

THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

SEPTEMBER 4, 2020 and DECEMBER 17, 2020

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS
VOLUME CCCVII

PEGGY POLACEK
OFFICIAL REPORTER

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SUPREME COURT
DURING THE PERIOD OF THESE REPORTS

MICHAEL G. HEAVICAN, Chief Justice
LINDSEY MILLER-LERMAN, Associate Justice
WILLIAM B. CASSEL, Associate Justice
STEPHANIE F. STACY, Associate Justice
JEFFREY J. FUNKE, Associate Justice
JONATHAN J. PAPIK, Associate Justice
JOHN R. FREUDENBERG, Associate Justice

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

FRANKIE J. MOORE, Chief Judge¹
MICHAEL W. PIRTLE, Chief Judge²
FRANKIE J. MOORE, Associate Judge³
MICHAEL W. PIRTLE, Associate Judge⁴
FRANCIE C. RIEDMANN, Associate Judge
RIKO E. BISHOP, Associate Judge
DAVID K. ARTERBURN, Associate Judge
LAWRENCE E. WELCH, JR., Associate Judge

PEGGY POLACEK Reporter
WENDY WUSSOW Clerk
COREY STEEL State Court Administrator

¹Until September 12, 2020

²As of September 13, 2020

³As of September 13, 2020

⁴Until September 12, 2020

JUDICIAL DISTRICTS AND DISTRICT JUDGES

First District

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

<i>Judges in District</i>	<i>City</i>
Vicky L. Johnson	Wilber
Ricky A. Schreiner	Beatrice
Julie D. Smith	Tecumseh

Second District

Counties in District: Cass, Otoe, and Sarpy

<i>Judges in District</i>	<i>City</i>
George A. Thompson	Papillion
Michael A. Smith	Plattsmouth
Stefanie A. Martinez	Papillion
Nathan B. Cox	Papillion

Third District

Counties in District: Lancaster

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

Fourth District

Counties in District: Douglas

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

Fifth District

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

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

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Sixth District

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

<i>Judges in District</i>	<i>City</i>
John E. Samson	Blair
Geoffrey C. Hall	Fremont
Bryan C. Meismer	Hartington

Seventh District

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

<i>Judges in District</i>	<i>City</i>
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

<i>Judges in District</i>	<i>City</i>
Mark D. Kozisek	Ainsworth
Karin L. Noakes	St. Paul

Ninth District

Counties in District: Buffalo and Hall

<i>Judges in District</i>	<i>City</i>
Mark J. Young	Grand Island
John H. Marsh	Kearney
Ryan C. Carson	Kearney
Andrew C. Butler	Grand Island

Tenth District

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

<i>Judges in District</i>	<i>City</i>
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

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

Twelfth District

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

<i>Judges in District</i>	<i>City</i>
Leo P. Dobrovolny	Gering
Derek C. Weimer	Sidney
Travis P. O’Gorman	Alliance
Andrea D. Miller	Gering

JUDICIAL DISTRICTS AND COUNTY JUDGES

First District

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

<i>Judges in District</i>	<i>City</i>
Curtis L. Maschman	Falls City
Steven B. Timm	Beatrice
Linda A. Bauer	Fairbury

Second District

Counties in District: Cass, Otoe, and Sarpy

<i>Judges in District</i>	<i>City</i>
Robert C. Wester	Papillion
Todd J. Hutton	Papillion
PaTricia A. Freeman	Papillion
David J. Partsch	Nebraska City

Third District

Counties in District: Lancaster

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

Fourth District

Counties in District: Douglas

<i>Judges in District</i>	<i>City</i>
Marcena M. Hendrix	Omaha
Darryl R. Lowe	Omaha
John E. Huber	Omaha
Jeffrey L. Marcuzzo	Omaha
Craig Q. McDermott	Omaha
Marcela A. Keim	Omaha
Sheryl L. Lohaus	Omaha
Thomas K. Harmon	Omaha
Derek R. Vaughn	Omaha
Stephanie R. Hansen	Omaha
Stephanie S. Shearer	Omaha
Grant A. Forsberg	Omaha

Fifth District

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

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

JUDICIAL DISTRICTS AND COUNTY JUDGES

Sixth District

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

<i>Judges in District</i>	<i>City</i>
Douglas L. Luebe	Hartington
Kenneth J. Vampola	Fremont
Francis W. Barron III	Blair

Seventh District

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

<i>Judges in District</i>	<i>City</i>
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

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

Ninth District

Counties in District: Buffalo and Hall

<i>Judges in District</i>	<i>City</i>
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

<i>Judges in District</i>	<i>City</i>
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

<i>Judges in District</i>	<i>City</i>
Kent D. Turnbull	North Platte
Edward D. Steenburg	Ogallala
Anne M. Paine	McCook
Jeffrey M. Wightman	Lexington
Joel B. Jay	North Platte

Twelfth District

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

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

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

Douglas County

<i>Judges</i>	<i>City</i>
Vernon Daniels	Omaha
Matthew R. Kahler	Omaha
Chad M. Brown	Omaha
Mary M. Z. Stevens	Omaha
Amy N. Schuchman	Omaha
Candace J. Novak	Omaha

Lancaster County

<i>Judges</i>	<i>City</i>
Roger J. Heideman	Lincoln
Reggie L. Ryder	Lincoln
Elise M. W. White	Lincoln

Sarpy County

<i>Judges</i>	<i>City</i>
Lawrence D. Gendler	Papillion
Robert B. O'Neal	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

<i>Judges</i>	<i>City</i>
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 306

OSCAR ORLANDO AGUILAR
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MAXWELL DONALD
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TROY PATRICK ANDERSON
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BRIAN BARMETTLER
TYLER WILLIAM BARNARD
SYLVIA BARTELL
ALEXANDRIA M. BARTELS
KIMBERLY MICHELLE BARTON
GABREAL MICHAEL
BELCASTRO
SHAINA DeNAE BERGT
ASHLEY ROSE BEUKENHORST
NICHOLAS JAMES MIRANDA
BLACKHAM
TERYN RENE BLESSIN
JACQUELINE JEANETTE
BOSSMAN
SARAH NICOLE BOSTON
MAGGIE LYN BROKAW
ISABELLE ANNE BUHR
ALISSA BUMGARDNER
COLE STANLEY BURMEISTER
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THOMAS JOHN CHVALA
COY T. CLARK
TIMOTHY MICHAEL COFFEY
CAREY D. COLLINGHAM
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RACHEL NICHOLE COLLINS

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KAYLA KENNEDY DIEKER
EMILY DOWDLE
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AMANDA KAY ESCOBAR
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DEVON FOX
MARK JOSEPH FOXALL
ERICK J. FREDERICK
AGNIESZKA MALGORZATA
GAERTNER
THOMAS BENNETT GAGE
JESSICA LYNNE GILGOR
SARAH MARGARET GORSCHÉ
ZACHARY KENT GRAY
DANIEL JOSEPH GRECO
SARAH MICHAEL HAMMOND
NICHOLAS JEFFERY HANDRICH
KATHERINE VICTORIA
HANLEY SCHOFIELD
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MARY CATHERINE MIKULS
HATTIE KATHRYN MILLER
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KIANNA LEORA MOORE
MERSADIE RENAE MOORE
SARAH JANE MOORE
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JACOB KYLE NEWMAN
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ERIN JOY OLSEN
COOPER JAMES OVERCASH
AMANDA LEIGH PALMER
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ANDREW VINCENT PENRY
RENAE ELIZABETH
 PEREZ-MUSEKAMP
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KLANCY MARTIN PETERSON
MATTHEW W. PICKENS
MICHAEL THOMAS PIRNIE
BRIANNA LEE POPPERT
ELLEN PATRICIA PROCHASKA
NOAH BURNS RASMUSSEN
MALLORY RECHTENBACH
CARTER ERIK REED
KATHERINE ANN REHAN
DEREK ROBERT REUTER
MARKO RIBAR
STEPHANIE RICHARDS
NATASHA MARIE RIGGLEMAN
SAMANTHA MICHELE ROBB
MICHAEL JOSEPH ROPELLA
SHELBY TAYLOR ANNE
 ROWAN
HELEN E. RUSSELL
VEMEXI TERESA RUIZ DE
 CHAVEZ
HILARY JACQUELINE SAYRE
NATHAN CHRISTOPHER
 SCHAAD
AMBER LYNN SCHLOTE
ROBERT CURTIS SCHMIDT

