 2014, to open his own medical practice. Naegele responded in his position as president of PFM, and stated that PFM agreed

to "follow the 'Buy Out' provisions of the bylaws of October 16, 2000, upon which we three members agreed." That same day, Naegele transferred a check in the amount of $90,000 from the PFM account for deposit to a trust fund. Naegele testified that he "estimated to buy a doctor out would be about $30,000" and that Naegele and Mantle would each receive $30,000 when they retired. It was listed in PFM's tax returns as a "Buy-Out Escrow." That money was later refunded in its entirety to PFM. On March 4, 2014, PFM distributed $30,000 to Naegele and $30,000 to Mantler.

Following Strohmyer's notice of departure from PFM, Naegele updated the office with new paint, carpet, and an x-ray machine. Strohmyer claims he did not know about any of these costs incurred, nor did he provide his approval for the purchases. Naegele claims that the office was overdue for these updates and that he thought the improvements were necessary to attract a new doctor to the practice.

On March 7, 2014, Strohmyer's attorney sent a letter to Naegele, stating that

> use of practice cash to pay for practice and leasehold remodeling constitutes misappropriation and breach of the By-laws with respect to the amounts of compensation received from prior earnings to be paid to the physicians.
>
> Any cash on hand now in the practice accounts (held for emergencies or high deductible situations) or for available cash is to be paid to . . . Strohmyer forthwith. . . . If you have plans to use . . . Strohmyer's share of the cash for any other purpose, please advise . . . Strohmyer immediately with an explanation and amounts planned to be used.

On April 11, 2014, pursuant to the October 16, 2000, bylaws' "Buy Out" provision, Naegele sent a letter to Strohmyer's attorney, stating that based on his calculations, the expenses were greater than the income between March 31 and April 11, 2014, and that "[b]ecause the bylaws prohibit charging a

former partner or his estate in the case of a negative balance, the net sum for a check today is zero dollars." He further stated that he "anticipated this outcome for ongoing payments." In a letter dated April 25, 2014, Naegele stated that for the period of April 14 to April 25, the expenses again exceeded the income, and that the net sum for a check to Strohmyer was zero.

### 2. Procedural History

On April 28, 2014, Strohmyer filed suit against PFM, Naegele, and Mantler. His operative complaint, filed October 14, alleges that defendants—PFM, Naegele, and Mantler—(1) breached the October 16, 2000, bylaws by failing to pay the wages due Strohmyer, by concealing $90,000, by refusing Strohmyer access to the financial records of PFM, and by using income and assets that would have otherwise been disbursed to Strohmyer to purchase capital assets and make capital improvements; (2) acted in violation of Neb. Rev. Stat. §§ 21-2212 and 21-2213 (Reissue 2012), which constituted grounds for judicial dissolution of PFM due to defendants' repudiation of the bylaws and failure to redeem Strohmyer's shares and due to the deadlock and oppressive conduct, all of which violate the articles of incorporation; (3) refused to pay Strohmyer wages, compensation, and/or director fees prior to and/or after his departure from PFM, in violation of the Act; (4) breached a fiduciary duty due to defendants' claim that the expenses of PFM have exceeded and will continue to exceed the total fees collected by PFM, and due to defendants' capital upgrades without notice to or approval of Strohmyer that have diverted funds that would have otherwise been paid to Strohmyer; and (5) failed to pay sums due to Strohmyer, thus requiring declaratory and injunctive relief, because compensation should have been paid to Strohmyer either as director fees or as postdeparture compensation and/or asset value under PFM's bylaws.

PFM, Naegele, and Mantler filed an answer and counterclaim to the first amended complaint. In the counterclaim,

they argued that (1) Strohmyer failed to engage in directors' activities and attend directors' meetings, and thus should not receive compensation for services as a director of PFM; (2) the services Strohmyer performed for Alegent and Uninet Healthcare Network during his time at PFM were performed "in violation of Strohmyer's duty to expend his best full-time professional efforts through PFM for the mutual benefit of the Physicians"; (3) following an agreement among the PFM physicians to refrain from accepting Medicaid patients, Strohmyer continued to provide medical services to Medicaid patients; and (4) while the physicians agreed to spend 4 days per workweek attending to patients of PFM, Strohmyer spent only 3 days per week attending to such patients. Accordingly, they argued that Strohmyer was unjustly enriched.

In Strohmyer's reply to defendants' answer and his answer to defendants' counterclaim, he alleged as an affirmative defense that (1) defendants in recent years called no directors' meetings and, in the alternative, distribution of director fees was not conditioned on attendance at directors' meetings; (2) Strohmyer's work for Alegent and Uninet Healthcare Network was "known, acquiesced to, and agreed to" by defendants and not in violation of the articles of incorporation; (3) the Act prevents defendants from reducing or delaying payment of compensation owed to Strohmyer; (4) the recovery of director fees paid to Strohmyer prior to 2010 are barred by the statute of limitations; (5) the causes of action and damages asserted by defendants for the recovery of income earned by Strohmyer as a result of his outside employment by Alegent or Uninet Healthcare Network prior to 2010 are barred by the statute of limitations; and (6) the causes of action and damages asserted by defendants are barred by the doctrine of laches, the doctrine of estoppel, and the statute of frauds.

The district court issued an order stating that PFM "does not meet the requirements of a professional corporation as dictated in the Nebraska Professional Corporation Act," because (1) the articles of incorporation do not comply with the Nebraska

Professional Corporation Act,[2] (2) there are no minutes indicating that PFM's alleged bylaws were adopted, and (3) the alleged bylaws from October 16, 2000, were not signed.

The court further held that the buyout clause was so ambiguous as to be unenforceable under Nebraska law. The court found that PFM was a business corporation and not a professional corporation, and that there was insufficient evidence to judicially dissolve the corporation. Accordingly, the court found it necessary to "stay the proceedings or any further order by this Court until the parties comply with Neb. Rev. Stat. § 21-20,166."

On May 22, 2015, Strohmyer subsequently filed a motion to exclude ex parte communications and for clarification of the earlier order. Following a hearing on that motion, the district court ordered:

> a. The Defendant corporation is given until July 13, 2015, to elect whether to purchase the common stock of [Strohmyer]. If it does, [Strohmyer's] counsel is to forthwith notify the Court at which time the Court will set down for hearing the evidentiary hearing needed to resolve the remaining issues if the parties cannot reach an agreement as to value as set forth in the statute. The hearing will follow the 60 day time allocated per the statute.
>
> b. During the 60 day period following the election to purchase, the parties are to attempt to set the gross value of [Strohmyer's] common stock and the terms of payment. The Court will thereafter involve itself, if needed, in determining the effect of the remaining unresolved issues on the value and any other matters associated with the judicial dissolution statute.

On July 13, 2015, defendants filed an election to purchase Strohmyer's stock in PFM in accordance with a July 7, 2015,

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[2] Neb. Rev. Stat. § 21-2201 et seq. (Reissue 2012).

agreement between the parties. The 60-day period for the parties to determine whether they could reach fair value expired without agreement.

Following a March 21, 2016, hearing, the court held that in determining the value of the stock of PFM on April 1, 2014, "the most compelling [are] Exhibits #46 and #113." The court stated that in each of these exhibits, "[Strohmyer] used the appraised value of the fixed assets proposed by [his] expert, being Exhibit #36 of a value of $79,495." However, the court found Naegele's testimony most persuasive, placing "the value of the fixed assets at $19,765, based upon cost when he purchased them on E-Bay." The court accordingly adjusted "the fair value of the Stock in Exhibits 46 and 113 by $19.91 per share," which set "a value per share on Exhibit #46 at $96.35 per share and on Exhibit #113 at $113.09, for an average fair value per share of $104.72," thus, "setting the value of [Strohmyer's] stock at $104,720.00." The court then ordered that "the value of [Strohmyer's] stock is fixed in the amount of $104,220." (This is an apparent contradiction. Our calculations indicate that the proper value based on the district court's calculation is $104,720.)

The court also found that there was "no goodwill or intangible value to [the] medical practice, where one of the physicians leaves and takes his patients and part of the staff with him."

The court next found that under § 48-1229 of the Act, Strohmyer was not entitled to compensation for March 2014. The court held that none of the physicians met the definition of an employee under the Act and that any sums due did not fall within the Act, because (1) there were no employment agreements between PFM and the physicians which set out specific compensation, (2) each of the physicians set his own schedule and saw his own patients, and (3) there was no evidence that the monthly payments to the physicians were paid as "W-2 wages or 1099 compensation."

The court found that "Exhibit #18 is the correct determination of the amounts due to [Strohmyer] for the period of

March 2014." Accordingly, Strohmyer was awarded the sum of $9,389.27 as unpaid compensation. The court stated that "the director's fees which were being held in trust, have been considered in the Court's valuing of [Strohmyer's] stock."

Next, the court concluded that due to the lack of employment contracts, [Strohmyer] did not breach a fiduciary duty when he worked 3 days per week for 4 years, because no fiduciary duty had been created. In addition, the court held that Strohmyer breached a fiduciary duty by treating Medicaid patients after the board of directors made a decision to cease treatment of Medicaid patients. The court determined that Strohmyer damaged PFM in the amount of $30,673.

## III. ASSIGNMENTS OF ERROR

Strohmyer assigns, restated and consolidated, that the district court erred in (1) miscalculating the value of PFM's share value and the amount of fixed assets due to Strohmyer, which led to an inequitable result; (2) finding that PFM had no compensable goodwill to which Strohmyer was entitled; (3) relying upon the values obtained from eBay in determining the replacement cost for medical equipment; (4) not awarding compensation for director fees, salary, and attorney fees as an employee covered by the Act; and (5) finding that Strohmyer breached a fiduciary duty by continuing to accept Medicaid patients, holding him liable for a physician assistant's continued treatment of Medicaid patients, and in its calculation of damages based on these claims.

On cross-appeal, PFM assigns, restated and consolidated, that the district court erred in finding that Strohmyer owed no fiduciary duty to the corporation to work 4 days per week and compensating PFM for this breach even though the court found that Strohmyer owed a fiduciary duty to the corporation to cease taking Medicaid patients.

## IV. STANDARD OF REVIEW

[1] In an appeal of an equitable 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 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]

[2] The existence of a fiduciary duty and the scope of that duty are questions of law for a court to decide.[4]

## V. ANALYSIS

### 1. PFM's Net Equity

Strohmyer argues that the district court miscalculated the value of PFM's shares. The lower court held that Strohmyer's stock was worth $104,720. We note that the court made a minor misstatement of the numbers when it then ordered "the value of [Strohmyer's] stock is fixed in the amount of $104,220." The lower court based its calculation on the following exhibits.

#### (a) Exhibit 46

In exhibit 46, entitled "Reconciliation of Assets as of March 31, 2014," the "Total Adjusted Assets" are listed as $348,767.90, or $116.26 per share. Exhibit 46 was drafted by Strohmyer's expert witness Todd Lehigh.

#### (b) Exhibit 113

Exhibit 113, entitled "Reconciliation of Net Liquid and Fixed Assets Before Intangibles & Goodwill as of March 31, 2014," lists the net equity before intangibles/business goodwill at $401,174.14. Exhibit 113 was also drafted by Lehigh. Exhibit 113 contains the same values as exhibit 46, and in addition includes: prepaid supplies on hand ($11,829.86), other

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[3] *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005).

[4] *In re Estate of Stuchlik*, 289 Neb. 673, 857 N.W.2d 57 (2014), *modified on denial of rehearing* 290 Neb. 392, 861 N.W.2d 682 (2015).

fixed assets per exhibit 35 ($79,545), daily supplies ($31,774), adjusted accounts receivable ($143,043.60), accounts payable ($11,185.41), payroll taxes ($3,391.32), and salary due to Strohmyer ($9,389.27).

(c) Exhibits 35 and 36

Exhibit 36 is a copy of the notes written by Strohmyer's expert witness Doug Killion, for his retrospective appraisal report. That report valued PFM's fixed assets at $79,545, based on the fair market value. Killion's report is found in exhibit 35.

(d) Exhibit 98

Exhibit 98 is a calculation by Naegele of the value of PFM's fixed assets based on the cost of each item in similar condition found on "eBay and Craigslist." Exhibit 98 contains the same items described in exhibit 36, but calculates the fair market value at $19,755.

(e) Trial Court's Calculation

The trial court found that exhibits 46 and 113 were credible valuations of the corporate shares of PFM. However, the court found that Naegele's assessment of fixed assets in exhibit 98 was a more persuasive valuation than Killion's assessment in exhibit 36. Because the share values in exhibits 46 and 113 were based on the cost of replacement in exhibit 98, the court adjusted the values in exhibits 46 and 113. The court accordingly subtracted the difference in cost of replacement between exhibits 36 and 98 and divided it by 3,000 shares, which equaled $19.91 per share.

For exhibit 46, the court deducted $19.91 in calculating the amount of $96.35 per share. For exhibit 113, the court deducted $19.91 to arrive at $113.09 per share. The court then averaged these two amounts. The average value was $104.72. Each director was issued 1,000 shares; therefore, the court multiplied $104.72 by 1,000 to arrive at a value of $104,720 for Strohmyer's shares.

### (f) Errors in Trial Court's Calculation

#### *(i) PFM's Share Value*

Strohmyer argues that the district court miscalculated the value of PFM's shares by "using inconsistent accounting and averaging logic," which led to an inequitable and unjust result. Strohmyer contends that the court should have awarded him $16,740 as the difference in value between exhibits 46 and 113.

Under a de novo standard of review, we give weight to the lower court's assessments of credibility. However, we find that the district court erred in its calculations using the values in these exhibits.

First, the court made a minor misstatement of the numbers in its calculations. The court stated that the value of fixed assets in exhibit 36 was $79,495, whereas exhibit 36 lists the value of fixed assets as $79,545. In addition, the court stated that Naegele placed the value of the fixed assets at $19,765, when the value listed in exhibit 98 was $19,755.

Second, the court averaged the values calculated in exhibits 46 ($348,767.90) and 113 ($401,174.14). In drafting each of these exhibits, Lehigh included everything listed in exhibit 46 in his valuation in exhibit 113. Because the lower court found exhibit 113 credible, it implicitly found all of the additional line items listed in exhibit 113 to be credible. It is therefore illogical to average the valuation in exhibit 113 with the more basic valuation in exhibit 46.

Because the trial court found the additional line items to be credible, under a de novo standard of review, we find that it should have relied only upon the valuation from exhibit 113. In support of our conclusion that the district court erred in averaging the two exhibits, we note that the adjusted value of exhibit 46 does not contain the fixed asset valuation per exhibit 35 of $79,545. By subtracting the difference in value of fixed assets of $59,790 ($79,545 − $19,755) from the net value in exhibit 113 of $401,174.14, the adjusted net equity value of exhibit 113 should equal $341,384.14.

Third, we find an error in the calculation in exhibit 113. In exhibit 113, "Account Payables" and "Payroll Taxes" are treated as assets. Our review indicates that these items should be treated as liabilities. In Lehigh's testimony, he does not address why he has listed these items as assets rather than as liabilities.

By treating the "Account Payables" and "Payroll Taxes" as liabilities rather than assets, and adjusting the value of fixed assets to the value in exhibit 98 (Naegele's calculation), the adjusted net equity value of exhibit 113 is $312,230.68. Thus, the value of Strohmyer's shares would be $104,077. Despite the lower court's calculation errors, this value is almost the same as the court's valuation of Strohmyer's shares at $104,720. This is not a material difference. Hence, we find no reversible error in the court's ultimate valuation of shares at $104,720.

*(ii) Director Fees*

Strohmyer argues that the lower court failed to award one-third of the "Net Quarterly Director Fees" to Strohmyer and that he should be awarded $72,991.22 accordingly.

In exhibit 113, entitled "Reconciliation of Net Liquid and Fixed Assets Before Intangibles & Goodwill," Lehigh calculated the "Total Adjusted Equity Before Director Fees" as $620,147.82. Lehigh then subtracted the "Net Quarterly Director Fees (1/3 for each shareholder)" from the total. In his testimony, Lehigh states that he arrived at the "Net Quarterly Director Fees" amount by adding the following components:

> [C]ash in [the] bank per QuickBooks [in the amount of] 37,143, the litigation escrow account [in the amount] of the 90,000, [and] the outstanding checks from 2008 through 2013 [are also included]. And then . . . the deposits for the carpet, painting, X-ray machine, the real estate taxes and for painting [are included in the amount], and all those numbers totaled the [amount of] 318,973.68.

Lehigh then subtracted $100,000 from this amount for operating capital in the business, based on the testimony of the assistant office manager, to arrive at the value of $218,973.68 as director fees.

The lower court stated in its order that "[Strohmyer] and Defendants were the sole Directors of the Corporation." The court stated thereafter that "[Strohmyer] for the two years prior to his departure refused to attend Director's meetings." The court further noted that "the director's fees which were being held in trust, have been considered in the Court's valuing of [Strohmyer's] stock."