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ALEXANDER KIRK SHANER	WURDEMAN
JOSIAH JAMES SHANKS	MADISON J. WURTELE
JOHN PHILLIP SIGMON	HANNES DAVID ZETZSCHE
JORDYN NIKOLE SINDT	
JACKSON LOUIS SLECHTA	
BENJAMIN JAMES SMITH	
ELIZABETH A. SMITH	
ANDREA HUNTER SNOWBALL	
CAROLINE ELIZABETH SOJKA	
ANDREW RAYMOND SPADER	
HARRISON ZACHARY SPECTOR	
RUSSELL JENNINGS SPRAGUE	
LUKE RYDEN STENARD	
ELIZABETH ANNE STEVENSON	
JACKSON EDWARD STOKES	
RYAN MICHAEL SUMP	
ALEXANDER DAVID SYCHER	
JON MICHAEL THOMAS	
DIANE KIKUYE UCHIMIYA	
TREVOR LEE VANDER KAMP	
DAVID OGDEN VOLENTINE	
MACKENZIE MARTIN	
WALDRON	
JAMEL JEWELL WALKER	
JOSHUA ALAN WALTJER	
AMANDA WEBER	
COYREEN R WEIDNER	
SARAH ANN WETZEL	
REILLY MARIE WHITE	
ANDREW R WILKINSON	
BENJAMIN DANIEL WILLIAMS	
JOSEPH FRANCIS WILLMS	
MIKAELA MARIE	
WITHERSPOON	
KRISTYN MICHU NAKAGAKI	
WONG	

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LIST OF CASES DISPOSED OF
BY FILED MEMORANDUM OPINION

No. S-18-583: **Henry A. Schulz Irrevocable Trust v. National Union Fire Ins. Co.** Affirmed in part, and in part reversed and remanded for further proceedings. Cassel, J.

No. S-19-1057: **Minardi v. Kettelhut.** Affirmed. Stacy, J.

No. S-20-083: **Millard Gutter Co. v. Liberty Mut. Ins. Co.** Vacated and remanded. Freudenberg, J.

No. S-20-142: **Stephenson v. Shoecraft.** Affirmed. Per Curiam. Stacy, J., not participating.

LIST OF CASES DISPOSED OF
WITHOUT OPINION

No. S-20-055: **State v. Campbell**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-20-123: **State v. Steele**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-20-197: **Travelers Cas. Ins. Co. v. North Central Serv.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-20-204: **Lefler v. North Central Serv.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-20-365: **State v. Leon**. Stipulation between parties for summary reversal allowed. See § 2-107(C). District court's denial of "Motion to Reinstate Appeal" reversed and cause remanded for evidentiary hearing.

No. S-20-382: **State v. Valdez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-20-682: **State v. Britt**. Motion of appellee for summary dismissal sustained; appeal dismissed. See § 2-107(B)(1).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. S-11-626: **State ex rel. Counsel for Dis. v. Crawford**, 285 Neb. 321 (2013). Petition of respondent for further review denied on November 13, 2020. See § 2-102(F).

No. A-18-975: **Applied Underwriters v. Pufall**. Petition of appellant for further review denied on October 13, 2020.

No. A-18-1082: **State v. McSwine**. Petition of appellant for further review denied on October 15, 2020.

No. A-18-1097: **State v. Barber**, 28 Neb. App. 820 (2020). Petition of appellant for further review denied on November 4, 2020.

No. A-19-181: **Lauer v. Golden Living Center**, 28 Neb. App. 729 (2020). Petition of appellee for further review denied on October 20, 2020.

No. A-19-380: **Moss v. Associated Underwriters**, 28 Neb. App. 739 (2020). Petition of appellant for further review denied on November 24, 2020.

No. A-19-383: **State v. Edwards**, 28 Neb. App. 893 (2020). Petition of appellee for further review denied on November 9, 2020.

No. A-19-430: **State v. Jenkins**, 28 Neb. App. 931 (2020). Petition of appellant for further review denied on December 9, 2020.

No. A-19-642: **State v. Stone**. Petition of appellant for further review denied on October 19, 2020.

No. A-19-643: **State v. Cavitte**, 28 Neb. App. 601 (2020). Petition of appellant for further review denied on September 15, 2020.

No. A-19-647: **State v. Washburn**. Petition of appellant for further review denied on September 25, 2020.

No. A-19-664: **State v. Williams**. Petition of appellant for further review denied on October 6, 2020.

No. A-19-720: **State v. Kandler**. Petition of appellant for further review denied on October 9, 2020.

No. A-19-721: **Williams v. Frakes**. Petition of appellant for further review denied on September 3, 2020, as untimely.

No. A-19-783: **Beran v. Nebraska Ortho. & Sports Medicine**, 28 Neb. App. 686 (2020). Petition of appellant for further review denied on November 13, 2020.

PETITIONS FOR FURTHER REVIEW

No. A-19-806: **State v. Keenan**, 28 Neb. App. 575 (2020), *modified on denial of rehearing* 28 Neb. App. 697. Petition of appellee for further review denied on September 14, 2020.

Nos. A-19-841, A-19-842: **In re Gale L. Tuttle Revocable Trust**. Petitions of appellee for further review denied on August 31, 2020.

No. A-19-965: **State v. Taylor**. Petition of appellant for further review denied on October 8, 2020.

No. A-19-1013: **In re Interest of Amelia C. & Anaya C.** Petition of appellant for further review denied on October 15, 2020.

No. A-19-1040: **State v. Watkins**. Petition of appellant for further review denied on October 13, 2020.

No. A-19-1046: **State v. Lonowski**. Petition of appellant for further review denied on September 25, 2020.

No. A-19-1058: **Weaver v. Weaver**, 28 Neb. App. 716 (2020). Petition of appellee for further review denied on September 4, 2020, as premature.

No. S-19-1058: **Weaver v. Weaver**, 28 Neb. App. 716 (2020). Petition of appellee for further review sustained on October 7, 2020.

No. A-19-1066: **State v. Ross**. Petition of appellant for further review denied on December 8, 2020.

No. A-19-1106: **State v. Sundberg**. Petition of appellant for further review denied on October 7, 2020.

No. A-19-1140: **David W. v. Elise B.** Petition of appellant for further review denied on October 9, 2020, as untimely.

No. A-19-1155: **State v. Moss**. Petition of appellant for further review denied on October 15, 2020.

No. A-19-1184: **State v. Wabashaw**. Petition of appellant for further review denied on September 18, 2020.

No. A-19-1185: **State v. Mallory**. Petition of appellant for further review denied on November 6, 2020.

Nos. A-19-1209, A-19-1211, A-19-1213: **State v. Sampson**. Petitions of appellant for further review denied on August 31, 2020.

No. A-19-1227: **Applied Underwriters v. Hotcakes Express**. Petition of appellant for further review denied on October 5, 2020.

No. A-20-076: **Davis v. Frakes**. Petition of appellant for further review denied on August 31, 2020.

No. A-20-106: **Applied Underwriters v. Abel Mendoza, Inc.** Petition of appellant for further review denied on October 13, 2020.

No. A-20-116: **Barber v. Boyd**. Petition of appellant for further review denied on August 31, 2020.

No. A-20-138: **State v. Yarns**. Petition of appellant for further review denied on October 29, 2020.

PETITIONS FOR FURTHER REVIEW

No. A-20-147: **State v. Burhan**. Petition of appellant for further review denied on October 28, 2020.

No. A-20-158: **State v. Killough**. Petition of appellant for further review denied on September 14, 2020.

No. A-20-164: **State v. Nagel**. Petition of appellee for further review denied on October 13, 2020.

No. A-20-216: **State v. Mullen**. Petition of appellant pro se for further review denied on October 22, 2020.

No. A-20-219: **State v. Robinson**. Petition of appellant for further review denied on November 24, 2020.

No. A-20-223: **Tyler v. Tyler**. Petition of appellant for further review denied on October 7, 2020.

No. A-20-227: **Williams v. Wilhelm**. Petition of appellant for further review denied on September 14, 2020.

No. A-20-248: **Lyle v. Frakes**. Petition of appellant for further review denied on September 14, 2020.

No. A-20-260: **Muhammad v. Frakes**. Petition of appellant for further review denied on October 7, 2020.

No. A-20-276: **State v. Andera**. Petition of appellant for further review denied on September 15, 2020.

Nos. A-20-278 through A-20-280: **In re Interest of Alexa M. et al.** Petitions of appellant for further review denied on December 8, 2020.

No. A-20-298: **State v. Grueso**. Petition of appellant for further review denied on October 5, 2020.

Nos. A-20-343, A-20-344: **State v. Terry**. Petitions of appellant for further review denied on October 29, 2020.

No. A-20-352: **State v. Davis**. Petition of appellant for further review denied on November 16, 2020.

No. A-20-423: **State v. Thompson**. Petition of appellant for further review denied on December 3, 2020.

No. A-20-424: **State v. Degarmo**. Petition of appellant for further review denied on October 27, 2020.

No. A-20-444: **Muhammad v. Frakes**. Petition of appellant for further review denied on October 23, 2020.

No. A-20-452: **State v. Barrow**. Petition of appellant for further review denied on October 2, 2020.

No. A-20-477: **State v. Miller**. Petition of appellant for further review denied on November 30, 2020.

No. A-20-500: **In re Interest of Bryan B.** Petition of appellant for further review denied on October 20, 2020.

PETITIONS FOR FURTHER REVIEW

No. A-20-525: **State v. Romero**. Petition of appellant for further review denied on November 10, 2020.

No. A-20-552: **Buckley v. Buckley**. Petition of appellant for further review denied on October 7, 2020, for failure to comply with § 2-102(F)(1).

No. A-20-561: **State v. Lyle**. Petition of appellant for further review denied on November 25, 2020.

No. A-20-608: **Goodwin v. Goodwin**. Petition of appellant for further review denied on October 16, 2020, for failure to comply with § 2-102(F)(1).

No. A-20-673: **State v. Jones**. Petition of appellant for further review denied on November 24, 2020.

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

STATE OF NEBRASKA ON BEHALF OF TINA K., AS
MOTHER AND NEXT FRIEND OF DESTINY B., A MINOR
CHILD, APPELLEE, v. ADAM B., THIRD-PARTY
PLAINTIFF, APPELLEE, TINA K., THIRD-PARTY
DEFENDANT, APPELLANT, AND JO K.,
INTERVENOR-APPELLEE.

948 N.W.2d 182

Filed September 4, 2020. No. S-19-448.

1. **Constitutional Law: Parental Rights.** Parents have a fundamental right to make decisions concerning the care, custody, and control of their children that is constitutionally protected.
2. **Constitutional Law: Parent and Child.** Establishment and continuance of the parent-child relationship is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic constitutional rights.
3. **Child Custody: Parent and Child: Presumptions.** The parental preference principle establishes a rebuttable presumption that the best interests of the child are served by placing custody of a minor child with his or her parent.
4. **Child Custody: Parental Rights: Proof.** Under the parental preference principle, absent proof that a parent is unfit or has forfeited the right to custody, a parent may not be deprived of the custody of a minor child.
5. **Child Custody: Parental Rights.** While the best interests of the child remain the lodestar of child custody disputes, a parent's superior right to custody must be given its due regard, and absent its negation, a parent retains the right to custody over his or her child.
6. **Parent and Child: Words and Phrases.** Parental unfitness means a personal deficiency or incapacity that has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and that has caused, or probably will result in, detriment to a child's well-being.

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7. **Parent and Child: Evidence.** Evidence of parental unfitness should be focused upon a parent's ability to care for a child, and not any other moral failings a parent may have. Evidence of a parent's past failings is pertinent only insofar as it suggests present or future faults.
8. **Parental Rights.** Parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection.
9. **Child Custody: Parental Rights: Proof.** Clear and convincing evidence of substantial, continuous, and repeated neglect of a child must be shown in order to overcome the parent's superior right.
10. **Child Custody: Parental Rights.** Allowing a third party to take custody, even for a significant period of time, is not the equivalent to forfeiting parental preference.
11. **Parent and Child.** In loco parentis status is not equivalent to status as a parent.
12. _____. In loco parentis status does not entitle a person to all the same rights that a legal parent would enjoy.
13. _____. In loco parentis status does not, by itself, eclipse the superior nature of the parental preference accorded to biological or adoptive parentage.
14. **Parental Rights: Proof.** In order for exceptional circumstances to negate the parental preference principle, there must be proof of serious physical or psychological harm to the child or a substantial likelihood of such harm.

Appeal from the District Court for Lancaster County: JODI L. NELSON, Judge. Reversed and remanded for further proceedings.

Mary C. Byrd, of Byrd & Greve Law, L.L.C., for appellant.

Matthew P. Saathoff and Donald E. Loudner III, of Saathoff Law Group, P.C., L.L.O., for intervenor-appellee.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

CASSEL, J.

INTRODUCTION

After finding a child's mother to be a fit parent, the district court found that parental preference was negated based on the child's best interests and awarded custody to an individual

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standing in loco parentis. We refine our standard for an exceptional case where a child's best interests can negate the parental preference principle. Because the district court did not have the benefit of this articulation, we reverse, and remand for reconsideration under the proper standard.

BACKGROUND

PRIOR PROCEEDINGS

In 2006, the State filed a complaint to establish paternity and support of Destiny B., a child born in July 2003 to Tina K. and Adam B. In March 2006, the State obtained a default order against Adam.

In November 2007, Adam filed an application to modify the default order. He alleged that it did not determine Destiny's custody and that a material change of circumstances had occurred because she was in Adam's custody. The court entered an ex parte temporary custody order in favor of Adam. In February 2008, the court entered an order, pursuant to Adam's and Tina's stipulation, which awarded Adam physical custody of Destiny and provided Tina with supervised visitation.

In October 2011, Tina filed a complaint to modify child custody. She alleged that Destiny had been with her for nearly a month while Adam was without a permanent residence. Adam consented to entry of a temporary order; thus, the court awarded Tina temporary custody of Destiny. In January 2013, the court dismissed Tina's complaint for want of prosecution.

CURRENT PROCEEDING

In January 2017, Tina filed a complaint to modify. She alleged that a material change of circumstances had occurred since the February 2008 order. Specifically, Tina alleged that Destiny had not lived with Adam since 2011, that Destiny lived exclusively with Tina from September 2011 to the beginning of 2014, and that Destiny had lived with Jo K., with frequent visitation by Tina, since 2015. Tina sought to be awarded sole physical custody.

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In August 2017, after being allowed to intervene, Jo filed a complaint. Jo alleged that she was Destiny's primary caretaker, that she stood in loco parentis over Destiny, and that Destiny had been in her custody since February 2014 with the consent of Adam and Tina and pursuant to valid temporary delegations of parental powers. Jo's complaint did not specifically request custody of Destiny, but she sought to intervene in order to "seek relief regarding any other matter affecting or concerning the welfare and best interests of the minor child."

TRIAL

In September 2018, a trial commenced on Tina's complaint to modify and Jo's complaint in intervention. At that time, Destiny was 15 years old.