In exhibit 46, director fees were not listed in the valuation of PFM's net equity. In exhibit 113, as mentioned above, director fees were subtracted in valuing the net equity. Therefore, in its calculation of net equity owed to Strohmyer, the court awarded only one-third of the value of PFM. It merely subtracted the director fees from the total net equity and did not make a separate finding of the amount of director fees due to Strohmyer. Our reading of the record is that the lower court made a factual finding that Strohmyer was a director of PFM, but that Strohmyer was not entitled to director fees, because he did not attend directors' meetings. Because this was a factual finding, we hold that under a de novo standard of review, the lower court did not err in finding that Strohmyer was not entitled to director fees.

### 2. Goodwill

Strohmyer argues that the district court erred in "not awarding an additional $55,000.00 for intangible assets . . . and by treating intangible assets in the same category as goodwill assets."[5] PFM contends that there is "no goodwill to divide upon dissolution of a professional enterprise when the clients remain with the firm taking their files."[6] The district court

[5] Brief for appellant at 31.

[6] Brief for appellees at 23.

held that there was "no goodwill or intangible value to a medical practice, where one of the physicians leaves and takes his patients and part of the staff with him."

In *Taylor v. Taylor*,[7] this court addressed whether a physician's professional corporation, of which he was the sole practitioner and shareholder, had professional goodwill that could be included as an asset in the marital estate upon dissolution of the marriage. In *Taylor*, we characterized goodwill as

> "'the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.'"[8]

This court further stated that

> where goodwill is a marketable business asset distinct from the personal reputation of a particular individual, as is usually the case with many commercial enterprises, that goodwill has an immediately discernible value as an asset of the business and may be identified as an amount reflected in a sale or transfer of such business. On the other hand, if goodwill depends on the continued presence of a particular individual, such goodwill, by definition, is not a marketable asset distinct from the individual.[9]

Therefore, we held that in the context of the division of marital property under Neb. Rev. Stat. § 42-365 (Reissue 1984), "goodwill must be a business asset with value independent

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[7] *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986).

[8] *Id.* at 727-28, 386 N.W.2d at 856-57.

[9] *Id.* at 731, 386 N.W.2d at 858.

of the presence or reputation of a particular individual, an asset which may be sold, transferred, conveyed, or pledged."[10] Accordingly, "[w]hether goodwill exists and whether goodwill has any value are questions of fact."[11] We held, on those facts, that the district court did not err in concluding that plaintiff's medical practice did not have any compensable goodwill.

In *Detter v. Miracle Hills Animal Hosp.*,[12] this court addressed whether a professional corporation can have goodwill as a distributable asset in a corporate dissolution proceeding. We reiterated the holding in *Taylor*, that "the existence of professional goodwill as a distributable asset presents a question of fact."[13]

In its analysis, the *Detter* court cited *Thomas v. Marvin E. Jewell & Co.*,[14] in which three partners left a partnership to begin their own partnership, and evidence showed that the departing partners took the files of the clients they wished to retain and contacted those clients. After the transition, "[m]ost of the clients stayed with the firm that possessed the client file."[15] We held that the parties received all of the goodwill to which they were entitled, because "each of the two factions took the clients and whatever goodwill was available at the time of dissolution."[16]

Strohmyer's expert witness on intangible asset valuation testified that according to his calculations, the intangible assets were worth $165,000. The witness stated that "from a business appraiser's standpoint . . . there's not business goodwill

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[10] *Id.* at 731, 386 N.W.2d at 858-59.

[11] *Id.* at 732, 386 N.W.2d at 859.

[12] *Detter v. Miracle Hills Animal Hosp.*, 269 Neb. 164, 691 N.W.2d 107 (2005).

[13] *Id*. at 175, 691 N.W.2d at 115-16.

[14] *Thomas v. Marvin E. Jewell & Co.*, 232 Neb. 261, 440 N.W.2d 437 (1989).

[15] *Id.* at 266, 440 N.W.2d at 441.

[16] *Id*. at 268, 440 N.W.2d at 443.

in this practice, but there's value of intangible assets, identifiable intangibles."

Among these identifiable intangibles, the witness listed PFM's computer system, patient records, and assembled workforce. However, Strohmyer testified that he did not take any patient files, though he did send letters to his patients informing them of his departure. Approximately 50 percent of those patients followed him to his new practice. Naegele testified that eight PFM employees, almost one-third of PFM's staff, also followed Strohmyer to his new practice. Furthermore, Naegele produced a spreadsheet showing that there was a $543,578.22 decrease in PFM revenues between the last 9 months of 2013, while Strohmyer was at PFM, and the last 9 months of 2014, after Strohmyer had departed. While Strohmyer's witness testified that there were unidentified intangible assets with value, there was also significant evidence that any goodwill depended on the continued presence of Strohmyer, not merely on PFM.

Similar to *Taylor*, the lower court here heard the expert witnesses and gave more weight to the testimony that there was no goodwill or unidentified intangible value to the medical practice. Under a de novo standard of review, the district court did not err in finding that there was no goodwill to the medical practice. Strohmyer's second assignment of error is without merit.

### 3. Replacement Cost for Medical Equipment

Strohmyer contends that the district court erred in accepting Naegele's testimony about replacement costs for medical equipment over the values testified to by Strohmyer's expert.

#### (a) Relevant Law

Generally,

> [a]n owner's opinion testimony as to the value of his or her property cannot be based on naked conjecture or solely speculative factors. In addition, purely hearsay

> evidence as to the value of a chattel is insufficient as a basis for testimony predicated thereon by the owner. However, information received in part from others has been held to be unobjectionable.[17]

The Iowa Supreme Court, in *W & W Livestock Enterprises, Inc. v. Dennler*,[18] stated that "[i]t is generally held that the price for which personal property sells at a bona fide sale is competent evidence of its value."

In *First Baptist Church v. State*,[19] this court addressed how to determine the market value of the land at issue. We held that

> "[m]arket value is not a question of science or skill upon which experts alone may give an opinion. [Citation omitted.] It is necessary only to show that he has the means of forming an intelligent opinion derived from an adequate knowledge of *the nature and kind of property* in controversy, and of *its value*. [Citation omitted.] It is not essential that every witness expressing an opinion shall have all-inclusive information of every detail of the elements entering into the value. . . ."[20]

The Nebraska Court of Appeals has also addressed a similar question and held that it was not an abuse of discretion for the lower court to rely upon a valuation of personal property based on "garage sale and 'craigslist' prices" in a marriage dissolution.[21]

(b) Testimony at Trial

At trial, several witnesses testified as to the estimation of the value of replacement cost for PFM's medical equipment.

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[17] 31A Am. Jur. 2d *Expert and Opinion Evidence* § 232 at 267 (2012).

[18] *W & W Livestock Enterprises, Inc. v. Dennler*, 179 N.W.2d 484, 489-90 (Iowa 1970).

[19] *First Baptist Church v. State*, 178 Neb. 831, 135 N.W.2d 756 (1965).

[20] *Id*. at 835, 135 N.W.2d at 758-59 (emphasis in original).

[21] See *McIver v. McIver*, No. A-13-052, 2013 WL 5434646 at *6 (Neb. App. Oct. 1, 2013) (selected for posting to court website).

Strohmyer offered the PFM's accountant's report of the assets, liabilities, and stockholders' equity for income tax basis on December 31, 2013, in which report the medical equipment was valued at $113,502. Killion, Strohmyer's expert witness, testified that fair market value of the medical equipment was $79,545.

In addition, during cross-examination, Naegele testified that his estimated values showed the fair value, which he defined as "what is the stuff actually worth, what did I buy it for or could replace it for, and your appraiser defined fair market value in a way that I disagree." He stated that his calculation was the fair and reasonable value because he "bought almost everything used on eBay or Craigslist."

Based on this understanding of fair market value, Naegele prepared exhibit 98, which lists the cost of replacement as $19,755. In the exhibit, Naegele also included printouts of each of the items and their listed prices on eBay, for which he based his estimations of replacement value.

The lower court judge heard the testimony from each of the witnesses and found Naegele's testimony to be more persuasive. Under a de novo standard of review, we cannot conclude that the district court erred in this finding. Strohmyer's third assignment of error is without merit.

### 4. Awarding Wages Under the Act

Strohmyer argues that the district court erred in failing to award attorney fees, director fees, and salary under the Act. The district court held that none of the physicians met the definition of employees under the Act, nor was there evidence presented that the payments they received were paid as "W-2 wages or 1099 compensation."

An individual is not an employee under the Act if the "individual has been and will continue to be free from control or direction over the performance of such services, both under his or her contract of service and in fact."[22] Testimony established

[22] § 48-1229(1)(a).

that Strohmyer set his own work schedule and unilaterally limited the number of days he worked at PFM, did not speak to Naegele and Mantler in the last 2 years before his departure from PFM, and continued to receive Medicaid patients after Naegele and Mantler decided that PFM should no longer treat Medicaid patients. In addition, Strohmyer was not working at PFM under an employment agreement. Accordingly, under § 48-1229, Strohmyer "has been and will continue to be free from control or direction over the performance of such services" and is thus not an employee under the Act. Thus, the district court did not err in finding that Strohmyer was not an employee under § 48-1229. Strohmyer's fourth assignment of error is without merit.

### 5. Fiduciary Duty and Medicaid Patients

Strohmyer next assigns that the district court erred in awarding PFM $30,673 on its allegation that Strohmyer's continued treatment of Medicaid patients was a breach of his fiduciary duty and that the calculation of damages on this claim was purely speculative.

[3,4] An officer or a director of a corporation occupies a fiduciary relation toward the corporation, and must comply with the applicable fiduciary duties in his or her dealings with the corporation and its shareholders.[23] A violation by a trustee of a duty required by law, whether willful, fraudulent, or resulting from neglect, is a breach of trust, and the trustee is liable for any damages proximately caused by the breach.[24]

In *D & J Hatchery, Inc. v. Feeders Elevator, Inc.*,[25] this court discussed ratification of a corporate officer's unauthorized acts by the corporation:

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[23] *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004).

[24] *Id.*

[25] *D & J Hatchery, Inc. v. Feeders Elevator, Inc.*, 202 Neb. 69, 74, 274 N.W.2d 138, 141 (1979).

> "'The unauthorized acts of an officer of a corporation may be ratified by the corporation by conduct implying approval and adoption of the act in question. Such ratification may be express, or may be inferred from silence and inaction, and if the corporation, after having full knowledge of the unauthorized act, does not disavow the agency and disaffirm the transaction within a reasonable time, it will be deemed to have ratified it.'"

In a memorandum from Naegele to all clinic staff, dated April 18, 2005, Naegele states that "Mantler's patient list is now closed to all Medicaid patients" and that "Strohmyer and . . . Naegele will continue for the moment to see current Medicaid patients, and will evaluate new Medicaid patients on a case-by-case basis." The minutes for the January 27, 2006, directors' meeting states all three doctors were in attendance and discussed that "Naegele chooses to leave Medicaid" and that "Strohmyer and PA Gilroy will continue to serve Medicaid population. Much of this will be in . . . Strohmyer's nursing home rounds. No other providers at PFM will see Medicaid patients." Naegele testified that at the meeting on January 27, Naegele and Mantler both wanted to discontinue treatment of all Medicaid patients and that Strohmyer disagreed, but this was not written down. Naegele testified that he verbally instructed Strohmyer to close his practice to Medicaid patients in 2006 because the two votes against continuing Medicaid treatment were controlling. Naegele testified that Strohmyer responded that "he would continue to do whatever he wanted to do."

Despite these alleged instances in which Strohmyer was instructed to cease treating Medicaid patients, Naegele also testified that there were "many, many issues" and that he "was afraid of a wrongful termination lawsuit" and "never wanted to confront [Strohmyer] on the issue until he left."

As in *D & J Hatchery, Inc.*, ratification of a corporate officer's unauthorized acts "may be inferred from silence and inaction, and . . . the corporation [had] full knowledge of the

unauthorized act." Naegele's April 18, 2005, memorandum to PFM's staff and the minutes from the January 27, 2006, directors' meeting indicate that the three physicians discussed ceasing treatment of Medicaid patients in 2006, but that they agreed that Strohmyer could continue treating such patients. Naegele provides no evidence of any oral agreement in 2006 that all doctors at PFM must cease taking Medicaid patients.

Even if Strohmyer was not authorized by PFM to accept Medicaid patients, Naegele's testimony, in addition to the meeting minutes and the memorandum, indicates that Naegele and Mantler had full knowledge of Strohmyer's continued treatment of Medicaid patients in 2006. After having full knowledge, they took no action to stop Strohmyer from accepting such patients until Strohmyer filed a complaint in 2014, thus failing to "'disaffirm the transaction within a reasonable time.'"[26] This inaction, from 2006 to the filing of the complaint in 2014, amounts to ratification of Strohmyer's unauthorized acts. Therefore, we conclude that PFM, Naegele, and Mantler ratified Strohmyer's actions. As such, Strohmyer's fifth assignment of error has merit, and the order awarding PFM $30,673 must be vacated.

### 6. PFM's Cross-Appeal

On cross-appeal, PFM assigns that the district court erred in finding that Strohmyer owed no fiduciary duty to the corporation to work 4 days a week and in failing to compensate PFM for this breach. The district court found that PFM had no employment contracts setting out the terms of employment; as such, no fiduciary duty existed. In addition, the court noted that PFM had the authority under the terms of the bylaws to terminate Strohmyer's employment, but failed to do so, and that Strohmyer's work production during the 3 days per week he worked was substantially the same as Naegele's and Mantler's.

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[26] *Id.*

[5,6] An officer or a director of a corporation occupies a fiduciary relation toward the corporation and its stockholders and should refrain from all acts inconsistent with his or her corporate duties.[27] Partners must exercise the utmost good faith in all their dealings with the members of the firm and must always act for the common benefit of all.[28]

Naegele claims that the three doctors had an oral agreement to work 4 days per week at PFM. Strohmyer contends that no such agreement existed. Through the course of his time at PFM, Strohmyer reduced his hours from 4 days per week to 3 days per week because of his outside employment. The minutes for the directors' meeting held June 23, 2006, at which all three doctors were listed as present, state: "Discussed and agreed: . . . Strohmyer to pursue medical directorship at Midlands. Discussed how that would impact [the] practice." And in a meeting on May 1, 2009, the minutes state:

> Strohmyer . . . brought up the possibility that Alegent might offer him a significant amount of money to become a hospital administrator . . . . We therefore had a frank conversation about that and the need to start planning for it. . . . Mantler and . . . Naegele were supportive of whatever steps he needs to take to best take care of his family and himself . . . .

The minutes from PFM's meetings indicate Strohmyer stated to the other doctors that he would be taking these outside positions and that it could impact his work at PFM. There is no evidence that prior to this litigation, the other doctors attempted to enforce this alleged oral agreement to work 4 days per week. Nor was any evidence introduced that Strohmyer's other employers competed with PFM.

Strohmyer's charges to patients at PFM decreased after taking the positions at Alegent in 2008. However, Strohmyer's charges remained comparable to Naegele's and Mantler's

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[27] *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007).

[28] *Id.*

between 2008 and 2013. Therefore, we find that neither Strohmyer's work for other employers nor his decision to work 3 days per week at PFM was "inconsistent with his . . . corporate duties" at PFM.[29] Strohmyer did not breach a fiduciary duty to PFM by failing to work at PFM's office 4 days per week. PFM's sole assignment of error on cross-appeal is without merit.

## VI. CONCLUSION

The district court did not err in its ultimate valuation of Strohmyer's shares, in finding that PFM had no goodwill for which Strohmyer was entitled to compensation, in relying upon the values PFM obtained from eBay in determining the replacement cost for medical equipment, and in failing to award compensation for director fees and salary as an employee covered by the Act.

However, we find that the district court erred in finding that Strohmyer breached a fiduciary duty by continuing to accept Medicaid patients, in holding Strohmyer liable for a physician assistant's continued treatment of Medicaid patients, and in its calculation of damages based on these claims. The district court did not err in finding on PFM's cross-appeal that Strohmyer did not breach a fiduciary duty by failing to work at PFM 4 days per week.

Accordingly, we affirm in part, and in part reverse and remand for further proceedings not inconsistent with this opinion.

Affirmed in part, and in part reversed and remanded for further proceedings.

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[29] See *id.* at 144, 738 N.W.2d at 446.

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

# State of Nebraska, appellee, v. Robert Hidalgo, appellant.

896 N.W.2d 148

Filed June 9, 2017. No. S-16-660.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Constitutional Law: Search and Seizure: Search Warrants.** The Fourth Amendment to the U.S. Constitution guarantees the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and further provides that no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.
3. **Constitutional Law: Search Warrants: Probable Cause.** The execution of a search warrant without probable cause is unreasonable and violates constitutional guarantees.
4. **Search Warrants: Affidavits: Probable Cause.** A search warrant, to be valid, must be supported by an affidavit which establishes probable cause.
5. **Search Warrants: Probable Cause: Words and Phrases.** Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found.
6. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a totality of the circumstances test. The question is whether, under the

totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.