Tina and Adam lived together for 7 to 8 months after Destiny's birth. According to Tina, Adam then moved out of Tina's apartment and Destiny remained with Tina until 2008. On the other hand, Adam testified that he was Destiny's primary parent from her birth until 2010 and that Tina rarely spent time with Destiny when she was between the ages of 2 and 10.

Adam testified that Tina used drugs before and after Destiny's birth. He observed Tina to be under the influence of methamphetamine many times over a significant period of time. In 2008, when Destiny was almost 5 years old, Tina was convicted of attempted delivery of a controlled substance. Adam obtained custody of Destiny at that time. While Tina served her sentence, she did not see Destiny but mailed letters weekly to stay in touch.

According to Adam, Tina was Destiny's primary parent from 2010 to 2013. In September 2011, Tina and Destiny moved to Lincoln, Nebraska. Tina enrolled Destiny in school, located a doctor and dentist for her, and took care of all of Destiny's needs. Destiny's school records showed that she had a significant number of absences while attending school in Lincoln.

In early 2013, Tina was using and selling methamphetamine. Although Destiny was in Tina's custody at the time, Destiny

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was not present when Tina was actively selling drugs. Tina stopped using and selling drugs in April, when she suspected she was pregnant.

Tina was convicted of attempted delivery of a controlled substance in connection with a March 2013 drug transaction. She began serving her sentence in February 2014 and planned for Destiny to remain with the father of Tina's newborn child during her incarceration. However, Adam removed Destiny after approximately 3 weeks. He arranged for Destiny to live with Jo, an "old family friend" whom Tina had known for over 25 years.

While incarcerated, Tina kept in communication with Destiny. Jo brought Destiny to the prison for visitation with Tina every other week. On a weekly basis, Tina wrote letters to Destiny and spoke on the telephone with her. Tina was incarcerated until November 2014 and then was on work release until January 2015.

Upon release, Tina recognized she lacked stability and therefore did not immediately seek Destiny's return. Tina explained that she needed housing and money. And Tina acknowledged that Destiny was doing well in Jo's care. But Tina testified that since her release in January 2015, she had seen Destiny four times a month, and that Destiny typically would spend the night with Tina every other weekend or every third weekend.

By June 2015, Tina had obtained employment and a residence. That summer, Tina told Jo that she wanted Destiny to live with Tina. According to Tina, Jo was receptive to the idea, as long as Tina was "working and everything was stable and [Tina] was on [her] feet." But Tina was living in a one-bedroom apartment, and she wanted a larger residence so Destiny would have her own bedroom. In May 2016, Tina saved enough money for a two-bedroom apartment. In the summer, Tina again broached the subject with Jo of having Destiny back in Tina's care. Jo responded that Tina "needed to do it legally." Tina then saved money to hire attorneys. Tina believed that she was now a fit and stable parent who could provide for Destiny's needs.

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In the summer of 2017, Tina picked up Destiny and “just was going to keep her.” She informed Jo after the fact. That night, Jo and Adam went to Tina’s apartment to get Destiny. After that incident, Jo’s demeanor toward Tina changed. Jo did not want Tina to see Destiny and wanted visits to be supervised. Prior to being incarcerated, Tina had a close relationship with Jo. But Tina testified that at the time of trial, she had a strong dislike for Jo because “nobody asked Jo to step in when she wasn’t needed and take Destiny.”

With regard to parenting time with Destiny, Tina testified that sometimes she and Jo met, sometimes Tina picked up Destiny, and sometimes Tina had someone else pick up Destiny. Tina’s car was unreliable and did not have license plates. During trial, Tina bought a different car. She explained, “Well, it seemed like it would be a — a big deal that I didn’t have transportation; so I just wanted to make sure . . . I can provide transportation.”

Jo testified that she has “always been in [Destiny’s] life” and that her level of involvement increased as Destiny aged. Tina and Destiny lived with Jo from November 2013 until mid-February 2014. For the past 5 years, Jo made all of the decisions regarding Destiny’s upbringing, care, education, and medical treatment. Tina agreed that Jo has stood in loco parentis. Tina’s proposed parenting plan provided for visitation with Jo. She believed it would be in Destiny’s best interests to continue to have a relationship with Jo and supported such a relationship.

There was no dispute that Destiny is involved in activities in Gretna, Nebraska, where she lives with Jo, and that her life is established there. Jo testified that Destiny has many friends in the Gretna area and that she is well-bonded to a lot of her friends. Jo worried about stability and routine for Destiny if she returned to Lincoln.

Tina testified that she would change Destiny’s school if she obtained custody. Adam believed that Destiny wanted to graduate from high school in Gretna rather than change schools again. He explained that in Lincoln, Destiny “jumped

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from school to school to school,” but that now she has stability and “she needs to continue that stability until she’s an adult.” According to Adam, Destiny achieved placement on the honor roll within 6 months of being in the Gretna school system and had maintained that honor.

Adam did not want Tina to have custody of Destiny and wished to have Destiny continue being parented by Jo. Adam thought it would be traumatic to Destiny to uproot her.

In April 2014, Jo arranged for Destiny to have counseling with Joanie Hansen, a licensed independent mental health care practitioner. Hansen testified that she typically would see Destiny once a week, sometimes twice a week if Destiny had a weekend with Tina. When therapy began, Destiny was lying, stealing, and cheating. Destiny’s grades in school were poor, with some of them being failing, and she had difficulty concentrating. Destiny also was having angry outbursts. Hansen testified that Destiny was frustrated with her parents and had been acting out in frustration. With Jo, Destiny had a stable home, rules, and guidelines. Hansen observed positive changes over the 4 years she worked with Destiny. Destiny would no longer steal or lie, and her grades had improved.

Hansen testified that Destiny is a “people pleaser.” Destiny told Hansen that “she has to tell her mom that she wants to live [with Tina] or she’ll get yelled at, because any time she disagrees with her mom, her mom yells at her.” Within the month before trial, Destiny had told Hansen that she wanted to live in Gretna but Destiny was too scared to tell Tina. Hansen testified that Destiny had consistently said she wanted to live in Gretna with Jo, but on cross-examination, Hansen testified that Destiny wavered back and forth regarding where she wanted to live, which Hansen attributed to guilt. She explained that Destiny would say she wanted to live in Gretna but that doing so would upset Tina.

Hansen testified that Destiny would be frustrated and angry after spending a weekend with Tina and that it would take Destiny a couple of days to adjust. Hansen had observed Destiny to be more despondent, depressed, and agitated after

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a visit with Tina. On the other hand, when Destiny would have weeks without a weekend with Tina, Destiny would be stable and secure.

Hansen feared that the therapeutic relationship would be discontinued if Destiny moved to Lincoln and that such discontinuation would be detrimental to Destiny. Tina testified that she had the ability to transport Destiny to see Hansen on a regular basis and that “no matter what happens, I’d always like Destiny to continue care with her.” Hansen also believed it would be detrimental to move Destiny from the Gretna school system, because Destiny was well established and was in high school. She believed it was in Destiny’s best interests to remain in Gretna with Jo.

The parties agreed not to call Destiny as a witness, and Jo’s counsel offered into evidence Destiny’s deposition. Although we have considered Destiny’s testimony, we will not summarize the contents of the confidential deposition. The record shows that Destiny’s deposition was taken at Hansen’s office and that by stipulation, neither Jo nor Tina were to attend. But Hansen testified that Tina was “there” when Destiny arrived. According to Hansen, “they were kind of yelling in the parking lot.” Hansen could not hear what was said and had “no idea what they were talking about.” Hansen testified that Destiny was “uptight” at the beginning of the deposition, and Hansen was “not sure if that had to do with the parking lot encounter.”

TRIAL COURT’S DECISION

In April 2019, the court entered an extensive order of modification. It accepted Adam’s testimony that Destiny remained with him when he moved out of Tina’s residence while Destiny was an infant. The court noted two material changes in circumstances: Jo’s standing in loco parentis to Destiny and Adam’s admission that he was not in a position to be the custodial parent.