7. **Search Warrants: Affidavits: Evidence: Appeal and Error.** In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.
8. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation. These two prongs are not accorded independent status, but, rather, are better understood as relevant considerations in the totality-of-the-circumstances analysis that traditionally has guided probable-cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.
9. **Search Warrants: Affidavits.** Among the ways in which the reliability of an informant may be established are by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.
10. ____: ____. An affidavit in support of the issuance of a search warrant must affirmatively set forth the circumstances from which the status of the informant can reasonably be inferred.
11. **Search Warrants: Motor Vehicles.** As a general rule, vehicles located on premises described in a warrant may be searched, even if the vehicle is not specifically listed in the warrant.

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

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

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

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

Heavican, C.J.

## I. INTRODUCTION

Following a stipulated bench trial, Robert Hidalgo was convicted of one count of possession of a firearm by a prohibited person and was sentenced to 3 to 5 years' imprisonment. He appeals. We affirm.

## II. FACTUAL BACKGROUND

On July 10, 2015, officers with the Omaha Police Department received a Crime Stoppers tip that a Hispanic male named "Roberto" was a felon and was in possession of illegal firearms. "Roberto" was described as an active member of the "18th Street" gang, was between 30 and 35 years of age, and had the nickname "Sporty." The informant also indicated that "Roberto" lived at a particular address in Omaha.

Officers attempted to corroborate this tip. On July 21, 2015, officers drove by of the address referenced in the Crime Stoppers tip. Officers noted approximately six tattooed Hispanic males between the ages of 20 and 30 sitting on the porch and dressed in loose clothing. According to the affidavit in support of the search warrant, the "physical description of the male persons had characteristics similar to that of gang members, between the clothing, how it was worn and the tattoos." The individuals looked alarmed at the approach of the officers' police cruiser. As such, the officers did not stop.

Officers noted and checked the registration on a white Nissan Sentra parked in the driveway. The vehicle was registered to Hidalgo and Jacqueline Linares. In addition, the utilities at the address listed Linares as the account holder. Upon learning these names, officers researched Hidalgo further and determined that he was born in May 1987, was a known

member of the "18th Street" gang, and went by the nickname "Shorty."

A "trash pull" at the address was completed that night. Two relevant items were found in the trash: a piece of mail directed to the address referenced in the tip and marijuana stems, seeds, and leaves.

Based upon this information, officers obtained a search warrant for

> the premises [referenced in the tip and verified by officers in] Omaha, Douglas County, Nebraska, which is further described as a white in color one and one half story residence with green trim. The unit has a white front door which includes a green storm door in front of it. The [house] numbers . . . are located at the exterior of [the] house on the trim of the covered patio. [The house] is located on the west side of [a nearby] intersection . . . .

The affidavit in support of the warrant sought marijuana and "all monies, records, weapons and ammunition used to conduct an illegal narcotics operation."

The search warrant was executed on July 26, 2015, granting officers the authority to "search the afore described location and/or person(s)." During the search, officers found a firearm and marijuana in the residence, as well as another firearm in a neighboring yard, which law enforcement believe was placed there by one of Hidalgo's associates just prior to the execution of the search warrant. In addition, the Nissan Sentra in the driveway of the house was searched and a third firearm was recovered from it. Hidalgo later admitted that the firearm in the vehicle belonged to him; two associates admitted to owning the other firearms.

Hidalgo had been previously convicted of being an accessory to a felony, a Class IIIA felony. As such, the possession of a firearm by him was unlawful and he was charged accordingly. Following a stipulated bench trial, Hidalgo was convicted of possession of a firearm by a prohibited person, a

Class ID felony, and was sentenced to 3 to 5 years' imprisonment. He appeals.

## III. ASSIGNMENTS OF ERROR

Hidalgo assigns that (1) his Fourth Amendment rights were violated when his house and vehicle were searched, because the application and warrant did not establish probable cause, and (2) officers exceeded the scope of the search warrant when they searched a vehicle parked outside the house described by the search warrant.

## IV. 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. 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.[1]

## V. ANALYSIS

### 1. Probable Cause

Hidalgo first argues that the evidence against him should be suppressed, because there was no probable cause to support the issuance of the search warrant. In arguing this, Hidalgo asserts that the affidavit did not sufficiently establish the reliability of the anonymous tip; the corroboration of information contained in the tip did not establish reliability, because the information confirmed was "innocent details"; an unspecified amount of marijuana leaves, seeds, and stems found during a trash pull does not establish probable cause; and the good faith exception does not apply here.[2]

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[1] *State v. Hill*, 288 Neb. 767, 851 N.W.2d 670 (2014).

[2] Brief for appellant at 10.

[2] The Fourth Amendment to the U.S. Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . ." and further provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Nebraska Constitution provides similar protection.[3]

[3-7] The execution of a search warrant without probable cause is unreasonable and violates these constitutional guarantees.[4] Accordingly, a search warrant, to be valid, must be supported by an affidavit which establishes probable cause.[5] Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found.[6] In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" test. The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.[7] In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.[8]

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[3] Neb. Const. art. I, § 7.

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

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

(a) Anonymous Tip

[8] When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation.[9] These two prongs are not accorded "independent status," but, rather, are

> better understood as relevant considerations in the totality-of-the-circumstances analysis that traditionally has guided probable-cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.[10]

[9,10] Among the ways in which the reliability of an informant may be established are by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.[11] An affidavit in support of the issuance of a search warrant must affirmatively set forth the circumstances from which the status of the informant can reasonably be inferred.[12]

Hidalgo and the State agree that this falls under the fourth scenario—that a police officer's independent investigation

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[9] *State v. Lytle*, 255 Neb. 738, 587 N.W.2d 665 (1998), *overruled on other grounds, State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999).

[10] *Illinois v. Gates*, 462 U.S. 213, 233, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

[11] *Id.*

[12] *Id.*

establishes the informant's reliability or the reliability of the information the informant has given. Hidalgo argues that the officers were not able to corroborate all parts of the tip—in particular, the portion suggesting that he was a felon in possession of illegal firearms—and this was sufficient to render the entire tip unreliable.

We turn first to Hidalgo's claim that the entire tip must be corroborated. Hidalgo offers no case law to support this assertion. Nebraska case law suggests differently. We held in *State v. Vermuele*[13] that "[t]here is no requirement that the 'crime' itself be corroborated or verified in order to justify probable cause for a warrantless search . . . ."

We also disagree with Hidalgo's contention that all law enforcement did was confirm innocent details. The record shows that law enforcement conducted an investigation in order to identify "Roberto." Officers were able to establish that the utilities at the address noted by the informant listed Linares as the account holder and that Linares, along with Hidalgo, owned the white Nissan Sentra in the driveway of the house. The vehicle registration indicated that Hidalgo's first name was Robert; the informant provided the name "Roberto" in the tip. Robert and Roberto are similar, which supports the reliability of the tip.

Once learning the name "Hidalgo," the officers, through their work in the gang suppression unit, identified Hidalgo as a known member of the "18th Street" gang, as the informant had indicated, and had the nickname "Shorty." "Shorty" is similar to "Sporty," the nickname provided by the tipster.

In addition, when officers drove by the property, they noted a group of Hispanic men between the ages of 20 and 30 on the porch. The tipster indicated that "Roberto" was Hispanic and was between the age of 30 and 35. This information, along

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[13] *State v. Vermuele*, 234 Neb. 973, 982, 453 N.W.2d 441, 447 (1990). See, also, *State v. Dussault*, 193 Neb. 122, 225 N.W.2d 558 (1975).

with the fact that Hidalgo could be considered a Hispanic name, further supports the reliability of the tip.

(b) Marijuana

Hidalgo argues that the marijuana leaves, stems, and seeds alone were insufficient to support the issuance of the search warrant in this case.

Hidalgo cites *United States v. Elliott*[14] to support his contention that the marijuana evidence was insufficient. In *Elliott*, the federal district court held that a small amount of discarded marijuana cigarettes and stems was evidence of past use and insufficient to "render[] the continued presence of contraband reasonably probable."[15]

Hidalgo also directs us to *State v. McKnight*,[16] a recent unpublished opinion of a single-judge panel of the Nebraska Court of Appeals. That opinion concluded that a 0.1-gram marijuana roach was insufficient to support a search warrant seeking evidence of a larger narcotics operation. In reaching that conclusion, the court noted that the affidavit in support of the warrant did not sufficiently establish the reliability of an anonymous tip in that case. The court also noted that the defendant's prior gun charges were not something the court could consider because they were only charges and not convictions and the timeframe of those charges was not stated in the affidavit.

While these cases might suggest that marijuana alone is insufficient to establish probable cause, other cases find to the contrary, noting that the possession of marijuana was illegal under state and federal law.[17]

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[14] *United States v. Elliott*, 576 F. Supp. 1579 (S.D. Ohio 1984).

[15] *Id.* at 1582.

[16] *State v. McKnight*, No. A-15-301, 2015 WL 5025473 (Neb. App. Aug. 25, 2015) (selected for posting to court website).

[17] See *U.S. v. Briscoe*, 317 F.3d 906 (8th Cir. 2003). See, also, *U.S. v. Allebach*, 526 F.3d 385 (8th Cir. 2008).

In any case, the marijuana evidence found in the trash was not the only evidence supporting probable cause. Rather, the issuing court was also entitled to consider the Crime Stoppers tip, which detailed Hidalgo's alleged possession of weapons. There was sufficient probable cause to support the issuance of the warrant, and as such, there is no merit to Hidalgo's first assignment of error. Because we find there was probable cause to support the warrant, we need not reach Hidalgo's arguments regarding the good faith exception to the warrant requirement.

### 2. Vehicle Search

Hidalgo also argues that the warrant issued in this case was specific as to describing his house, but did not include his vehicle, and that as such, officers violated his Fourth Amendment rights when his white Nissan Sentra was searched. During police questioning, Hidalgo admitted that the firearm found in the vehicle belonged to him.

[11] As a general rule, vehicles located on premises described in a warrant may be searched, even if the vehicle is not specifically listed in the warrant.[18] This includes vehicles parked in a driveway (as this one was) or in a garage.[19] One court reasoned in part:

> [A] car parked in a garage is just another interior container, like a closet or a desk. If, as in this case, the trunk or glove compartment is not too small to hold what the search warrant authorizes the police to look for, they can search the trunk and the glove compartment.[20]

The warrant would not, however, cover a vehicle parked on a nearby street, even if police knew that the vehicle belonged to the occupant of the described premises.[21]

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[18] 2 Wayne R. LaFave, Search and Seizure, A Treatise on the Fourth Amendment § 4.10(c) (5th ed. 2012) (citing cases).

[19] *Id.*

[20] *U.S. v. Evans*, 92 F.3d 540, 543 (7th Cir. 1996).

[21] 2 LaFave, *supra* note 18.

We agree with Hidalgo that the warrant did not explicitly provide that vehicles found on the property could be searched. But we do not find that such failure requires suppression of the search of Hidalgo's vehicle. The vehicle was parked in the driveway of the house described in the warrant. During the hearing on the motion to suppress, one officer testified that the vehicle was located about 10 feet from the front steps of the house and was not separated from the house by a fence or other obstruction.

Moreover, in the portion of the warrant authorizing a no-knock warrant, the issuing court specifically noted that "individuals involved in gang activity often will possess, maintain or store weapons and ammunition in the residence, building or vehicle used during the facilitation of illegal narcotics operations." Thus, the officers and issuing judge envisioned that weapons could be concealed in vehicles on the property. The Eighth Circuit has held that the search of a vehicle not explicitly listed in a warrant was covered under the scope of the warrant where facts in the affidavit indicated the defendant's connection to the vehicle in question.[22]

We conclude that the vehicle search was valid under the warrant and that there is no merit to Hidalgo's second assignment of error.

## VI. CONCLUSION

The district court did not err in denying the motion to suppress. As such, there was sufficient evidence to support Hidalgo's conviction. Accordingly, we affirm.

Affirmed.

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[22] See *U.S. v. Pennington*, 287 F.3d 739 (8th Cir. 2002).

Nebraska Supreme Court
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# State of Nebraska, appellee, v. Michael L. Ross, appellant.

899 N.W.2d 209

Filed June 16, 2017. No. S-16-131.

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.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion.
3. **Postconviction: Constitutional Law.** An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.
4. ____: ____. Postconviction relief is a very narrow category of relief available only to remedy prejudicial constitutional violations.
5. **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.
6. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When a defendant is represented both at trial and on direct appeal by the same lawyer, the defendant's first opportunity to assert ineffective assistance of counsel is in a motion for postconviction relief.
7. ____: ____: ____. To establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104

S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.

8. **Effectiveness of Counsel.** Under the framework of *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a court may address the two elements, deficient performance and prejudice, in either order.
9. ____. 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.
10. **Constitutional Law: Criminal Law: Effectiveness of Counsel.** The Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not ensure that defense counsel will recognize and raise every conceivable constitutional claim.

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

Gerald L. Soucie for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

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

Stacy, J.

After a jury trial, Michael L. Ross was convicted of three counts, including violation of Neb. Rev. Stat. § 28-1212.04 (Supp. 2009). We affirmed Ross' convictions on direct appeal,[1] and he moved for postconviction relief. The district court denied his motion without conducting an evidentiary hearing. In this appeal, Ross contends he should have received an evidentiary hearing on his allegations (1) that § 28-1212.04 is unconstitutional both facially and as applied to him and

[1] *State v. Ross*, 283 Neb. 742, 811 N.W.2d 298 (2012).

(2) that his trial and appellate counsel were ineffective for failing to preserve constitutional challenges to § 28-1212.04. We conclude Ross' arguments are without merit, and affirm the denial of postconviction relief.

## FACTS

The facts of the underlying crimes are fully set forth in Ross' direct appeal.[2] As relevant here, Ross argues the district court erred in denying an evidentiary hearing on his motion for postconviction relief. His arguments are premised on the constitutionality of § 28-1212.04, which at the time of his crime prohibited

> [a]ny person, within the territorial boundaries of any city, incorporated village, or county containing a city of the metropolitan class or primary class [from] unlawfully, knowingly, and intentionally or recklessly discharg[ing] a firearm, while in or in the proximity of any motor vehicle that such person has just exited, at or in the general direction of any person, dwelling, building, structure, [or] occupied motor vehicle . . . .

Violation of § 28-1212.04 is a Class IC felony.

Ross' trial counsel did not move to quash the information charging a violation of § 28-1212.04 and did not raise any argument that the statute was unconstitutional. After a jury trial, Ross was convicted of violating § 28-1212.04, as well as other felonies. Ross appealed his convictions, asserting that the evidence was insufficient. He was represented on appeal by the same counsel, who did not raise any issue regarding the constitutionality of § 28-1212.04.

After his convictions and sentences were affirmed on appeal, Ross moved for postconviction relief. As relevant to this appeal, Ross alleged that § 28-1212.04 is both facially unconstitutional and unconstitutional as applied to him, based on theories of special legislation and equal protection. Generally,

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[2] *Id.*

he alleged § 28-1212.04 is special legislation in violation of Neb. Const. art. III, § 18, because it criminalizes behavior in certain geographic areas but not in others. He alleged § 28-1212.04 violates the Equal Protection Clause of the U.S. and Nebraska Constitutions for essentially the same reason, and because the areas of enforcement resulted in the statute's being disproportionately applied against African-Americans and other minorities.

Ross also alleged he received ineffective assistance of trial and appellate counsel because counsel failed to "investigate, allege, research, present, argue, and thereby preserve" the constitutional claims. Ross alleged he was prejudiced by his trial counsel's failure to file a motion to quash because either the district court would have granted the motion based on the unconstitutionality of § 28-1212.04 or the constitutional issues would have been preserved for appeal and the appellate court would have found § 28-1212.04 unconstitutional.

The district court denied postconviction relief without conducting an evidentiary hearing. It found Ross' direct challenges to the constitutionality of § 28-1212.04 were procedurally barred because those challenges could have been raised at trial or on direct appeal. And, relying on *State v. Sanders*,[3] it found Ross' counsel was not ineffective for failing to raise or preserve constitutional challenges to § 28-1212.04. In *Sanders*, we expressly held trial counsel was not ineffective for failing to raise a constitutional challenge to § 28-1212.04, because counsel cannot perform in a deficient manner by failing to raise novel legal arguments or assert changes to existing law. Ross filed this timely appeal.

## ASSIGNMENTS OF ERROR

Ross assigns, restated and consolidated, that the district court erred in (1) denying an evidentiary hearing on his allegation that § 28-1212.04 is facially unconstitutional, in violation

[3] *State v. Sanders*, 289 Neb. 335, 855 N.W.2d 350 (2014).

of Neb. Const. art. III, § 18; (2) denying an evidentiary hearing on his allegation that § 28-1212.04 is facially unconstitutional on equal protection grounds because it treats identical geographic areas differently; (3) denying an evidentiary hearing on his allegation that § 28-1212.04 is facially unconstitutional on equal protection grounds because it discriminates against African-Americans; (4) denying an evidentiary hearing on his allegation that the § 28-1212.04 is unconstitutional as applied to him; and (5) denying an evidentiary hearing on his allegation that he received ineffective assistance of trial and appellate counsel when counsel failed to move to quash the amended information.