The court acknowledged the parental preference doctrine. The court stated that there was a presumption in favor of

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Adam or Tina over Jo “unless it is shown that the lawful parent is unfit or has forfeited his or her superior right *or the preference is negated by a demonstration that the best interests of the child lie elsewhere.*” (Emphasis in original.) The court reasoned that Adam had generally forfeited his superior right in favor of Jo.

The court determined that Tina was now a fit person to care for Destiny. The court recognized that Tina had attained more stability in her life. But the court stated that its paramount concern was Destiny’s best interests. The court found that “parental preference in favor of [Tina] is negated by the overwhelmingly clear and convincing evidence that Destiny’s best interest is for her to remain with [Jo].” The court described the situation as “one of those rare instances” when the best interests of a child defeat the parent’s preference. The court placed legal and physical custody with Jo, set parenting time for Adam and Tina, and determined child support.

Tina timely appealed, and we moved the case to our docket.¹ As authorized by court rule, we submitted the case without oral argument.²

ASSIGNMENT OF ERROR

Tina assigns that the court abused its discretion by awarding custody to Jo rather than to Tina.

STANDARD OF REVIEW

Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court’s determination will normally be affirmed absent an abuse of discretion.³

ANALYSIS

[1-4] Parents have a fundamental right to make decisions concerning the care, custody, and control of their children

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

² See Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2017).

³ *Eric H. v. Ashley H.*, 302 Neb. 786, 925 N.W.2d 81 (2019).

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that is constitutionally protected.⁴ Establishment and continuance of the parent-child relationship is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic constitutional rights.⁵ In recognition of this important relationship, the parental preference principle establishes a rebuttable presumption that the best interests of the child are served by placing custody of a minor child with his or her parent.⁶ Under the parental preference principle, absent proof that a parent is unfit or has forfeited the right to custody, a parent may not be deprived of the custody of a minor child.⁷

[5] While the best interests of the child remain the lodestar of child custody disputes, a parent's superior right to custody must be given its due regard, and absent its negation, a parent retains the right to custody over his or her child.⁸ In *Windham v. Griffin*,⁹ we touched on the relationship between the parental preference principle and the best interests standard. We stated, "While preference must be given to a biological or adoptive parent's superior right to custody where the parent is not unfit and has not forfeited his or her parental rights, a court also considers the child's best interests in making its custody determination."¹⁰ Significantly, we characterized cases where best interests of the child defeated parental preference as being "exceptional."¹¹

[6,7] Turning to the instant case, we begin with consideration of Tina's fitness as a parent. The district court found

⁴ See *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

⁵ *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992).

⁶ *In re Guardianship of K.R.*, 304 Neb. 1, 932 N.W.2d 737 (2019).

⁷ *Id.*

⁸ *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004).

⁹ *Windham v. Griffin*, 295 Neb. 279, 887 N.W.2d 710 (2016).

¹⁰ *Id.* at 290, 887 N.W.2d at 718.

¹¹ *Id.*

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that she was a fit parent, and Jo does not challenge that finding. Parental unfitness means a personal deficiency or incapacity that has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and that has caused, or probably will result in, detriment to a child's well-being.¹² Evidence of parental unfitness should be focused upon a parent's ability to care for a child, and not any other moral failings a parent may have.¹³ Evidence of a parent's past failings is pertinent only insofar as it suggests present or future faults.¹⁴ The evidence showed that at the time of trial, Tina had a residence and employment, was not using or selling drugs, and was actively involved in Destiny's life. Upon our de novo review, we agree with the court that Tina "is now a fit person to care for Destiny."

[8-10] Next, we consider forfeiture. The district court did not explicitly make a finding as to whether Tina forfeited her superior right to custody, but implicit in its decision is that she did not. Parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection.¹⁵ Clear and convincing evidence of such neglect must be shown in order to overcome the parent's superior right.¹⁶ And we have stated that allowing a third party to take custody, even for a significant period of time, is not the equivalent to forfeiting parental preference.¹⁷ Under our jurisprudence, we agree that the evidence does not establish forfeiture by Tina of her parental preference.

¹² *In re Guardianship of K.R.*, *supra* note 6.

¹³ See *In re Interest of Lakota Z. & Jacob H.*, 282 Neb. 584, 804 N.W.2d 174 (2011).

¹⁴ *Id.*

¹⁵ *Windham v. Griffin*, *supra* note 9.

¹⁶ See *Farnsworth v. Farnsworth*, 276 Neb. 653, 756 N.W.2d 522 (2008).

¹⁷ See *Windham v. Griffin*, *supra* note 9.

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[11-13] It is important to differentiate Jo’s status from Tina’s status as a biological parent. It is undisputed that Jo stood in loco parentis to Destiny. In loco parentis is a common-law doctrine that gives standing to a nonparent to exercise the rights of a natural parent when the evidence shows that the nonparent’s exercise of such rights is in the child’s best interests.¹⁸ In order to stand in loco parentis, one must assume all obligations incident to the parental relationship.¹⁹ But in loco parentis status is not equivalent to status as a parent.²⁰ Such status does not entitle a person to all the same rights that a legal parent would enjoy.²¹ In loco parentis status does not, by itself, eclipse the superior nature of the parental preference accorded to biological or adoptive parentage.²² We recently noted that *Windham* rejected an invitation to view the parent and nonparent as being on equal footing and to determine custody by reference to best interests alone.²³ Thus, Tina retains a superior right to custody of her child as compared to Jo.

Here, the district court found that the parental preference was negated by evidence that it was in Destiny’s best interests to remain with Jo. In so finding, that court emphasized our language in *Windham* that the parental preference could be “negated by a demonstration that the best interests of the child lie elsewhere.”²⁴ But in *Windham*, we did not articulate a standard for when the best interests of a child lie elsewhere. Instead, we stated that “[a]lthough we are aware of instances where courts have determined that the best interests of the

¹⁸ *Jennifer T. v. Lindsay P.*, 298 Neb. 800, 906 N.W.2d 49 (2018).

¹⁹ *Id.*

²⁰ *Whilde v. Whilde*, 298 Neb. 473, 904 N.W.2d 695 (2017).

²¹ See *id.*

²² *Jennifer T. v. Lindsay P.*, *supra* note 18.

²³ See *In re Guardianship of K.R.*, *supra* note 6.

²⁴ *Windham v. Griffin*, *supra* note 9, 295 Neb. at 288, 887 N.W.2d at 717.

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child defeated the lawful parent’s preference, we view these cases as exceptional.”²⁵

[14] Although *Windham* did not articulate a standard for the exceptional case, we cited a New Jersey case²⁶ therein that did so. In *Watkins v. Nelson*,²⁷ the New Jersey Supreme Court declared that the exceptional circumstances standard “always requires proof of serious physical or psychological harm or a substantial likelihood of such harm.” The *Watkins* court explained that the standard was “designed to reduce or minimize judicial opportunity to engage in social engineering in custody cases involving third parties.”²⁸ We agree with this articulation. We now refine our articulation in *Windham* to clarify that in order for exceptional circumstances to negate the parental preference principle, there must be proof of serious physical or psychological harm to the child or a substantial likelihood of such harm.

The district court relied on language in *Windham*, but it did not have the benefit of this refined standard. Thus, it is unsurprising that the court’s order did not speak in terms of serious physical or psychological harm or a substantial likelihood of such harm. The court stated that it agreed with Hansen’s conclusions that “it would be detrimental to move Destiny from Gretna and [Jo]” and that “it would be a serious undoing and one that Destiny might not be able to handle.” But we cannot determine whether the court abused its discretion when it applied an incomplete and unrefined standard.²⁹

Accordingly, we reverse, and remand for reconsideration under the elucidated standard for exceptional circumstances.

²⁵ *Id.* at 290, 887 N.W.2d at 718.

²⁶ *Watkins v. Nelson*, 163 N.J. 235, 748 A.2d 558 (2000).