## 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.[4]

[2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.[5] When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion.[6]

## ANALYSIS

[3] An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show

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[4] *State v. Nolan*, 292 Neb. 118, 870 N.W.2d 806 (2015); *State v. Cook*, 290 Neb. 381, 860 N.W.2d 408 (2015).

[5] *State v. Harris*, 292 Neb. 186, 871 N.W.2d 762 (2015); *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015).

[6] *State v. Molina*, 279 Neb. 405, 778 N.W.2d 713 (2010).

that the movant is entitled to no relief, no evidentiary hearing is required.[7]

### Constitutional Challenges Are Procedurally Barred

[4,5] In his first four assignments of error, Ross alleges the district court erred in failing to grant an evidentiary hearing on his allegations raising direct constitutional challenges to § 28-1212.04. We conclude the district court properly found these allegations were procedurally barred, because they could have been raised at trial or on direct appeal. Postconviction relief is a very narrow category of relief available only to remedy prejudicial constitutional violations.[8] A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.[9] We therefore affirm the denial of postconviction relief as to the direct constitutional challenges.

### Counsel Was Not Ineffective

[6] Although a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, when a defendant was represented both at trial and on direct appeal by the same lawyer, the defendant's first opportunity to assert ineffective assistance of counsel is in a motion for postconviction relief.[10] Ross' ineffective assistance of counsel claim is properly before us.

[7,8] To establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has

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[7] *State v. Ware*, 292 Neb. 24, 870 N.W.2d 637 (2015); *State v. Sellers*, 290 Neb. 18, 858 N.W.2d 577 (2015).

[8] *State v. Hessler*, 282 Neb. 935, 807 N.W.2d 504 (2011).

[9] *State v. Sellers, supra* note 7; *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

[10] *State v. Armendariz*, 289 Neb. 896, 857 N.W.2d 775 (2015); *State v. Robinson*, 285 Neb. 394, 827 N.W.2d 292 (2013).

the burden, in accordance with *Strickland v. Washington*,[11] to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.[12] Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.[13] Under the *Strickland v. Washington* framework, a court may address the two elements, deficient performance and prejudice, in either order.[14]

Ross makes a novel argument in this regard based on *Hall v. State*.[15] In *Hall*, the defendant, after being convicted of second degree murder, attempted to challenge the constitutionality of the Nebraska homicide statutes via declaratory judgment. We held the procedure was improper because declaratory judgment does not lie where another equally serviceable remedy is available. We stated:

> This [constitutional] issue could have been raised by conventional forms of remedy within the criminal prosecution. In a criminal prosecution, a defendant can bring a constitutional challenge to the facial validity of the statute under which he or she is charged by filing a motion to quash or a demurrer. . . . In the event the defendant's counsel fails to make such a challenge, the defendant can allege ineffective assistance of counsel either on direct appeal or in an action for postconviction relief.[16]

Ross argues that this language from *Hall* established a rule that any time counsel fails to file a motion to quash challenging the constitutionality of a statute, a defendant has a valid

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

[12] *State v. Armendariz, supra* note 10.

[13] *Id.*

[14] *State v. Torres*, 295 Neb. 830, 894 N.W.2d 191 (2017).

[15] *Hall v. State*, 264 Neb. 151, 646 N.W.2d 572 (2002).

[16] *Id.* at 158, 646 N.W.2d at 578.

ineffective assistance of counsel claim in a postconviction action. We disagree. *Hall* simply recognized the proper procedure for raising a constitutional claim within a criminal prosecution—it spoke to the procedure for alleging such claims. It did not, as Ross suggests, presume the validity of such claims. Whenever a claim of ineffective assistance is raised, a court must analyze whether the defendant has sufficiently alleged deficient performance resulting in prejudice.[17]

We focus here on whether Ross has sufficiently alleged that his trial and appellate counsel performed deficiently. Ross' postconviction motion alleged his counsel was deficient for failing to raise a constitutional challenge to § 28-1212.04.

[9] We addressed a nearly identical postconviction claim in *State v. Sanders*.[18] There, we held that trial counsel did not perform in a deficient manner when he failed to raise a constitutional challenge to § 28-1212.04. We reasoned "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."[19]

That same rationale applies to this case. Ross was tried in 2010, and his direct appeal was decided in 2012. At that time, no appellate court had been presented with a constitutional challenge to § 28-1212.04. We decided *Sanders* 2 years later. Given our holding in *Sanders* that counsel's failure to raise a novel constitutional challenge to § 28-1212.04 did not constitute deficient performance, we fail to see how Ross' trial counsel could be found deficient for not asserting such a challenge even earlier.

[10] "'The Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not [e]nsure that defense counsel will recognize and raise every conceivable

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[17] See *Strickland v. Washington, supra* note 11.

[18] *State v. Sanders, supra* note 3.

[19] *Id.* at 343, 855 N.W.2d at 357.

constitutional claim.'"[20] Ross' postconviction motion did not contain factual allegations which would constitute deficient performance under *Strickland v. Washington*. No evidentiary hearing was required.[21]

## CONCLUSION

For the foregoing reasons, we find Ross' direct challenges to the constitutionality of § 28-1212.04 are procedurally barred. And we conclude his ineffective assistance of counsel claim does not entitle him to an evidentiary hearing, because the allegations cannot support a finding of deficient performance. We affirm the denial of postconviction relief.

Affirmed.

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[20] *Id.* at 342, 855 N.W.2d at 356, quoting *Engle v. Isaac*, 456 U.S. 107, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982).

[21] See, *State v. Ware, supra* note 7; *State v. Sellers, supra* note 7.

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# State of Nebraska, appellee, v. Robert L. Schwaderer, appellant.

898 N.W.2d 318

Filed June 16, 2017. No. S-16-501.

1. **Trial: Evidence: Appeal and Error.** An appellate court reviews the trial court's conclusions with regard to evidentiary foundation and witness qualification for an abuse of discretion.
2. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection.
3. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
4. **Effectiveness of Counsel: Appeal and Error.** Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law.
5. ____: ____. In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only questions of law: Are the undisputed facts contained within the record sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance?
6. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.
7. **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.

8. **Convictions: Proof.** To sustain a conviction based on information derived from an electronic or mechanical measuring device, there must be reasonable proof that the measuring device was accurate and functioning properly.
9. **Evidence: Proof.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
10. **Rules of Evidence: Proof.** A proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity.
11. ____: ____. If the proponent's showing is sufficient to support a finding that the evidence is what it purports to be, the proponent has satisfied the requirement of Neb. Rev. Stat. § 27-901 (Reissue 2016).
12. **Rules of Evidence: Circumstantial Evidence: Proof.** Under Neb. Rev. Stat. § 27-901(2)(d) (Reissue 2016), a proponent may authenticate a document by circumstantial evidence, or its appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.
13. **Trial: Appeal and Error.** On appeal, a defendant may not assert a different ground for his or her objection than was offered at trial.
14. **Trial: Hearsay: Proof.** It is best practice, when overruling a hearsay objection on the ground that an out-of-court statement is not received for the truth of the matter asserted, for a trial court to identify the specific nonhearsay purpose for which the out-of-court statement is relevant and probative.
15. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
16. **Effectiveness of Counsel: Appeal and Error.** When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record; otherwise, the issue will be procedurally barred.
17. **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 will recognize whether the claim was brought before the appellate court.
18. **Effectiveness of Counsel: Records: Appeal and Error.** The fact that an ineffective assistance of counsel claim is raised on direct appeal

does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.

19. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** To establish a right to postconviction relief because of counsel's ineffective assistance, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. A court may address the two prongs of this test, deficient performance and prejudice, in either order.
20. **Effectiveness of Counsel.** As a matter of law, counsel cannot be ineffective for failing to raise a meritless argument.

Appeal from the District Court for Lancaster County: Lori A. Maret, Judge. Affirmed.

Joe Nigro, Lancaster County Public Defender, and Yohance Christie for appellant.

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

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

Cassel, J.

## I. INTRODUCTION

In this direct appeal, Robert L. Schwaderer challenges his drug-related convictions and sentences. He raises numerous issues, but we focus primarily on (1) the admissibility of evidence of drug weights and "owe notes" and (2) the propriety of jury admonishments and instructions. Because we find no prejudicial error, we affirm the judgment. We also reject three claims of ineffective assistance of trial counsel and decline to reach a fourth claim because the record is not sufficient.

## II. BACKGROUND

### 1. Arrest and Charges

Schwaderer was arrested for driving under suspension and false reporting. A search incident to his arrest yielded a significant amount of packaged methamphetamine, approximately $3,300 in cash, a digital scale, empty baggies, and several notebooks and notepads. A later search of his person at the county jail produced another smaller amount of separately packaged methamphetamine. Schwaderer was then charged with possession with intent to deliver methamphetamine, at least 28 grams but less than 140 grams; possession of money to be used, violating Neb. Rev. Stat. § 28-416(1) (Supp. 2015) (drug money); and false reporting.

### 2. Trial

At trial, Schwaderer did not contest his actual possession of the methamphetamine but he alleged that he was only a user and did not possess the controlled substance with intent to deliver. Therefore, the main issues at trial were (1) whether Schwaderer was a seller—rather than a mere user—of methamphetamine and (2) how much methamphetamine he actually possessed.

#### (a) "Owe Notes"

The State offered the seized notebooks and notepads into evidence as indicative of sales of narcotics. Schwaderer objected to their admittance on authentication, foundation, relevance, and hearsay grounds. The court overruled the objections, received the items into evidence as exhibits 11 through 15, and soon thereafter recessed for the day. The following morning, the court revisited its ruling. When the jurors were seated, the court instructed as follows:

> Jurors, yesterday, as a part of the evidence received by the Court, the Court did receive Exhibits 11, 12, 13, 14 and 15.
>
> I'm, at this time, giving a cautionary instruction regarding those exhibits. The Court has received those

> exhibits not for the truth of the matter asserted in the statements contained within those exhibits, but has received those exhibits for the purposes of trial today.

The State later called on an individual who had previously worked for the Lincoln/Lancaster County Narcotics Unit to explain the significance of the writings within the notebooks and notepads and to testify to the general practices of narcotics dealers. He testified as an expert witness and opined that the notebooks were records of narcotics sales and that they, taken with the large amount of methamphetamine and cash found on Schwaderer, indicated that Schwaderer sold methamphetamine.

The expert witness testified that through his work with the narcotics unit, he became familiar with "the drug culture" and the terms and procedures used for sales of narcotics. When the State attempted to elicit testimony from him concerning the meaning of words similar to those found within the notepads, Schwaderer objected on relevance and a side bar discussion was held. Schwaderer reminded the court that the notepads were received with the limiting instruction that they were not to be considered for the truth of the matter asserted within. He therefore objected to the witness' testimony as unfairly and highly prejudicial. The State responded that the testimony "can be used to explain the items in those notebooks," and the court overruled the objection. The court later explained, during another side bar discussion, its understanding of the limiting instruction:

> The cautionary instruction was they've — those exhibits were received not for the truth of the matter asserted in the statements contained within those exhibits. For example, if Joe Blow — if it says Joe Blow owes me $25 for an eight ball, it's not the truth of that asserted fact that Joe Blow actually does owe me $25 for that eight ball. That was what the cautionary instruction was going to.

> For any other purpose, that it illustrates something else, that it — for any other purpose, it is received.

Over Schwaderer's objections, the notebooks and notepads were then published to the jury. The expert witness examined each page and testified to his opinion as to what various terms and phrases contained within meant. He concluded that the notebooks and notepads were consistent with ledgers for transactions involving controlled substances that he had seen in past narcotics investigations.

In the final instructions to the jury, instruction No. 8 stated: "Exhibits #11, #12, #13, #14, and #15 have been admitted for the limited purpose of showing the character and use of the location where they were found and not for the truth of any matters asserted in Exhibits #11, #12, #13, #14 and #15."

(b) Weight of Methamphetamine

While the State repeatedly emphasized that the "owe notes" were "consistent with the sales of methamphetamine," it also heavily relied on the large amount of methamphetamine as showing an intent to distribute for sale.

A forensic scientist testified to the processing and testing of the substance found on Schwaderer. The forensic scientist testified that the substance tested positive for methamphetamine. She additionally testified to the methods used to weigh the methamphetamine and the calibrations and tests done on the scales used. She testified that the large amount of packaged methamphetamine weighed 34.06 grams, plus or minus 0.15 grams, and that the separate smaller amount of packaged methamphetamine weighed 0.3580 grams, plus or minus 0.0056 grams.

The forensic scientist additionally testified to the purity analysis conducted on the methamphetamine. The court received into evidence the scientist's report that showed the purity testing confirmed the large amount of packaged methamphetamine to be at least 31 grams of actual, undiluted methamphetamine. During closing argument, the State noted

that this amount of methamphetamine would be about 170 doses of methamphetamine and that a simple user would not have that much with them at any given time.

### 3. Convictions and Sentences

On this evidence, the jury found Schwaderer guilty of possession with intent to deliver methamphetamine, at least 28 grams but less than 140 grams; possession of drug money; and false reporting. The court sentenced Schwaderer to concurrent sentences of 10 to 15 years' imprisonment for possession with intent to deliver, 2 to 2 years' imprisonment for possession of drug money, and 1 to 1 year's imprisonment for false reporting.

Schwaderer timely appealed, and we moved the appeal to our docket.[1]

## III. ASSIGNMENTS OF ERROR

Schwaderer alleges, restated, that (1) the district court erred in (a) admitting testimony regarding the weight of the methamphetamine, (b) admitting the notebooks and notepads seized from Schwaderer's vehicle into evidence, (c) its instructions to the jury, and (d) admitting expert testimony; (2) he received ineffective assistance of counsel "as a result of the acts and omissions of . . . trial counsel"; (3) there was insufficient evidence; and (4) the sentences imposed were excessive.

## IV. STANDARD OF REVIEW

[1] An appellate court reviews the trial court's conclusions with regard to evidentiary foundation and witness qualification for an abuse of discretion.[2]

[2] Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

[2] *State v. Richardson*, 285 Neb. 847, 830 N.W.2d 183 (2013).

underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection.[3]

[3] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[4]

[4,5] Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law.[5] In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only questions of law: Are the undisputed facts contained within the record sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance?[6]

[6] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[7]

[7] We will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[8]

## V. ANALYSIS

### 1. Weight of Methamphetamine

Schwaderer first alleges that the district court erred by allowing testimony of the weight of the methamphetamine found on Schwaderer. He argues that such testimony should have been excluded because it was based on hearsay, lacked

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[3] *State v. Hale*, 290 Neb. 70, 858 N.W.2d 543 (2015).

[4] *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

[5] *State v. Parnell*, 294 Neb. 551, 883 N.W.2d 652 (2016).

[6] *Id.*

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

[8] *Id.*

sufficient foundation, and violated his right of confrontation. He suggests that the witness lacked personal knowledge of the calibration because she testified that an outside company calibrates the scales twice a year. But, he does not account for the same witness' testimony as to the other procedures used to verify the accuracy and reliability of the scales.

[8] To sustain a conviction based on information derived from an electronic or mechanical measuring device, there must be reasonable proof that the measuring device was accurate and functioning properly.[9] And there was.

Assuming that it was error to allow the witness to testify to the calibration done by an outside company, such error was harmless, because the accuracy of the scales had already been established. The witness provided sufficient foundation of personal knowledge concerning calibration procedures performed by the laboratory and the witness herself. She testified that she personally used a known weight to measure the accuracy and variability of the scales used to weigh the methamphetamine. She further testified that she would use a known weight on a daily and monthly basis to check the accuracy of the scales. Though she did not classify such procedures as "calibration," we agree with the district court that the procedures met the definition of calibration and were sufficient to show the accuracy of the scales.

The testimony provided identified the time period during which the scales were tested against known weights and established that the scales were operating correctly. Therefore, there was sufficient foundation regarding the calibration of the scales and the district court did not err in allowing the witness to testify to the weight of the methamphetamine.

### 2. Notebooks and Notepads

Schwaderer next assigns that the district court erred in admitting the notebooks and notepads found in Schwaderer's vehicle into evidence because they were inadmissible hearsay

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[9] *State v. Richardson, supra* note 2.

and were not properly authenticated. Although we have not confronted such records, numerous courts have.[10] And we follow their reasoning.

(a) Hearsay

Schwaderer alleges that the notebooks and notepads were inadmissible hearsay because they "were received for the truth of the matter asserted by the declarants,"[11] who Schwaderer suggests were the testifying officers. We disagree and note that this argument relies on a mistaken understanding of the definition of hearsay.