²⁷ *Id.* at 248, 748 A.2d at 565.

²⁸ *Id.* at 252, 748 A.2d at 567.

²⁹ See, *Eric H. v. Ashley H.*, *supra* note 3; *State v. McGuire*, 301 Neb. 895, 921 N.W.2d 77 (2018).

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We leave to the district court's discretion whether to allow for the expansion of the existing record.

CONCLUSION

When a fit parent has not forfeited his or her superior right to custody, the best interests of a child will negate the parental preference principle only in an exceptional case. We now clarify that an exceptional case requires proof of serious physical or psychological harm or a substantial likelihood of such harm. Because the district court did not have the benefit of this articulation, we reverse, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

FREUDENBERG, J., concurring.

The district court based its placement decision upon a finding that this was one of those rare instances where a minor child's best interests weigh so heavily in favor of placement with a nonparent standing in loco parentis that it overcomes the presumption of the parental preference principle under *Windham v. Griffin*.¹ However, as the majority noted, cases where the best interests of the child defeated parental preference are exceptional when the court finds a parent fit and has not otherwise forfeited such parental preference. In the present case, the district court found the mother, Tina K., to be a fit parent. I disagree with the district court's parental fitness finding. However, it was not challenged on appeal.

I believe there was sufficient evidence based on a de novo review of the record to find Tina was unfit to parent her minor daughter, Destiny B. Tina's repeated criminal actions resulted in her inability to parent, and her lifestyle choices created an unhealthy and unstable living environment. The record in this matter sets forth Tina's significant lack of positive parenting

¹ See *Windham v. Griffin*, 295 Neb. 279, 887 N.W.2d 710 (2016).

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functions as they are defined in Nebraska's Parenting Act, specifically, Neb. Rev. Stat. § 43-2922 (Reissue 2016).²

Destiny's father, Adam B., testified that Tina was using drugs both before and after Destiny was born in July 2003. Adam and Tina separated a few months later, and Adam retained custody. Other than a few letters and occasional visits, the record does not show that Tina attempted to support or care for Destiny until she sought visitation rights in 2008 after completing a prison sentence imposed due to a drug distribution conviction. Tina did not obtain custody at that time.

In 2011, Tina again moved to modify custody and was granted temporary custody of Destiny. However, the complaint to modify custody was subsequently dismissed for want of prosecution, which reverted custody back to Adam. Adam testified that he was unaware the complaint had been dismissed, so Destiny remained with Tina for a time. Approximately 3 years after taking custody of Destiny, Tina was again convicted and sentenced to incarceration for a drug distribution offense. Further, Tina testified that during the period she had custody of Destiny, she had become addicted to methamphetamines. The record demonstrates that Tina has only provided direct care and support for Destiny 3 of the 15 years of Destiny's life, and for at least 1 of those years, Tina was addicted to methamphetamines and engaging in the illegal distribution of controlled substances.

While Tina was completing her second relevant incarceration period, Destiny's father reached out to Jo K. and found Destiny a stable caretaker. Such placement appears to be the first time in Destiny's life that she was in a safe, stable, consistent, and nurturing setting. The record further establishes that with Jo's support, Destiny began to flourish and address some of the psychological issues she had developed during her earlier childhood. Both Adam and Tina acknowledged that Jo had been the only person parenting Destiny for the previous 5 years.

² Neb. Rev. Stat. § 43-2922 (Reissue 2016).

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Tina admits that she was not a stable or fit parent until 2016 and claims that she became so prior to the filing of her motion to modify custody. That raises the question whether Tina made adequate improvements in her parenting abilities and personal situation to merit a finding of fitness. The record clearly shows she has not done so. Tina has chosen to allow nearly all parenting duties and related financial obligations to remain with Jo, even when she had the ability to do otherwise. Tina has not exercised the many opportunities she has had to become involved in caring for Destiny or fulfilling her parenting functions.

Although Tina testified she could provide insurance for Destiny through her work, Tina had not made any effort to put Destiny onto her health insurance plan or to engage Destiny's medical or dental providers. Tina also admitted that she has never contacted Destiny's school to attend parent-teacher conferences, inquire about grades, or be involved with her extra-curricular activities.

Tina attended one counseling session with Destiny, and that one session was enough to raise several concerns for the therapist. Tina demonstrated an unwillingness to be attentive to Destiny's feelings and concerns. The therapist testified that Destiny felt intimidated by Tina to the point that Destiny could not express to Tina that she does not want to live with her.

During her incarceration and for a short time thereafter, Tina attempted to address her addiction issues but stopped once she had met her court-ordered minimum requirements. Tina testified that she believes she is no longer an addict and that due to that fact, she has not voluntarily pursued an aftercare plan or chosen to further address her risk of relapse.

I do not believe that a parent is fit when he or she has shown a pattern of drug abuse, which leads to dangerous criminal behavior, and yet refuses to acknowledge the potential of relapse and take preventative measures. I believe that Tina's repeated choices to use and sell dangerous and illegal drugs has demonstrated a personal deficiency that has and will continue

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to prevent performance of her reasonable parental obligations. Such conduct has been a detriment to Destiny's well-being and will likely continue to be so in the future.³

I agree with the district court that it would be in Destiny's best interests to remain with Jo. However, my position is based upon the fact that there was sufficient evidence in the record on which to find that Tina was unfit to parent Destiny. Unfortunately, this court cannot review what I believe to be the district court's mistaken findings of Tina's parental fitness, because it was not challenged upon appeal. Therefore, I must concur in the majority's conclusion that this matter should be remanded for further proceedings to determine whether "exceptional circumstances" exist as that phrase is now articulated.

HEAVICAN, C.J., joins in this concurrence.

³ See *In re Guardianship of K.R.*, 304 Neb. 1, 932 N.W.2d 737 (2019).

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

TELENA MOSER, PERSONAL REPRESENTATIVE
OF THE ESTATE OF TERRY L. BERRY, JR.,
DECEASED, APPELLANT, V. STATE
OF NEBRASKA, APPELLEE.

948 N.W.2d 194

Filed September 4, 2020. No. S-19-726.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Tort Claims Act: Appeal and Error.** Whether the allegations made by a plaintiff constitute a cause of action under the State Tort Claims Act or whether the allegations set forth claims which are precluded by the exemptions set forth in the act is a question of law, for which an appellate court has a duty to reach its conclusions independent of the conclusions reached by the district court.
4. **Tort Claims Act: Immunity: Waiver: Appeal and Error.** An exception to the State's waiver of immunity under the State Tort Claims Act is an issue that the State may raise for the first time on appeal and that a court may consider sua sponte.
5. **Tort Claims Act: Legislature: Immunity: Waiver.** Through the State Tort Claims Act, the Legislature has waived the State's immunity with respect to certain, but not all, types of tort actions.
6. **Statutes: Immunity: Waiver.** Statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver. A waiver of sovereign immunity is found only where stated by the most express

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language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.

7. **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.
8. **Assault: Political Subdivisions Tort Claims Act: Tort Claims Act.** Because the assault and battery exceptions of the State Tort Claims Act and the Political Subdivisions Tort Claims Act are nearly identical, cases construing the Political Subdivisions Tort Claims Act are applicable to cases under the State Tort Claims Act and vice versa.
9. **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.
10. **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.

Appeal from the District Court for Johnson County: RICKY A. SCHREINER, Judge. Affirmed.

Thomas J. Monaghan and Rodney C. Dahlquist, Jr., of Dornan, Troia, Howard, Breitkreutz & Conway, P.C., L.L.O., for appellant.

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

HEAVICAN, C.J., MILLER-LEMAN, CASSEL, STACY, FUNKE, and PAPIK, JJ.

HEAVICAN, C.J.

INTRODUCTION

Terry L. Berry, Jr., was incarcerated at the Tecumseh State Correctional Institution (TSCI), an institution under the control of the Nebraska Department of Correctional Services (DCS). On April 10, 2017, Berry was moved into a cell with Patrick W. Schroeder, another inmate at TSCI. Five days later, Schroeder strangled Berry, who died of his injuries on April 19.