"Hearsay is a statement, *other than the one made by the declarant while testifying at the trial or hearing*, offered in evidence to prove the truth of the matter asserted."[12] Therefore, the declarant is the author of the writings contained within the notebooks and notepads—not the officers testifying to the seizure and contents of the notebooks and notepads. And, the truth of the matter asserted refers to *the statements made by the declarant*—not the professed reason for why the statements are offered into evidence.

The notebooks and notepads appeared to be "owe notes" or ledgers evidencing the exchange of money for various

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[10] See, e.g., *United States v. Southard*, 700 F.2d 1 (1st Cir. 1983) (documents containing records of bets not hearsay as proof of scope of defendant's gambling operations), *cert. denied sub nom. Ferris v. United States*, 464 U.S. 823, 104 S. Ct. 89, 78 L. Ed. 2d 97; *United States v. Wilson*, 532 F.2d 641 (8th Cir. 1976) (notebooks containing writings related to various drug transactions not hearsay as proof of character and use of place in which notebooks were found), *cert. denied* 429 U.S. 846, 97 S. Ct. 128, 50 L. Ed. 2d 117; *Collins v. State*, 977 P.2d 741, 746 (Ala. App. 1999) (day planner and "drug ledgers" not hearsay as circumstantial evidence that controlled substances were distributed on premises); *Guerra v. State*, 897 P.2d 447 (Wyo. 1995) (letter to defendant detailing proposed drug transaction not hearsay as circumstantial evidence that defendant deals in controlled substances).

[11] Brief for appellant at 15.

[12] Neb. Rev. Stat. § 27-801(3) (Reissue 2016) (emphasis supplied).

amounts of methamphetamine; they included notes with numbers, names, and addresses. The State offered these notebooks and notepads not to prove that a listed individual owed or paid money for a certain amount of methamphetamine, but to show that Schwaderer possessed the methamphetamine for purposes of sale and distribution. Thus, the notebooks and notepads were not offered to prove the truth of the matter asserted therein and did not constitute hearsay.

(b) Authentication

Schwaderer additionally alleges that the notebooks and notepads were not properly authenticated, because the State did not adduce evidence or testimony establishing "the origin of the exhibits, the author of the exhibits, the handwriting in the exhibits, or the date the exhibits were created."[13] He concedes in his brief that the State did adduce testimony establishing that the notebooks and notepads were the same as those found within his vehicle. But, he argues this testimony was insufficient to support a finding that the exhibits were what the State claimed them to be.

[9-12] The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.[14] A proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity.[15] If the proponent's showing is sufficient to support a finding that the evidence is what it purports to be, the proponent has satisfied the requirement of Neb. Rev. Stat. § 27-901 (Reissue 2016).[16] Under § 27-901(2)(d), a proponent may authenticate a document by circumstantial evidence, or its "[a]ppearance,

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[13] Brief for appellant at 20.

[14] *State v. Casterline*, 293 Neb. 41, 878 N.W.2d 38 (2016).

[15] *Id.*

[16] *Id.*

contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."[17]

The State presented the "owe notes" found within Schwaderer's possession as records of drug transactions. The State did not claim that Schwaderer authored the notes or was involved in the notated transactions, but merely alleged that *possession* of such notes was consistent with drug dealing. As such, the State was not required to prove that Schwaderer authored the notes or was involved in the transactions.[18]

The arresting officer testified that the notebooks and notepads presented at trial were the same he seized from Schwaderer's vehicle. And, a witness reviewed the notebooks and notepads and explained that the notations and language used within were consistent with records of drug transactions, specifically with the sale of methamphetamine. This was sufficient to authenticate the notebooks and notepads under § 27-901(2)(d).

Because the notebooks and notepads were not hearsay and were properly authenticated, the district court did not err in admitting them into evidence.

### 3. Jury Instructions

[13] Schwaderer assigns error to the court's cautionary instruction given at trial and to jury instruction No. 8. However, he did not properly preserve these errors for review. Schwaderer did not object to the cautionary instruction given at trial. And, though he did object to jury instruction No. 8, he argued that no instruction should reference the exhibits because the exhibits should not have been received into evidence. On appeal, he may not assert a different ground for his objection than was offered at trial.[19]

[14] We cannot find anything clearly erroneous or unduly prejudicial in the instructions given. It is best practice, when

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[17] See *id.*

[18] See *State v. Elseman*, 287 Neb. 134, 841 N.W.2d 225 (2014).

[19] *State v. Samayoa*, 292 Neb. 334, 873 N.W.2d 449 (2015).

overruling a hearsay objection on the ground that an out-of-court statement is not received for the truth of the matter asserted, for a trial court to identify the specific nonhearsay purpose for which the out-of-court statement is relevant and probative.[20] However, the cautionary instruction that the exhibits were not to be considered by the jury for the truth of the matter asserted was sufficient. Likewise, the final jury instruction was sufficient, because it specifically instructed the jury not to consider the exhibits for the truth of the matter asserted.

The district court's instructions to the jury, read together and taken as a whole, correctly advised the jury that the notebooks and notepads were not to be considered for the truth of the matter asserted. They correctly stated the law, were not misleading, and adequately covered the issues raised by the evidence. For these reasons, the district court did not err in its instructions to the jury.

### 4. Expert Testimony

Schwaderer next alleges that the witness who previously worked with the narcotics unit was not an expert witness. He argues that the witness was not properly qualified and that the court did not follow the proper procedure in determining whether expert testimony was admissible. The State argues that Schwaderer waived this argument. We agree.

[15] Failure to make a timely objection waives the right to assert prejudicial error on appeal.[21] At trial, Schwaderer continuously objected to the witness' testimony on foundation and relevance grounds and challenged the qualifications of the witness during closing argument. But, he never specifically objected to the witness' qualification as an expert or asked the court to make specific findings as to the witness' qualifications. And, he cannot assert a new ground for

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[20] See *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010).

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

his objection to the witness' testimony for the first time on appeal.[22] Therefore, Schwaderer waived his right to assert this assignment of error.

### 5. Ineffective Assistance of Counsel Claims

#### (a) Preliminary Matters

[16,17] Schwaderer is represented on direct appeal by different counsel than the counsel who represented him at trial. When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record; otherwise, the issue will be procedurally barred.[23] 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 will recognize whether the claim was brought before the appellate court.[24]

[18] The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved.[25] The determining factor is whether the record is sufficient to adequately review the question.[26]

Schwaderer asserts several claims of ineffective assistance of counsel. A few of his claims overlap and have been combined and restated for review. Schwaderer alleges that he received ineffective assistance of counsel when trial counsel failed to (1) renew his motion to suppress at trial, (2) obtain

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[22] See *State v. Samayoa, supra* note 19.

[23] *State v. Loding, ante* p. 670, 895 N.W.2d 669 (2017).

[24] *Id.*

[25] *State v. Parnell, supra* note 5.

[26] *Id.*

independent testing and weighing of the methamphetamine, (3) request a preliminary hearing and specific findings on the qualifications of the State's expert witness, and (4) object to the State's closing argument, which was inconsistent with the limiting instruction on exhibits 11 through 15.

The record is insufficient to address his second claim concerning the failure to obtain independent testing and weighing of the methamphetamine, but the record is sufficient to resolve the remaining three claims.

(b) *Strickland* Analysis

[19] To establish a right to postconviction relief because of counsel's ineffective assistance, the defendant has the burden, in accordance with *Strickland v. Washington*,[27] to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.[28] Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.[29] 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.[30] A court may address the two prongs of this test, deficient performance and prejudice, in either order.[31]

*(i) Failure to Renew Motion to Suppress*

Schwaderer alleges that his trial counsel was ineffective for failing to renew his motion to suppress at trial and thus waiving the issues presented in his motion to suppress. However, he cannot show deficient performance or prejudice on this claim.

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

[28] *State v. Ely*, 295 Neb. 607, 889 N.W.2d 377 (2017).

[29] *Id.*

[30] *Id.*

[31] *Id.*

Schwaderer's motion to suppress alleged that the warrantless stop, detention, and search of Schwaderer and his vehicle were unlawful. The evidence presented at the motion to suppress hearing established that the arresting officer identified Schwaderer before making the stop and that the arresting officer was advised that Schwaderer had a suspended license. The officer thus had reasonable suspicion to initiate the stop.

Once stopped, the officer approached Schwaderer, identified himself as law enforcement, and asked Schwaderer for identification. Schwaderer claimed he had no identification and, when asked to confirm his name, claimed to be his brother, "William Schwaderer." Because he knew this to be false based on the information within the Nebraska Criminal Justice Information System, the officer requested another officer in the area to come and assist him in detaining and investigating Schwaderer.

The arresting officer asked Schwaderer to exit the vehicle to perform a safety pat down, after which he noticed what appeared to be a wallet in Schwaderer's pocket. The officer then asked whether Schwaderer had identification in that wallet. At this point, Schwaderer admitted that he was, in fact, "Robert Schwaderer" and the arresting officer arrested him for driving under suspension and false reporting.

The arresting officer and the assisting officer conducted a valid search incident to arrest for contraband and weapons before placing Schwaderer in the police cruiser. The search yielded items that the arresting officer testified were "common with narcotics use or distribution" and a large amount of methamphetamine.

The assisting officer testified that he then conducted a search of the vehicle for further evidence of contraband and to inventory the contents prior to the vehicle being towed away. That search yielded the notebooks and notepads containing records of narcotics sales. Because the contraband discovered during a lawful search incident to an arrest provided the probable cause for the further warrantless search of

the vehicle, the subsequent search did not violate the Fourth Amendment.

[20] As a matter of law, counsel cannot be ineffective for failing to raise a meritless argument.[32] Because there was no merit in the initial motion to suppress, Schwaderer's counsel was not ineffective for failing to renew the motion at trial.

*(ii) Failure to Object to Expert Witness' Qualifications*

Schwaderer alleges that his trial counsel was ineffective for failing to request specific findings and a preliminary hearing to determine the qualifications of the State's expert witness. This claim is also without merit because Schwaderer cannot show prejudice.

Even if trial counsel had objected to the witness' qualifications or requested a preliminary hearing, the result would not have been different. Under our analysis in *State v. Russell*,[33] there was sufficient foundation to allow the witness to testify to the interpretation of the terms used within the notebooks and notepads. The witness' testimony was rationally based on the perception of the witness and the testimony was helpful to the determination of a fact in issue.

Because the witness would have qualified as an expert witness, or at the very least would have been allowed to testify to the same matters as a lay witness based on his experience and perception, Schwaderer was not prejudiced by trial counsel's failure to object to the witness' qualifications or to request a preliminary hearing on the matter.

*(iii) Failure to Object to State's Closing Argument*

Lastly, Schwaderer alleges that his trial counsel was ineffective for failing to object to the State's closing argument insofar as it was inconsistent with jury instruction No. 8.

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[32] *Id.*

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

Again, he cannot show deficient performance or prejudice on this claim.

The State's closing argument referred to the notebooks and notepads as "owe notes" and emphasized that the writing within was consistent with the distribution of methamphetamine. At no point did the State suggest that the transactions notated actually occurred or claim that the writings were proof Schwaderer received the listed amounts of money in exchange for methamphetamine. Therefore, the State's closing argument was not inconsistent with jury instruction No. 8, which admonished the jury not to consider the notebooks and notepads for the truth of the matters asserted.

Schwaderer's counsel was not ineffective for failing to make a meritless objection to the State's closing argument. Schwaderer has failed to show ineffective assistance of counsel.

### 6. Remaining Assignments of Error

We have carefully considered Schwaderer's remaining claims—that there was insufficient evidence and that he received excessive sentences—and find them to be without merit. He premises his claim of insufficient evidence on his arguments that certain evidence and testimony should have been excluded and asserts that the remaining evidence was insufficient to support the convictions. We have already rejected these arguments. He also failed to establish that the district court abused its discretion in imposing his sentences.

## VI. CONCLUSION

For the reasons set forth above, we conclude that the district court did not err in allowing the challenged exhibits and testimony into evidence or in its instructions to the jury. We also conclude that three of the four claims of ineffective assistance of counsel are without merit. The record is insufficient to resolve the remaining claim on direct appeal. Because Schwaderer's other assignments of error are without merit, 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, v. Henry O. Salvador Rodriguez, appellant.

898 N.W.2d 333

Filed June 16, 2017. No. S-16-563.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Motions to Suppress: Warrantless Searches: Appeal and Error.** In reviewing a trial court's denial of a motion to suppress evidence obtained by a warrantless search under the emergency doctrine, an appellate court employs a two-part standard in which the first part of the analysis involves a review of the historical facts for clear error and a review de novo of the trial court's ultimate conclusion that exigent circumstances were present. Where the facts are largely undisputed, the ultimate question is an issue of law.
3. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2016), and the trial court's decision will not be reversed absent an abuse of discretion.
4. **Search and Seizure: Warrantless Searches: Proof.** Searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions that must be strictly confined by their justifications. The State has the burden of showing the applicability of one or more of the exceptions to the warrant requirement.
5. **Search and Seizure: Warrants: Police Officers and Sheriffs.** In the case of entry into a home, a police officer who has obtained neither an

arrest warrant nor a search warrant cannot make a nonconsensual and warrantless entry in the absence of exigent circumstances.

6. **Search and Seizure: Words and Phrases.** The "emergency doctrine" is a category of exigent circumstances. The elements of the emergency doctrine are that (1) the police must have reasonable grounds to believe there is an immediate need for their assistance for the protection of life or property and (2) there must be some reasonable basis to associate the emergency with the area or place to be searched.
7. **Constitutional Law: Police Officers and Sheriffs.** An action is reasonable under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances viewed, objectively, justify the action.
8. **Police Officers and Sheriffs: Probable Cause.** The presence of an emergency, like probable cause, hinges on the reasonable belief of the officers in light of specific facts and the inferences derived therefrom, not whether, in hindsight, one actually existed.
9. **Search and Seizure: Police Officers and Sheriffs: Probable Cause.** The first element of the emergency doctrine is similar to probable cause and asks whether the facts available to the officer at the moment of entry warranted a person of reasonable caution to believe that entry was appropriate.
10. **Search and Seizure: Police Officers and Sheriffs: Burglary.** Courts generally find sufficient exigent circumstances to justify the warrantless entry into a home when a police officer reasonably believes that a burglary is in progress or was recently committed therein.
11. **Burglary.** A burglary indicates an immediate need to secure the premises because it raises the possibility of danger to an occupant and the continued presence of an intruder.
12. **Other Acts: Words and Phrases.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2016), concerns evidence of other crimes, wrongs, or acts. Other acts under rule 404(2) are acts that are not part of the events giving rise to the present charges.
13. **Indictments and Informations: Words and Phrases.** The phrase "on or about" in an information indicates the date with approximate certainty.
14. **Criminal Law: Time: Words and Phrases.** The crime of "possession" may extend over a period of time if uninterrupted.
15. **Criminal Law: Statutes: Words and Phrases.** Absent language indicating differently, "possession" within a criminal statute contemplates a continuing offense as opposed to a single incident.
16. **Criminal Law: Time: Words and Phrases.** An offense is continuing if set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy; an offense which continues day by

day; a breach of the criminal law, not terminated by a single act or fact, but subsisting for a definite period and intended to cover or apply to successive similar obligations or occurrences.

17. **Evidence: Other Acts: Words and Phrases.** Evidence of uncharged criminal activity is not considered "other crimes" evidence under Neb. Evid. R. 404(1)(b), Neb. Rev. Stat. § 27-404(1)(b) (Reissue 2016), if it arose out of the same transaction or series of transactions.
18. **Records: Appeal and Error.** Where allegedly prejudicial remarks of counsel do not appear in the bill of exceptions, an appellate court is precluded from considering an assigned error concerning such remarks.
19. **Motions for New Trial: Affidavits: Evidence: Records: Appeal and Error.** Affidavits in support of a motion for new trial must be offered in evidence and preserved in and made a part of a bill of exceptions to be considered by an appellate court.
20. **Motions for New Trial: Testimony: Affidavits: Records: Appeal and Error.** An appellate court will not review testimony in the form of affidavits used in the trial court on the hearing of a motion for new trial, unless such affidavits have been included in and presented by a bill of exceptions.

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

Travis Penn, of Penn Law Firm, L.L.C., for appellant.

Douglas J. Peterson, Attorney General, and Siobhan E. Duffy for appellee.

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

Wright, J.

## I. NATURE OF CASE

The defendant appeals from his conviction of possession of methamphetamine with intent to deliver. At issue is whether the trial court should have suppressed evidence found during a search with a warrant that was obtained as a result of observing defaced firearms during a prior warrantless search for a possible burglar at the request of a houseguest. Also at issue is whether the defendant was prejudiced by the admission,

without a limiting instruction, of evidence of his drug use around the time specified in the information. The defendant argued the drug use was evidence of prior bad acts subject to Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 2016). The court concluded the drug use was intrinsic to the crime charged. Finally, the defendant argues he was prejudiced by comments purportedly made by the prosecutor during closing arguments erroneously stating that the defendant owned the home he lived in.