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Telena Moser, the personal representative of Berry's estate, filed a claim with the State of Nebraska under the State Tort Claims Act (STCA). After the statutory time for the State to respond to her claim had passed, Moser filed this suit on behalf of Berry's estate. The suit alleges negligence and wrongful death on the part of DCS. The district court dismissed Moser's complaint. Moser appeals.

We granted the State's motion to bypass the Nebraska Court of Appeals due to the public interest involved in this case and, as asserted in the State's petition to bypass, to address an apparent "inconsistency in this Court's opinions in applying the strict construction legal principles of the STCA exceptions to sovereign immunity as those legal principles have been explained and applied by this Court's more recent decisions," specifically in the context of the intentional tort exception.

We find that the State has immunity under the intentional tort exception to the STCA, and accordingly, we affirm the order dismissing Moser's suit, albeit under different grounds for immunity than those relied upon by the district court.

BACKGROUND

In this case, the district court granted the State's motion to dismiss; therefore, the operative facts are those set forth in Moser's complaint. According to that complaint, Berry was incarcerated with DCS on November 20, 2015, after being convicted of second degree forgery and assault by a confined person. He was sentenced to 3 to 4 years' imprisonment.

Schroeder was convicted of first degree murder, use of a weapon to commit a felony, and six counts of second degree forgery. He was sentenced to life imprisonment and was committed to DCS on August 31, 2006. Schroeder had been committed to TSCI since 2007, and according to the complaint, he was known for "having a bad temper." Berry was also known for having behavioral issues and had been identified as "needing anger management programming."

On April 10, 2017, Schroeder was notified that he would need to move out of his cell and into a different unit and

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that he would be “double bunked.” Schroeder told staff that he would not accept being double bunked. Fifteen minutes before he was due to be moved, Schroeder was told that his new cellmate would be Berry. Schroeder objected, because “he knew Berry to have enemies [and be] talkative” and because Berry was “believed to be dirty.” On that same day, Berry was notified that he was being moved and that “if he refused the move, [he] would be double bunked with another inmate.”

On April 15, 2017, Schroeder physically attacked Berry, who was subsequently transported to a local hospital and then to a hospital in Lincoln, Nebraska. Berry was declared brain dead on April 17 and was removed from life support on April 19. An autopsy showed that Berry’s cause of death was asphyxia due to strangulation.

On September 15, 2017, Moser filed an administrative claim under the STCA. No action was taken within 6 months. Moser filed this action on November 26, 2018. In it, she asserted three causes of action: (1) the State’s negligence in breaching its duty to protect Berry from harms against which he was unable to prevent himself, (2) its negligence per se in failing to comply with “the requirements of [DCS] Administrative Regulation 210.01,” and (3) wrongful death under Neb. Rev. Stat. § 30-809 et seq. (Reissue 2016).

The State filed a motion to dismiss for lack of subject matter jurisdiction under Neb. Ct. R. Pldg. § 6-1112(b)(1), specifically arguing that the discretionary function exception of Neb. Rev. Stat. § 81-8,219(1) (Reissue 2014) to the STCA gave the State immunity from suit. The State also argued that Moser failed to state a claim under § 6-1112(b)(6). The district court granted that motion, concluding that the State was immune from suit under § 81-8,219(1).

Moser appeals.

ASSIGNMENTS OF ERROR

On appeal, Moser assigns that the district court erred in (1) finding that the mandatory safety regulations designed to

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prevent inmate assaults were discretionary rather than mandatory, (2) finding that the decision by TSCI staff to “double bunk” Berry and Schroeder was a policy decision rather than an operational decision, (3) finding that the discretionary function exception applied to the decision to double bunk Berry with Schroeder and to maintain such housing despite warnings regarding Berry’s safety, (4) finding that the State acted with due care when it placed Berry with Schroeder and when it maintained this housing despite warnings regarding Berry’s safety, and (5) granting the State’s motion to dismiss under § 81-2,219(1).

STANDARD OF REVIEW

[1-3] A district court’s grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.¹ 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 Whether the allegations made by a plaintiff constitute a cause of action under the STCA or whether the allegations set forth claims which are precluded by the exemptions set forth in the act is a question of law, for which an appellate court has a duty to reach its conclusions independent of the conclusions reached by the district court.³

[4] An exception to the State’s waiver of immunity under the STCA is an issue that the State may raise for the first time on appeal and that a court may consider sua sponte.⁴

¹ *Amend v. Nebraska Pub. Serv. Comm.*, 298 Neb. 617, 905 N.W.2d 551 (2018).

² *Id.*

³ *Id.*

⁴ *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017).

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ANALYSIS

On appeal, Moser argues that the district court erred in granting the State’s motion to dismiss. Her assignments of error center on the district court’s finding that § 81-8,219(4) barred her claim.

[5] Through the STCA, the Legislature has waived the State’s immunity with respect to certain, but not all, types of tort actions.⁵ As pertinent here, the STCA waives the State’s sovereign immunity for tort claims against the State on account of personal injury caused by the negligent or wrongful act or omission of any employee of the State, while acting within the scope of his or her office or employment, under circumstances in which the State, if a private person, would be liable to the claimant for such injury.⁶

But there are exceptions to the State’s waiver of immunity. As relevant to this appeal, § 81-8,219 provides that the STCA shall not apply to the following:

(1) Any claim based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute, rule, or regulation, whether or not such statute, rule, or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion is abused;

. . . .

(4) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, or interference with contract rights.

The State argues, for the first time in its brief on appeal, that Moser’s lawsuit is barred, not just by § 81-8,219(1)—the grounds argued below which the district court relied upon—but

⁵ *Jill B. & Travis B. v. State*, 297 Neb. 57, 899 N.W.2d 241 (2017).

⁶ See Neb. Rev. Stat. § 81-8,210(4) (Reissue 2014).

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also by the intentional tort exception found in § 81-8,219(4). The State notes that this court is bound to construe statutes waiving the State's immunity strictly and in favor of the State and against the waiver, and it argues that the plain language of the intentional tort exception applies to "[a]ny claim arising out of assault [or] battery." The State suggests that we should adopt the reasoning of the concurrence filed in our recent decision in *Rutledge v. City of Kimball*⁷ and overrule our earlier decision in *Doe v. Omaha Pub. Sch. Dist.*⁸

As an initial matter, we observe that this court may consider the State's contention that the exception set forth in § 81-8,219(4) is applicable.⁹ We have held that "when a plaintiff's complaint shows on its face that a claim is barred by one of the exceptions [to the State's waiver of immunity], the State's inherent immunity from suit is a jurisdictional issue that an appellate court cannot ignore."¹⁰

[6,7] It is well settled that statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver.¹¹ A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.¹² Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.¹³

⁷ *Rutledge v. City of Kimball*, 304 Neb. 593, 935 N.W.2d 746 (2019).

⁸ *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007).

⁹ *Davis v. State*, *supra* note 4.

¹⁰ *Id.* at 979, 902 N.W.2d at 186.

¹¹ *Jill B. & Travis B. v. State*, *supra* note 5.

¹² *Id.*

¹³ *Id.*

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As we noted in *Jill B. & Travis B. v. State*:¹⁴

The principle of strict construction predated the [STCA] and has been consistently followed after its adoption. We had long said that statutes authorizing suit against the State are to be strictly construed, since they are in derogation of the State's sovereignty. Following adoption of the [STCA], we emphasized that statutes in derogation of sovereignty should be strictly construed in favor of the State, so that its sovereignty may be upheld and not narrowed or destroyed, and should not be permitted to divest the State or its government of any of its prerogatives, rights, or remedies, unless the intention of the Legislature to effect this object is clearly expressed. We also said that because the State has given only conditional consent to be sued and there is no absolute waiver of immunity by the State, requirements of the [STCA] must be followed strictly. Our most recent pronouncements uphold these principles. Because the rationale for the intentional torts exception . . . has not always been clearly expressed, the rule of strict construction becomes critically important.