## II. BACKGROUND

Henry O. Salvador Rodriguez was charged with one count of possession of methamphetamine with intent to deliver and one count of possession of a defaced firearm, both on or about July 30, 2014. A jury found Salvador Rodriguez guilty of possessing methamphetamine, in an amount of over 10 grams, with intent to deliver. The jury found Salvador Rodriguez not guilty of possession of a defaced firearm.

### 1. Warrantless Search

Salvador Rodriguez sought suppression of all evidence obtained during searches of his place of residence conducted pursuant to warrants that were issued based on observations during an initial warrantless search. The State asserted that the warrantless search was reasonable because of the exigent circumstance of a possible intruder in the house. Alternatively, the State argued the search was authorized by Lori Ezell, who had common authority over the house.

#### (a) Officer Testimony

Officer Adam Wackler testified that on July 23, 2014, he responded to a report of a domestic disturbance between Ezell and Gilbert Chavez at the apartment where Chavez lived. Wackler had responded previously to similar disturbances at that apartment. Wackler suggested that Ezell and Chavez spend the night apart, and they agreed.

Ezell told Wackler that she had the key to a friend's house because she was taking care of the friend's dog and that she stayed there when she was not getting along with Chavez. Ezell told Wackler that she had a bedroom at that house and that she kept some of her and her children's things there. Ezell said she stayed at the house sometimes for just a day, other times for 2 weeks; it depended on the situation.

Ezell explained to Wackler that her friends, whom she identified as Salvador Rodriguez and Rosa Anguiano, were out of town. She explained that Salvador Rodriguez and Anguiano rented the house, hereinafter referred to as the "Salvador Rodriguez house."

Wackler testified that after making a telephone call, Ezell reported to him that Salvador Rodriguez and Anguiano had given Ezell permission to stay at their house that night. Wackler drove Ezell and one of her children to the Salvador Rodriguez house.

A couple of hours later, Wackler received another call from Ezell. Wackler had given Ezell his work cell phone number to use in case things escalated further between Ezell and Chavez that night. Ezell seemed upset. She told Wackler that she was afraid an intruder was in the Salvador Rodriguez house. Wackler met Ezell and her child on a street corner near the house.

Ezell told Wackler that she had gone for a walk with her child. When she returned to the Salvador Rodriguez house, all the lights were on and she thought she saw somebody in the garage looking at her. Ezell reported that she had shut and locked the door and had turned off all the lights in the house before leaving for their walk.

Ezell told Wackler that she was afraid to go back into the house, because she knew Salvador Rodriguez and Anguiano were not there. She asked Wackler to come and make sure that nobody was inside.

When Officer Clay Heath arrived as backup, Wackler and Heath approached the Salvador Rodriguez house and observed

that the front door was unlocked and open a crack—though in later testimony Wackler described that it was closed but was not latched closed.

Wackler and Heath entered and proceeded to clear the house by looking "anywhere that a person could fit." They did not find anyone in the house. When looking in closets, however, Wackler and Heath observed two firearms in plain view. In the closet of the kitchen, they observed a shotgun that appeared to have the barrel cut off. In the closet of the master bedroom, they saw a pistol.

Concerned that someone might be hiding in the house who would have access to the weapons, Wackler and Heath made sure that the pistol did not have ammunition. They picked it up to clear the chamber. In doing so, they found that the pistol's serial number appeared to have been partially scratched off. They returned the pistol and continued their search. It was unclear whether Wackler and Heath picked up the shotgun in the kitchen.

After ensuring that no one was in the Salvador Rodriguez house, Wackler and Heath returned the keys to Ezell. Anguiano called Wackler later that night to ask if the house had been broken into. Wackler reported that because Ezell did not see anything out of place, he did not think so. Wackler confirmed with Anguiano that Ezell had permission to stay in the house.

(b) Ezell's Testimony

Ezell testified that she stayed at the Salvador Rodriguez house at least once a week, when she and Chavez would "get into it." She had a bedroom there where she and her children slept when they stayed the night. She kept some of her and her children's possessions in that bedroom and had a key to the house.

Ezell repeatedly testified that she moved into the Salvador Rodriguez house approximately 1 week prior to July 23, 2014. But in other testimony, she seemed to indicate that she moved into the Salvador Rodriguez house on July 23.

After moving in, Ezell considered herself a "permanent resident" insofar as she was living there and had all of her and her children's belongings there. She described those belongings as clothing, toiletries, medicines, and a crib. Salvador Rodriguez and Anguiano told her to "make it like it was [her] own home." She further affirmed that she had "free rein over the entire house." Ezell said she was a "guest" inasmuch as she did not pay any bills or rent.

Ezell testified that a couple of hours after Wackler responded to the domestic disturbance report, she called Wackler because she thought an intruder was inside the Salvador Rodriguez house. Salvador Rodriguez and Anguiano were out of town all that week. Ezell and her children had gone to get ice cream. When they returned, she noticed that a light was on and the garage door was open, but she did not think anything of it right away. One of her children wanted to go back to get more ice cream, and when they exited the house, they saw Ezell's van with all the doors open, including the back hatch. She had left all the van doors closed. One of her children screamed that someone was in the garage. Ezell testified that she also saw someone in the garage.

Sometime after Wackler and Heath searched the house and found no intruders, Ezell called Salvador Rodriguez and Anguiano. Ezell testified that neither gave her any indication that she did not have authority to ask the police to check if there was an intruder in the house. Salvador Rodriguez reportedly told her, "'It's okay. I had someone go check on the house.'"

(c) Subsequent Searches

On July 30, 2014, Wackler and Heath obtained a warrant to search the Salvador Rodriguez house, based on their observations of the defaced firearms. A water bill confirmed Salvador Rodriguez and Anguiano as the residents, either the owners or the renters, of the house. At trial, Wackler testified that photographs inside the home, as well as other documents, such as

checkbooks and tax documents, identified Salvador Rodriguez and Anguiano as the residents of the house.

When conducting the search pursuant to the warrant, Wackler and Heath found what appeared to be methamphetamine under a couch in the basement. On August 2, 2014, Wackler and Heath obtained another warrant, to search for drugs and drug paraphernalia. In the search conducted pursuant to this second warrant, they found more methamphetamine under the couch in the basement, as well as underneath a basement sink.

(d) Trial Court's Order

The court overruled the motion to suppress. The court found that Wackler was called to a domestic dispute between Ezell and Chavez and that Ezell had Wackler take her to the Salvador Rodriguez house. The court found that Ezell advised Wackler that she was housesitting for Salvador Rodriguez and Anguiano, had a key to the premises, stayed there off and on when she and Chavez were fighting, and had a room at the house.

The court found that after a couple of hours, Ezell called Wackler and reported that upon her return from a walk, the lights of the residence were on and she thought she saw someone in the garage. Ezell told Wackler that she had shut off all the lights and locked the door before going for her walk. Ezell was frantic, very upset, and scared. She asked Wackler to check the house to make sure no one was inside.

The court found that once Heath arrived as backup, the officers approached the house and noticed the lights were on and that the door was unlocked and not entirely shut. They entered the house and searched the house only in locations where it was reasonable that a person could hide.

In the closet of the master bedroom, the officers saw a revolver. The court found that for their safety, Wackler and Heath decided to clear the handgun of any ammunition. In doing so, they noticed that the serial number had been altered

or filed and that it was defaced. After clearing the bedroom, the officers searched a closet in the kitchen that was large enough for a person to hide in. Inside, they found a shotgun that appeared to have been altered.

The trial court concluded that the warrantless search at issue was reasonable under the Fourth Amendment either as a search undertaken with consent or as a search conducted under exigent circumstances. With regard to its conclusion that the search was undertaken with consent, the court reasoned that Wackler had a reasonable basis to conclude that Ezell had common authority over the house at that time. With regard to the exigent circumstances, the court reasoned that Wackler had reasonable grounds to believe that there was an emergency and that the clearing of the guns found during the search did not exceed the scope of the exigency.

#### (e) Evidence Seized During Searches

The motion to suppress was overruled. The evidence adduced at trial showed that a total of approximately 340 grams of methamphetamine was seized during a search of the Salvador Rodriguez house. From the master bedroom, the officers also seized the pistol and drug paraphernalia; they did not find the sawed-off shotgun.

### 2. Prior Drug Use

The prosecution offered testimony by Ezell describing Salvador Rodriguez' drug usage and how he kept methamphetamine under the basement couch and provided the drug to her and other guests. No notice was filed by the State prior to trial advising Salvador Rodriguez that it intended to adduce any evidence of prior bad acts under rule 404(2), and Salvador Rodriguez did not file any pretrial motions concerning the possible admission of prior bad acts. No hearing pursuant to rule 404(3) was conducted outside the presence of the jury to determine whether the State proved by clear and convincing evidence that a prior crime, wrong, or act occurred.

Ezell testified, without objection, that she and Salvador Rodriguez used methamphetamine together in the basement of the Salvador Rodriguez house as follows:

> Q[.] Once you became friends with [Anguiano] did you also get to know [Salvador Rodriguez] better as well?
>
> A[.] Yes.
>
> Q[.] In what way?
>
> A[.] We both shared a habit that we used together.
>
> Q[.] Well, let's talk about that. You said you shared a habit that you used together. What do you mean by that?
>
> A[.] We both used meth.
>
> . . . .
>
> Q[.] And when you began using methamphetamine, how did it happen that you started using it?
>
> A[.] The owners of the plant first offered it to me at a party. And that's when I very first started using it.
>
> Q[.] And you said that you and [Salvador Rodriguez] shared in that habit. What did you mean by that?
>
> A[.] After I got to know him a little better, I found out that he also smoked meth and so we would smoke meth together.
>
> Q[.] And where would you typically do that?
>
> A[.] At his house.
>
> Q[.] Where at in the house?
>
> A[.] In the basement.

When the prosecutor proceeded after this questioning to ask if other people smoked methamphetamine with Ezell and Salvador Rodriguez, defense counsel objected for the first time. Defense counsel objected on the ground that the line of questioning violated rule 404. The court sustained the objection, but denied defense counsel's motion to strike Ezell's testimony that she and Salvador Rodriguez smoked methamphetamine together.

When the prosecutor pursued further questioning about Ezell's and Salvador Rodriguez' drug usage, the attorneys

approached the bench for an off-the-record discussion. Questioning about drug usage after that was focused on the summer of 2014. Defense counsel made a continuing objection to "any evidence regarding past use of drugs" as being in violation of rule 404. The court overruled the objection.

Ezell then testified that two or three times a week she smoked methamphetamine with Salvador Rodriguez in his basement. Other people were sometimes present. The methamphetamine that anyone used in the basement always came from underneath the basement couch.

Ezell also testified that she once saw Anguiano with a large amount of cash. Ezell testified that on the day of the "raid" on the house, Salvador Rodriguez admitted to her that law enforcement would find large quantities of methamphetamine there, because he was a dealer.

After the State's case in chief, defense counsel called several character witnesses who testified generally as to Salvador Rodriguez' good character and testified that Salvador Rodriguez was not a drug user or abuser.

At the jury instruction conference, defense counsel conceded that he was not arguing that the evidence of Salvador Rodriguez' drug usage with Ezell was inadmissible. Defense counsel asked for a jury instruction that would ensure the jury would use the evidence for its independent relevance and not for propensity reasoning. The trial court denied the request and did not instruct the jury on the proper purpose for which it could consider the evidence of Salvador Rodriguez' drug use. The court reasoned that the drug use was not prior bad acts, but instead was an integral part of and contributed to the factual setting of the crime charged.

### 3. Closing Arguments

No record was made of closing arguments. Neither did Salvador Rodriguez make an offer of proof concerning any statements allegedly made during closing arguments. In a motion for new trial, defense counsel alleged that the prosecutor

stated in closing arguments that Salvador Rodriguez "'owned'" the house where the methamphetamine was found. The motion further alleged that defense counsel's objections to such testimony were overruled. Defense counsel attached to the motion an affidavit averring that the factual allegations in the motion for new trial were true.

The jury was instructed that "possession" of a thing means either knowingly having it on one's person or knowing of its presence and having the right to exercise dominion and control over it. During deliberations, the jury asked, "Is there any other evidence that [Salvador Rodriguez] had leased or rented the house?" and "Does ownership/lease equate to liability?" The court answered that the jury had received all the evidence and must refer to the jury instructions.

## III. ASSIGNMENTS OF ERROR

Salvador Rodriguez assigns that the trial court erred when it (1) overruled his motion to suppress evidence gained as a result of the warrantless search of his residence, (2) allowed evidence of past methamphetamine use, (3) gave no limiting instruction concerning for what limited purpose the evidence of past methamphetamine use was allowed, and (4) overruled his objection during closing arguments to the State's comments that he owned the house where he lived.

## IV. 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. 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.[1]

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[1] *State v. McCumber*, 295 Neb. 941, 893 N.W.2d 411 (2017).

[2] In reviewing a trial court's denial of a motion to suppress evidence obtained by a warrantless search under the emergency doctrine, an appellate court employs a two-part standard in which the first part of the analysis involves a review of the historical facts for clear error and a review de novo of the trial court's ultimate conclusion that exigent circumstances were present.[2] Where the facts are largely undisputed, the ultimate question is an issue of law.[3]

[3] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rule 404(2), and the trial court's decision will not be reversed absent an abuse of discretion.[4]

## V. ANALYSIS

Three basic issues are raised in this appeal. First, Salvador Rodriguez asserts that the court should have suppressed the physical evidence found in his home, because it was the fruit of a warrantless search. Second, Salvador Rodriguez argues he was prejudiced by the lack of a limiting instruction concerning what he contends was evidence of prior bad acts within the purview of rule 404. Lastly, Salvador Rodriguez argues there was prosecutorial misconduct during closing arguments when the prosecutor falsely stated Salvador Rodriguez owned the home where he resided.

### 1. Motion to Suppress Evidence Obtained in Warrantless Search

[4] Searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions that must be strictly confined by their justifications.[5] The State has the burden of showing the

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[2] See *State v. Eberly*, 271 Neb. 893, 716 N.W.2d 671 (2006).

[3] *State v. Modlin*, 291 Neb. 660, 867 N.W.2d 609 (2015).

[4] *State v. Parnell*, 294 Neb. 551, 883 N.W.2d 652 (2016).

[5] See, *State v. Rocha*, 295 Neb. 716, 890 N.W.2d 178 (2017); *State v. Perry*, 292 Neb. 708, 874 N.W.2d 36 (2016).

applicability of one or more of the exceptions to the warrant requirement.[6]

[5] In the case of entry into a home, a police officer who has obtained neither an arrest warrant nor a search warrant cannot make a nonconsensual and warrantless entry in the absence of exigent circumstances.[7] The trial court found that the search of the Salvador Rodriguez house was justified by the exigent circumstance of a possible burglary in progress and by being, regardless, consensual.

The question presented on appeal is whether the trial court was correct in determining that the warrantless search was constitutional because a reasonable officer would have believed either that (1) a burglary was in progress or (2) Ezell had authority to consent to the search. The parties do not dispute that if the warrantless search was unreasonable, the court should have suppressed evidence of the items seized during subsequent searches pursuant to warrants based on the items observed during the warrantless search. The parties do not dispute that if the warrantless search was reasonable, any handling of the weapons in plain view in order to ensure officer safety was within the proper scope of the search.

We conclude that the exigent circumstance of a possible burglary in progress justified the warrantless search, and we need not address the alternative basis from the trial court's order that Ezell had authority to consent to the search.

[6] The "'emergency doctrine'" is a category of exigent circumstances.[8] The elements of the emergency doctrine are that (1) the police must have reasonable grounds to believe there is an immediate need for their assistance for the protection of life or property and (2) there must be some reasonable basis to associate the emergency with the area or place to be searched.[9]

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[6] *State v. Perry, supra* note 5.

[7] See *State v. Eberly, supra* note 2.

[8] See *id.* at 900, 716 N.W.2d at 677.

[9] See *id.*

The first element considers whether there were reasonable grounds to find an emergency, and the second element considers the reasonableness of the scope of the search.[10] Salvador Rodriguez focuses only on the first element and argues that reasonable police officers would not have had grounds under these facts to believe there was an immediate need for their assistance for the protection of life or property.

[7-9] An action is reasonable under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances viewed, objectively, justify the action.[11] The presence of an emergency, like probable cause, hinges on the reasonable belief of the officers in light of specific facts and the inferences derived therefrom, not whether, in hindsight, one actually existed.[12] The first element of the emergency doctrine is similar to probable cause and asks whether the facts available to the officer at the moment of entry warranted a person of reasonable caution to believe that entry was appropriate.[13]

[10,11] Courts generally find sufficient exigent circumstances to justify the warrantless entry into a home when a police officer reasonably believes that a burglary is in progress or was recently committed therein.[14] A burglary indicates an immediate need to secure the premises, because it raises the possibility of danger to an occupant and the continued presence of an intruder.[15]

In *State ex rel. Zander v. District Court*,[16] the court found that an officer reasonably believed a burglary might be in progress in a house after a neighbor reported that he knew

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[10] See *id.*

[11] See *id.*

[12] See *id.*

[13] See *State v. Eberly, supra* note 2.

[14] See *id*. See, also, Annot., 64 A.L.R.5th 637 (1998) (and cases cited therein).

[15] See *State v. Eberly, supra* note 2.

[16] *State ex rel. Zander v. District Court*, 180 Mont. 548, 591 P.2d 656 (1979).

no one was at home, he saw someone tampering with a window in the home, and the door to the home was always kept locked. The investigating officer found no signs of tampering at the window, but after knocking on the door and receiving no response, the officer found the door unlocked when he tested the handle.[17] The court concluded it was reasonable for the officer, believing a burglar might be hiding in the house, to search without a warrant those areas of the house where a burglar might be hiding.[18]

In *Hill v. Com.*,[19] the court similarly found that officers reasonably believed a burglar might be in a house that was the subject of a warrantless search. A neighbor reported that the occupant of the house had been out of town for 2 days and that the front door of his house was open. When the officers arrived, they observed that the front door was ajar approximately 12 to 15 inches and that no one answered the door when they rang the doorbell and knocked on the storm door.[20] The court found that under such circumstances, it was reasonable to search without a warrant those places inside the house where a burglar might hide.[21]

The court in *Hill* explained that the situation of a possible burglary in progress required prompt action and an immediate, warrantless entry. It was the officers' duty to determine if the house had been burglarized, to apprehend any burglar, and to resecure the premises.[22] It would have been impractical, the court noted, for one officer to go for a warrant while the other attempted to secure the premises from all sides.[23]

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[17] *Id.*

[18] *Id.*

[19] *Hill v. Com.*, 18 Va. App. 1, 441 S.E.2d 50 (1994). See, also, e.g., *Love v. State*, 290 Ga. App. 486, 659 S.E.2d 835 (2008).

[20] *Hill v. Com., supra* note 19.

[21] *Id.*

[22] *Id.*

[23] *Id.*

In contrast to *State ex rel. Zander* and *Hill*, in *United States v. Selberg*,[24] the court held there were insufficient facts for a reasonable officer to believe that warrantless entry was appropriate. The neighbor who called the police saw the occupant leave the door open when he left, observed that the door remained open the following day, and observed that the occupant's car was still gone. No occupant answered to knocks on the door.[25] The court found that under such facts, the warrantless search of the home was unreasonable.[26]

We find no clear error in the trial court's findings concerning the historical facts. Ezell told Wackler that Salvador Rodriguez and Anguiano, who leased the house, were out of town, and that she and her child were the only occupants in the house before they went for a walk. Ezell told Wackler that when they left for their walk, they turned off all the lights in the house and locked the doors. Ezell told Wackler that when they returned, they saw someone in the garage and all the lights in the house were on. Wackler and Heath confirmed that the lights of the house were on, and they found that the front door of the house was unlocked and not entirely shut.

In our de novo review, we agree with the trial court that these facts, taken together with rational inferences therefrom, reasonably warranted an immediate intrusion of the Salvador Rodriguez house into areas where a burglar might be hiding. The officers had reasonable grounds to believe that there was an emergency requiring an immediate warrantless search of the house. The trial court did not err in overruling Salvador Rodriguez' motion to suppress.

### 2. Drug Use as Prior Bad Act

Salvador Rodriguez' second assignment of error concerns Ezell's testimony that she smoked methamphetamine

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[24] *United States v. Selberg*, 630 F.2d 1292 (8th Cir. 1980). See, *State ex rel. Zander v. District Court, supra* note 16; *Hill v. Com., supra* note 19.

[25] *United States v. Selberg, supra* note 24.

[26] *Id.*

with Salvador Rodriguez and other guests and that Salvador Rodriguez provided the methamphetamine which he kept underneath his basement couch. Salvador Rodriguez argues that the court committed error because the testimony was admitted as intrinsic evidence rather than as other acts evidence admitted for a proper purpose under rule 404(3). Specifically, he argues he was prejudiced by a lack of an instruction to the jury to consider the evidence only for its proper purpose.

[12] We find no error in the trial court's determination that Ezell's testimony was direct evidence of the crime charged and thus outside the purview of rule 404. Rule 404(2) concerns "[e]vidence of other crimes, wrongs, or acts." Other acts under rule 404(2) are acts that are not part of the events giving rise to the present charges.[27]

Salvador Rodriguez was charged with possession of methamphetamine with intent to deliver "on or about" July 30, 2014, the date when officers found methamphetamine underneath Salvador Rodriguez' basement couch. Defense counsel objected to Ezell's testimony that during the summer of 2014, she had observed Salvador Rodriguez in possession of methamphetamine which he kept underneath the basement couch.

[13-16] The phrase "on or about" in an information indicates the date with approximate certainty.[28] Furthermore, the crime of "possession" may extend over a period of time if uninterrupted.[29] Absent language indicating differently, "possession" within a criminal statute contemplates a continuing offense as opposed to a single incident.[30] There is no indication

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[27] *U.S. v. Gorman*, 312 F.3d 1159 (10th Cir. 2002). See *State v. Cullen*, 292 Neb. 30, 870 N.W.2d 784 (2015). See, also, e.g., *U.S. v. Carboni*, 204 F.3d 39 (2d Cir. 2000); *U.S. v. Kinshaw*, 71 F.3d 268 (8th Cir. 1995); *U.S. v. Soliman*, 813 F.2d 277 (9th Cir. 1987); *U.S. v. Fortenberry*, 971 F.2d 717 (11th Cir. 1992).

[28] See *State v. Metzger*, 199 Neb. 186, 256 N.W.2d 691 (1977).

[29] *State v. Williams*, 211 Neb. 650, 319 N.W.2d 748 (1982).

[30] See *id.*

the Legislature intended that possession of methamphetamine should always be a single incident rather than a continuing offense. An offense is continuing if

> "set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy; an offense which continues day by day; a breach of the criminal law, not terminated by a single act or fact, but subsisting for a definite period and intended to cover or apply to successive similar obligations or occurrences."[31]

[17] In *U.S. v. Towne*,[32] the court held that evidence of the defendant's possession of a pistol on days other than the date described in the information charging him with being a felon in unlawful possession of a pistol was not evidence of other acts within the meaning of Fed. R. Evid. 404(b), the federal equivalent to our rule 404(2). The continuous possession of the gun, the court explained, constituted a single offense. And evidence of uncharged criminal activity is not considered "'other crimes'" evidence under that rule if it "'arose out of the same transaction or series of transactions.'"[33]

Justice Cassel in his concurring opinion in *State v. Freemont*[34] discussed several analogous cases holding that evidence of possession on dates other than those specified in the information is direct evidence of the charged crime of possession rather than other acts evidence.[35] The defendant in *Freemont* was charged with second degree murder. In addition,

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[31] *Id.* at 655, 319 N.W.2d at 751, quoting 22 C.J.S. *Criminal Law* § 1 (1961).

[32] *U.S. v. Towne*, 870 F.2d 880 (2d Cir. 1989). Compare *U.S. v. Bowie*, 232 F.3d 923 (D.C. Cir. 2000) (affirmative evidence that is not same item previously observed).

[33] See *U.S. v. Towne, supra* note 32, 870 F.2d at 886.

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

[35] See, *U.S. v. Dorsey*, 677 F.3d 944 (9th Cir. 2012); *U.S. v. Adams*, 604 F.3d 596 (8th Cir. 2010); *United States v. Mitchell*, 613 F.2d 779 (10th Cir. 1980).

he was charged with use and possession of a deadly weapon. Justice Cassel reasoned that evidence that the defendant had been seen a week prior with a gun similar to the one used in the shooting bore directly on an element of the possession charge and therefore was not other acts evidence. Noting that the crime of possession stated in the information was committed "'on or about'" the date specified, he concluded that the evidence of the possession days before was "not so removed in time as to lose its temporal connection to the charged date of possession."[36]

The majority in *Freemont* held that the evidence of the defendant's possession of a gun before the date specified in the information was other acts evidence. But we failed to discuss the concept of continuing possession. We have since explained that our holding in *Freemont* is limited to circumstances where the offense of possession is entirely different from the most serious charged offense.[37] That is not the situation presented here.

We find the reasoning in *Towne*[38] is applicable to this case. Ezell's testimony supports the inference that in July 2014, Salvador Rodriguez gradually consumed with his acquaintances a stash of methamphetamine that he kept in his basement.

In the objected-to testimony, Ezell did not testify that Salvador Rodriguez had committed on unrelated occasions the crime of possession of methamphetamine with intent to deliver, such that he had the character trait of being the type of person who possesses methamphetamine with intent to deliver. Rather, Ezell's testimony was direct evidence that on or about July 30, 2014, Salvador Rodriguez was engaged in a series of transactions constituting the crime of possession of

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[36] *State v. Freemont, supra* note 34, 284 Neb. at 212, 213, 817 N.W.2d at 303, 304 (Cassel, J., concurring).

[37] *State v. Cullen, supra* note 27.

[38] *U.S. v. Towne, supra* note 32.

methamphetamine with intent to deliver. This is not other acts evidence. Ezell's testimony did not require an intermediate propensity inference in order for the trier of fact to have concluded based on that testimony that Salvador Rodriguez committed the crime charged. The court did not err in overruling defense counsel's rule 404 objection.

### 3. Comments in Closing Arguments

[18] Salvador Rodriguez asserts there was prosecutorial misconduct in closing arguments. But the closing arguments were not recorded in the bill of exceptions. It is the law in Nebraska that, where allegedly prejudicial remarks of counsel do not appear in the bill of exceptions, this court is precluded from considering an assigned error concerning such remarks.[39] We mentioned in *State v. Harris*[40] that counsel could have made an offer or proof when closing arguments were not in the record. But here, the only "evidence" of the statements made in closing arguments is an affidavit attached to the motion for new trial in which the defense attorney avers that the factual allegations in the motion are true.

[19,20] It has long been the law of this state that affidavits in support of a motion for new trial must be offered in evidence and preserved in and made a part of a bill of exceptions to be considered by this court.[41] This court will not review testimony in the form of affidavits used in the trial court on the hearing of a motion for new trial, unless such affidavits have been included in and presented by a bill of exceptions.[42]

Salvador Rodriguez argues he was unfairly prejudiced when the prosecutor said in closing arguments that Salvador

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[39] *State v. Harris*, 205 Neb. 844, 290 N.W.2d 645 (1980).

[40] See *id.*

[41] *Metschke v. Department of Motor Vehicles*, 186 Neb. 197, 181 N.W.2d 843 (1970), *overruled on other grounds, State v. Perez*, 235 Neb. 796, 457 N.W.2d 448 (1990).

[42] *Id.*

Rodriguez owned the house where the methamphetamine was found. Defense counsel averred that in his closing arguments, he corrected this and told the jury that Salvador Rodriguez was only a tenant and had no legal ownership in the house. Even assuming the prosecution made the statements alleged, the prosecutor's remarks were not misconduct and Salvador Rodriguez was not prejudiced. The ownership of the house was not decisive of any issue in the case, and there was no allegation that the prosecutor told the jury that ownership of the residence was relevant to the crimes charged. We find no merit to this last assignment of error.

## VI. CONCLUSION

For the foregoing reasons, 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

# Norman Kroemer, appellee, v. Omaha Track Equipment, L.L.C., and The Tie Yard of Omaha, now known as Omaha Track, Inc., appellees, and Ribbon Weld, LLC, appellant.

898 N.W.2d 661

Filed June 16, 2017. No. S-16-856.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Workers' Compensation: Judgments: Appeal and Error.** Distribution of the proceeds of a judgment or settlement under Neb. Rev. Stat. § 48-118.04 (Reissue 2010) is left to the trial court's discretion and reviewed for an abuse of that discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
4. **Workers' Compensation: Subrogation.** Neb. Rev. Stat. § 48-118 (Reissue 2010) grants an employer who has paid workers' compensation benefits to an employee injured as a result of the actions of a third party a subrogation interest against payments made by the third party.
5. **Workers' Compensation.** A settlement of a third-party claim is void under Neb. Rev. Stat. §48-118.04(1) (Reissue 2010) unless the settlement is either agreed upon in writing by the employee and employer or its insurer or determined by the court to be fair and reasonable.
6. **Workers' Compensation: Insurance.** In determining the fairness and reasonableness of a settlement of a third-party claim under the Nebraska Workers' Compensation Act, a court considers liability, damages, and the ability of the third person and his or her liability insurance carrier to satisfy any judgment.
7. **Workers' Compensation: Subrogation.** The policies behind the Nebraska Workers' Compensation Act favor a liberal construction in

favor of an employer's statutory right to subrogate against culpable third parties.

8. **Workers' Compensation: Insurance: Case Disapproved.** *In re Estate of Evertson*, 23 Neb. App. 734, 876 N.W.2d 678 (2016), is disapproved to the extent that the court considered payment of premiums and comparative risk in allocating none of the proceeds of a workers' compensation settlement to the insurer.
9. **Workers' Compensation: Subrogation: Equity.** Although Neb. Rev. Stat. § 48-118.04(2) (Reissue 2010) calls for a fair and equitable distribution, subrogation in workers' compensation cases is based on statute, and not in equity.
10. **Workers' Compensation: Insurance: Equity.** A distribution of the proceeds of a judgment or settlement under Neb. Rev. Stat. § 48-118.04(2) (Reissue 2010) must be fair and equitable to both the employee and the employer or its insurer.

Appeal from the District Court for Douglas County: J Russell Derr, Judge. Affirmed in part, and in part reversed and remanded with direction.

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

Ronald L. Brown, of Brown & Theis, L.L.P., for appellee Norman Kroemer.

Gregory F. Schreiber and Albert M. Engles, of Engles, Ketcham, Olson & Keith, P.C., and, on brief, Brock S.J. Hubert, for appellee Omaha Track Equipment, L.L.C.

Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Cassel, J.

## I. INTRODUCTION

An injured employee proposed to settle his third-party suit for $150,000. His employer, which had a subrogation interest of over $200,000, contested the settlement. The district court determined that the settlement was fair and reasonable but

allocated none of it to the employer. Because of the disputed litigation risk, approval of the settlement was not an abuse of discretion. But under our statutory scheme, the allocation of zero to the employer was legally untenable. We affirm in part and in part reverse, and remand with direction.

## II. BACKGROUND

At the relevant time, Ribbon Weld, LLC, and Omaha Track Equipment, L.L.C. (OTE), were both wholly owned subsidiaries of The Tie Yard of Omaha, now known as Omaha Track, Inc. Ribbon Weld's employees occasionally used OTE's shop to service their equipment and, while doing so, used OTE's tools. Norman Kroemer, a Ribbon Weld employee, sustained an eye injury in connection with the use of OTE's tools at OTE's shop.

Kroemer and Ribbon Weld entered into a compromise lump-sum settlement for $80,000, which the Nebraska Workers' Compensation Court approved. After payment of the lump sum, Ribbon Weld's subrogation interest totaled $207,555.01.

Kroemer then sued OTE, The Tie Yard of Omaha, and Ribbon Weld. The suit alleged negligence. Kroemer made Ribbon Weld a party "for the limited purpose provided by [Neb. Rev. Stat. §] 48-118 [(Reissue 2010)]." OTE asserted numerous affirmative defenses, including comparative negligence. In Ribbon Weld's answer, it asked that any recovery by Kroemer be subject to its subrogation right.

Kroemer and OTE engaged in mediation to settle the third-party claim. Ultimately, they negotiated a compromise settlement of claims in the amount of $150,000. Although Ribbon Weld did not contribute or share in litigation expenses, it contested the proposed settlement.

The district court held a settlement and allocation hearing under Neb. Rev. Stat. § 48-118.04 (Reissue 2010). Kroemer testified about the accident and injury, which occurred as he and a coworker endeavored to cut through a "spot-weld on [an] Allen wrench." Kroemer planned to hold the Allen wrench

and socket with a pair of pliers as his coworker operated a "Milwaukee grinder with the wheel." When Kroemer's coworker started the grinder, the wheel exploded, sending shrapnel into Kroemer's face and left eye. Kroemer was wearing safety glasses but not a face shield. After undergoing three surgeries, Kroemer ultimately sustained a 95-percent loss of vision in his left eye. Due to the injury, Kroemer no longer physically qualified for a commercial driver's license. He returned to work with Ribbon Weld, but had restrictions of light-duty work and no dusty conditions. Ribbon Weld subsequently sold its business, and Kroemer lost his employment a short time later.

The district court received evidence concerning the value of Kroemer's case. One expert opined that "there was a very substantial probability (80%-90%) of a jury verdict for the defendants were the case to proceed to trial." He stated that a jury could have easily determined that Kroemer's comparative fault was greater than 50 percent. Another expert valued Kroemer's claim in the range of $850,000 to $1,250,000, before consideration of comparative negligence. But he also opined that the settlement of $150,000 was in Kroemer's best interests, due to the high probability of a jury verdict for the defendants. Ribbon Weld's expert opined that it was "more than likely (70-80% chance) that a Plaintiff's verdict would be reached," that a jury would likely assess "contributory negligence" in the range of 25 to 35 percent, and that Kroemer would have likely recovered in excess of $500,000 if the case proceeded to trial. Ribbon Weld's expert believed that the settlement was inadequate given the value of the case and that the settlement appeared to have been accepted with the intention of no, or very minimal, payback to Ribbon Weld of the subrogation amount.

The district court determined that the settlement of $150,000 was reasonable. It made the following allocation: $94,834.27 to Kroemer, $55,165.73 for attorney fees and expenses, and $0 to Ribbon Weld.

Ribbon Weld appealed, and we granted its petition to bypass review by the Nebraska Court of Appeals. We subsequently ordered supplemental briefing, which we have considered in resolving this appeal.

## III. ASSIGNMENTS OF ERROR

Ribbon Weld assigns that the district court erred in (1) finding the settlement to be fair and reasonable and (2) finding that an allocation of $0 to Ribbon Weld was fair and equitable.

## IV. STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[1]

[2,3] Distribution of the proceeds of a judgment or settlement under § 48-118.04 is left to the trial court's discretion and reviewed for an abuse of that discretion.[2] A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.[3]

## V. ANALYSIS

### 1. Overview

[4,5] We first set forth two principles of law under the Nebraska Workers' Compensation Act (the Act).[4] First, § 48-118 grants an employer who has paid workers' compensation benefits to an employee injured as a result of the actions of a third party a subrogation interest against payments made by the third party.[5] Second, a settlement of a third-party claim

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[1] *Estermann v. Bose, ante* p. 228, 892 N.W.2d 857 (2017).

[2] *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007).

[3] *Id.*

[4] Neb. Rev. Stat. §§ 48-101 to 48-1,117 (Reissue 2010 & Cum. Supp. 2016).

[5] *Burns v. Nielsen, supra* note 2.

is void under § 48-118.04(1) unless the settlement is either agreed upon in writing by the employee and employer (or its insurer) or determined by the court to be fair and reasonable. We now turn to the assigned errors.

### 2. Fairness and Reasonableness of Settlement

[6] Ribbon Weld first challenges the amount of the settlement. In determining the fairness and reasonableness of a settlement of a third-party claim under the Act, the court considers "liability, damages, and the ability of the third person and his or her liability insurance carrier to satisfy any judgment."[6] We examine these factors in reverse order.

#### (a) Ability to Satisfy Judgment

The record does not contain much evidence as to OTE's ability to satisfy the judgment. Kroemer testified that the proposed settlement of $150,000 did not reflect the limits of OTE's insurance policy. Accordingly, the ability of OTE and its liability insurance carrier to pay was not an impediment to a greater settlement.

#### (b) Damages

The estimated damages in this case were significant. Kroemer sustained a 95-percent loss of vision in his left eye. Kroemer's expert valued Kroemer's claim between $850,000 to $1,250,000. Ribbon Weld's expert agreed with an assessment of damages set forth in a demand letter valuing the case at $858,989.86.

#### (c) Liability

Under the facts of this case, the deciding factor on the reasonableness of the settlement is the issue of liability. Kroemer's two experts opined that there was a high probability

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[6] § 48-118.04(1)(b).

of a jury verdict in favor of OTE. Ribbon Weld's expert, on the other hand, opined that it was "more than likely" a jury would return a verdict in Kroemer's favor and that the jury would assess contributory negligence in the range of 25 to 35 percent.

Evidence reflected negligence on Kroemer's part. Kroemer planned to hold the Allen wrench with pliers because the vice on the table was in use. He knew that using the vice would have been safer, and he testified that he would not have been injured if a vice were used. Kroemer believed Ribbon Weld's rules or regulations required use of safety glasses and a face shield when using a hand grinder. But he was not wearing a face shield. As the supervisor, it was Kroemer's responsibility to make sure his crew wore safety glasses and face shields. Kroemer testified that when a member of his crew used a hand grinder, a guard was required to be affixed to the grinder. He did not recall seeing a Ribbon Weld grinder without a guard. A guard protects the operator from being struck by flying debris generated from using the grinder. But the grinder selected by Kroemer's coworker did not have a guard.

Other evidence lessened the effect of Kroemer's own negligence. On an earlier occasion, an OTE shop foreman told Kroemer that OTE employees used the same grinder without a guard. That foreman also told Kroemer that they used a 7-inch wheel on a 4-inch grinder. Although a person using a hand grinder should wear a face shield, Kroemer was not the person doing the grinding. Further, Kroemer did not select the grinder. And Ribbon Weld points out that a guard may not have prevented the injury because Kroemer was injured as a result of the tool's exploding—not by any debris resulting from grinding. Kroemer testified that it was possible he would have been injured even if the grinder had a guard, but that his injury would have been less likely if the grinder had a guard.

(d) Resolution

After consideration of the relevant factors, we cannot say that the district court abused its discretion in finding the settlement to be fair and reasonable. Although there was potential for a large verdict in Kroemer's favor, he accepted a greatly reduced settlement due to concerns that he would receive nothing if a jury determined that his comparative negligence was 50 percent or more. We cannot fault him for declining to take this gamble.

3. Allocation of Settlement Proceeds

Ribbon Weld argues that the district court abused its discretion in allocating none of the proceeds of Kroemer's $150,000 settlement to Ribbon Weld. We observe at the outset that Ribbon Weld does not contend the court abused its discretion in awarding $55,165.73 for attorney fees and expenses. At the hearing, Ribbon Weld's counsel stated that "whatever the settlement level is, we do believe that it was obtained by [Kroemer's counsel], and attorney fees and costs are simply not an issue in this case." Thus, our review in this case focuses on the allocation of $94,834.27 to Kroemer and of $0 to Ribbon Weld.

(a) Overview

When an employee injured as a result of a third person's tortious conduct receives compensation from his or her employer and from the tort-feasor, an issue arises as to how to divide any proceeds obtained from the third party. "The obvious disposition of the matter is to give the employer so much of the negligence recovery as is necessary to reimburse it for its compensation outlay, and to give the employee the excess."[7]

[7] 10 Arthur Larson et al., Larson's Workers' Compensation Law § 110.02 at 110-3 (2016).

Doing so prevents a double recovery by the employee. "Under most subrogation statutes the payor of compensation gets reimbursement for the amount of its expenditure as a first claim upon the proceeds of the third-party recovery, and the employee gets the excess."[8] But since 1994, our Legislature has rejected that approach. Our statute clearly mandates that proceeds in excess of the employer's subrogation interest must be paid forthwith to the employee.[9] But how the remaining proceeds should be divided does not automatically allocate first claim to the employer.

At least two states have statutes that reject the employer-first approach and yet provide for a fully or partially guaranteed allocation to the employee. Wisconsin mandates that after deducting the reasonable cost of collection, the injured employee receives, at a minimum, one-third of the amount recovered.[10] In Georgia, a statute provides that an employer or insurer may recover on its subrogation lien only "if the injured employee has been fully and completely compensated, taking into consideration both the benefits received under this chapter and the amount of the recovery in the third-party claim, for all economic and noneconomic losses incurred as a result of the injury."[11] We have described the latter concept as the "made whole" doctrine.[12]

Nebraska's current statute rejects both the "first claim" and the "made whole" doctrines. Under § 48-118.04(2), the trial court is required to "order a fair and equitable distribution of the proceeds of any judgment or settlement." The distribution is left to the court's discretion and "simply requires the court to determine a reasonable division of the proceeds among the

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[8] *Id.*, § 117.01[1] at 117-2.

[9] See § 48-118.

[10] See Wis. Stat. Ann. § 102.29(1)(b) (West Cum. Supp. 2016).

[11] Ga. Code Ann. § 34-9-11.1(b) (2008).

[12] See *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006).

parties."[13] Prior to a 1994 amendment to § 48-118,[14] "employers and insurers were subrogated 'dollar for dollar' in any recovery against a third-party tort-feasor."[15] But through the amendment, employers and insurers were "subrogated for the amount judicially determined to be a fair and equitable division of the settlement under the circumstances."[16] We have determined that "[t]here is no indication, either in the statutory language or the legislative history, that § 48-118.04 was intended to infringe on the right of subrogation guaranteed by § 48-118 beyond the extent necessary to effectuate a reasonable settlement."[17] We have also stated that a fair and equitable distribution does not require that an employee be "made whole" or that tort proceeds be split proportionately.[18]

(b) *Bacon v. DBI/SALA*

[7] We discussed the purposes of the Act vis-a-vis workers' compensation subrogation in *Bacon v. DBI/SALA*.[19] We explained that "the beneficent purposes of the Act concern the employee's ability to promptly obtain workers' compensation benefits—not the employee's ability to additionally retain recovery against negligent third parties in tort actions."[20] We found "no reason to conclude that the beneficent purposes of the Act require us to narrowly interpret the employer's statutory subrogation rights."[21] Rather, we determined that "the

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[13] See *Burns v. Nielsen, supra* note 2, 273 Neb. at 735, 732 N.W.2d at 650.

[14] See 1994 Neb. Laws, L.B. 594.

[15] *Turney v. Werner Enters.*, 260 Neb. 440, 446, 618 N.W.2d 437, 441 (2000).

[16] *Id.* at 446, 618 N.W.2d at 442.

[17] *Burns v. Nielsen, supra* note 2, 273 Neb. at 732, 732 N.W.2d at 648.

[18] See *Turco v. Schuning, supra* note 12.

[19] *Bacon v. DBI/SALA*, 284 Neb. 579, 822 N.W.2d 14 (2012).

[20] *Id.* at 588, 822 N.W.2d at 24.

[21] *Id.*

policies behind the Act favor a liberal construction in favor of the employer's statutory right to subrogate against culpable third parties."[22] In an effort to balance the rights of injured employees against the costs to employers, most workers' compensation acts "liberally allow employers to shift liability onto third parties whenever possible."[23] We iterated that "§ 48-118 was enacted 'for the benefit of the employer'"[24] and that where a third party negligently causes the employee's injury, "'employers who are required to compensate employees for injuries are intentionally granted a measure of relief equivalent to the compensation paid and the expenses incurred.'"[25]

(c) *In re Estate of Evertson*

Recently, the Court of Appeals affirmed an allocation of zero to a workers' compensation carrier in *In re Estate of Evertson*.[26] In that case, the carrier claimed a subrogation interest in the entire $250,000 settlement allocated to the victim's surviving spouse. The county court found that a fair and equitable distribution was for the spouse to receive $207,416.69, for the attorneys to receive $42,583.31, and for the carrier to receive nothing.

In affirming the county court's distribution, the Court of Appeals set out the factors considered by the county court. The Court of Appeals noted that the county court considered the victim's lengthy marriage and "factors such as that [the workers' compensation carrier] had charged and received the necessary premiums to provide workers' compensation coverage . . . and that under all the circumstances, [the workers' compensation carrier's] financial risk was minimal and

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[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *In re Estate of Evertson*, 23 Neb. App. 734, 876 N.W.2d 678 (2016), *vacated on other grounds* 295 Neb. 301, 889 N.W.2d 73.

insurance companies are in the business of assuming risk."[27] The Court of Appeals disagreed with the carrier's "assessment that the county court was considering an equitable assessment in considering there was no evidence that [the workers' compensation carrier] helped finance the settlement."[28] Instead, the Court of Appeals stated that "the county court's language indicates that the court was considering that [the workers' compensation carrier] did not expend any funds in securing the settlement."[29] Ultimately, the Court of Appeals could not say that the county court abused its discretion in distributing the settlement proceeds.

We granted further review in *In re Estate of Evertson*. But because we determined that the county court lacked subject matter jurisdiction to hear and decide the subrogation matter, we did not reach the merits of the appeal—which included the carrier's assignment that the Court of Appeals erred in affirming a distribution that was not fair and equitable.[30]

In the instant case, the district court clearly relied on the Court of Appeals' decision in *In re Estate of Evertson* in making its distribution. After reciting the above-quoted language from *In re Estate of Evertson*, the court stated that it considered the nature of Kroemer's loss, the substantial damages he suffered, the insurer's charging and receiving a premium of nearly $175,000 for the insurance coverage, and the "comparative risk to the insurance carrier versus Kroemer." But neither the district court in the instant case nor the Court of Appeals in *In re Estate of Evertson* considered the effect of our decision in *Bacon*.

The reasoning in *In re Estate of Evertson* is flawed for several reasons. First, the payment of premiums for workers'

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[27] *Id.* at 741, 876 N.W.2d at 684.

[28] *Id.*

[29] *Id.*

[30] See *In re Estate of Evertson*, 295 Neb. 301, 889 N.W.2d 73 (2016).

compensation coverage is not an appropriate factor to consider in distributing proceeds recovered from a third party. "The . . . Act requires, with few exceptions, that every employer carry workers' compensation insurance."[31] Thus, an employer (or its insurer) should not be stripped of its statutory subrogation right for obtaining such insurance.

Second, the comparative risk between an insurance company and employee is likewise an inappropriate factor. Every insurance company is in the business of assuming risk. Consideration of this factor would nearly always elevate the employee's right to the proceeds over that of the employer or its insurer.

Third, in making a distribution of the recovery, consideration of an employer's or its insurer's participation in obtaining the settlement is suspect. The statutes give the employer or its insurer the option to actively prosecute its subrogation claim or to allow the employee to prosecute the claim and then obtain a portion of the recovery and share in the expenses.[32] An employer's (or its insurer's) right to reimbursement is preserved even if it selects the latter option.

Fourth, the county court and Court of Appeals gave short shrift to the right of the employer or its insurer to recover on its subrogation interest. We have stated that § 48-118 "encourag[es] prompt payment of benefits, even when a third party is liable for the injury, by providing an employer or insurer with the means to recover at least a portion of its payout."[33] The lower courts in *In re Estate of Evertson* did not allow the insurer to recover any of its payout. Frankly, it is difficult to imagine a situation in which an allocation of $0 to an employer or insurer with a sizable

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[31] *Travelers Indemnity Co. v. International Nutrition*, 273 Neb. 943, 945, 734 N.W.2d 719, 722 (2007).

[32] See, generally, §§ 48-118 to 48-118.03 (Reissue 2010).

[33] *Burns v. Nielsen, supra* note 2, 273 Neb. at 733, 732 N.W.2d at 649.

subrogation interest would be a fair and equitable distribution of proceeds.

[8] We disapprove the Court of Appeals' decision in *In re Estate of Evertson*[34] to the extent that the court considered payment of premiums and comparative risk in allocating none of the proceeds of the settlement to the insurer.

(d) Distribution in Instant Case

[9] The district court's distribution in this case ignored Ribbon Weld's statutory right to subrogation. Under § 48-118, Ribbon Weld is entitled to "reimbursement, under the right of subrogation, of any compensation paid." Instead, the court allocated nothing to Ribbon Weld. Although the court did not explicitly use "made whole" language, it essentially applied a "made whole" formulation when it denied Ribbon Weld any recovery. We have found error when a trial court concluded that the worker had to be "made whole" before the subrogated compensation carrier was entitled to any portion of the settlement.[35] And although the statute calls for a "fair and equitable distribution,"[36] subrogation in workers' compensation cases is based on statute, and not in equity.[37]

[10] The district court appeared to focus on a distribution that would be equitable only to Kroemer. But the distribution must be "fair and equitable"[38] to both the employee and the employer or its insurer. Although Kroemer's damages may have been worth over $800,000, Ribbon Weld paid over $200,000 in workers' compensation benefits to Kroemer for an accident for which OTE was liable. Ribbon Weld was

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[34] *In re Estate of Evertson, supra* note 26.

[35] See *Turco v. Schuning, supra* note 12. See, also, *Sterner v. American Fam. Ins. Co.*, 19 Neb. App. 339, 805 N.W.2d 696 (2011).

[36] § 48-118.04(2).

[37] See *Burns v. Nielsen, supra* note 2.

[38] § 48-118.04(2).

entitled to some portion of Kroemer's settlement with OTE. The court's denial of the same was untenable and must be reversed. But we review a district court's allocation for abuse of discretion, and thus, it is not for us to dictate a fair and equitable distribution in the first instance.

## VI. CONCLUSION

Under the circumstances, the district court did not abuse its discretion in determining that the amount of Kroemer's settlement with OTE was fair and reasonable. We affirm that part of the court's order. But we conclude that the district court did abuse its discretion in not allocating any of the settlement proceeds to Ribbon Weld. Accordingly, we reverse that portion of the court's order and remand the cause to the district court with direction to make a fair and equitable distribution between Kroemer and Ribbon Weld of the remaining $94,834.27 of the settlement proceeds.

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

Heavican, C.J., not participating.

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