[8] Because the assault and battery exceptions of the STCA and the Political Subdivisions Tort Claims Act (PSTCA) are nearly identical, cases construing the PSTCA are applicable to cases under the STCA and vice versa.¹⁵ Our case law on the assault and battery exception to this point has generally found immunity in cases where the actor committing the assault or battery was an employee or agent of the State, but not where the actor was a nongovernmental actor.

This court was presented with the intentional tort exception to the STCA in *Johnson v. State*.¹⁶ In *Johnson*, an inmate with DCS filed a claim under the STCA, alleging that she

¹⁴ *Id.* at 68-69, 899 N.W.2d at 251-52.

¹⁵ See *Amend v. Nebraska Pub. Serv. Comm.*, *supra* note 1.

¹⁶ *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005).

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was sexually assaulted by a DCS employee. We noted that the phrase “arising out of an assault or battery” was broader than the phrase “for assault or battery” and thus covered “‘claims . . . that sound in negligence but stem from a battery.’”¹⁷ We further found that the intentional tort exception applied and that the State was immune. We explained:

Where the plaintiff’s tort claim is based on the mere fact of government employment (such as a respondeat superior claim) or on the employment relationship between the intentional tort-feasor and the government (such as a negligent supervision or negligent hiring claim), the exception in § 81-8,219(4) applies and the State is immune from suit.¹⁸

We were again presented with the intentional tort exception in *Doe*, a case governed by the PSTCA involving a nongovernmental actor.¹⁹ In *Doe*, a student sued a school district, alleging she was sexually assaulted by a fellow student during school hours and while on school property. Citing the U.S. Supreme Court’s decision in *Sheridan v. United States*,²⁰ we held that the claim was not barred by the PSTCA because it was

not based upon the assault itself, and [the plaintiff] could not prevail merely by proving that it occurred. Rather, [the plaintiff alleged] that *before* the alleged assault, [the school district] breached an independent legal duty, unrelated to any possible employment relationship between the assailant and [the school district], to take reasonable steps to prevent foreseeable violence from occurring on its premises. . . . The claim therefore does not arise from an assault, but, rather, from an alleged

¹⁷ *Id.* at 320, 700 N.W.2d at 624.

¹⁸ *Id.* at 323, 700 N.W.2d at 625.

¹⁹ *Doe v. Omaha Pub. Sch. Dist.*, *supra* note 8.

²⁰ *Sheridan v. United States*, 487 U.S. 392, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988).

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negligent failure to protect a student from a foreseeable act of violence.²¹

In 2011, we decided *Britton v. City of Crawford*.²² There, the plaintiff's decedent was shot and killed by law enforcement. His estate filed suit against the city, which argued that it was immune from suit under the intentional tort exception to the PSTCA because the claim arose out of a battery.

We observed in *Britton*, as we had held in *Johnson*, that the phrase "arising out of an assault or battery" created a broader exemption than one for an assault or battery. We distinguished *Johnson*, noting that although the claims were based on the officers' government employment, the death of the plaintiff's decedent was not the result of negligent supervision or hiring. We ultimately concluded that the city had immunity from suit, noting that without

the battery, there would have been no claim. No semantic recasting of events can alter the fact that the shooting was the immediate cause of [the decedent's] death and, consequently, the basis of [the] claim. Even if it is possible that negligence was a contributing factor to the [decedent's] death, the alleged negligence was inextricably linked to a battery.²³

We used similar reasoning in *Jill B. & Travis B.*,²⁴ which involved immunity under § 81-8,219(5). That section provided an exception from immunity under the STCA for "any claim arising out of misrepresentation or deceit."²⁵ We held that the State was entitled to immunity, reasoning that "[n]o matter how the [plaintiffs] try to frame their complaint, their claim arises out of a misrepresentation. . . . '[A] plaintiff cannot

²¹ *Doe*, *supra* note 8, 273 Neb. at 88, 727 N.W.2d at 456.

²² *Britton v. City of Crawford*, 282 Neb. 374, 803 N.W.2d 508 (2011).

²³ *Id.* at 386, 803 N.W.2d at 518.

²⁴ *Jill B. & Travis B. v. State*, *supra* note 5.

²⁵ § 81-8,219(5).

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circumvent the misrepresentation exception simply through artful pleading of [the] claims.’”²⁶

We most recently addressed this issue in *Rutledge*, wherein the plaintiff alleged that a city employee had attacked and choked her in a building belonging to the city.²⁷ On appeal, the plaintiff relied on *Doe* to argue that the city was negligent in failing to protect her and the rest of the public from its employee.²⁸ We distinguished *Doe*, noting the absence of an allegation that the assailant was an agent or employee of the political subdivision. The situation in *Rutledge* presented an employment relationship, and accordingly, we found the city to be immune from suit. In *Rutledge*, we were not presented with the question of whether *Doe* was correctly decided, but we find that question squarely before us today.

As we noted above, our propositions of statutory interpretation require us to give statutory language its plain and ordinary meaning. And we have done as much, particularly in *Johnson*, and later in *Britton*, when we held that the use of the phrase “arising out of” in the intentional tort exception to the PSTCA meant that more than just claims for listed intentional torts were exempted and that plaintiffs may not reframe claims that arise out of those intentional torts to escape the exemption.²⁹

Our decision in *Doe*,³⁰ where we held that the claim was not based upon the underlying assault but upon the breach of the legal duty to take reasonable steps to prevent foreseeable violence from occurring on its premises, was rooted in *Sheridan*.³¹ But *Doe* is an outlier in that it is inconsistent with our prior and

²⁶ *Jill B. & Travis B.*, *supra* note 5, 297 Neb. at 92-93, 899 N.W.2d at 265.

²⁷ *Rutledge v. City of Kimball*, *supra* note 7.

²⁸ *Id.* See *Doe v. Omaha Pub. Sch. Dist.*, *supra* note 8.

²⁹ See, *Britton v. City of Crawford*, *supra* note 22; *Johnson v. State*, *supra* note 16.

³⁰ *Doe v. Omaha Pub. Sch. Dist.*, *supra* note 8.

³¹ *Sheridan v. United States*, *supra* note 20.

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subsequent case law generally setting forth a broad definition of the phrase “arising out of an assault or battery.”

A broad definition is consistent with the plain language of that phrase, which suggests that if a claim would not exist without an assault or battery, it arises out of that battery and is more consistent with our other case law on this issue. As Justice O’Connor noted in her dissenting opinion in *Sheridan*, “‘arising out of,’” if given its ordinary meaning, would cover any case in which a battery is essential to the claim.³² We can conceive of no reason why the scope or meaning of the phrase “arising out of,” as we defined it in *Britton*, should change depending on the status of the actor as governmental versus nongovernmental.

Additionally *Sheridan*, upon which we relied in *Doe*, did not purport to give the waiver of sovereign immunity in the Federal Tort Claims Act a strict construction. Indeed, the U.S. Supreme Court has not uniformly used the same strict construction canon with respect to waivers of sovereign immunity. It recently noted that such a canon is simply “a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction.”³³

Conversely, this court has long strictly construed waivers of immunity in favor of a State or political subdivision. In order to strictly construe against a waiver of sovereign immunity, we must read exemptions from a waiver of sovereign immunity broadly.³⁴ Of course, as the dissent to this opinion notes, courts must be careful to interpret exceptions to a waiver of immunity in a way that does not defeat the initial purpose of

³² *Id.*, 487 U.S. at 409 (O’Connor, J., dissenting) (citing *Kosak v. United States*, 465 U.S. 848, 104 S. Ct. 1519, 79 L. Ed. 2d 860 (1984), and *United States v. Shearer*, 473 U.S. 52, 105 S. Ct. 3039, 87 L. Ed. 2d 38 (1985)).

³³ *Richlin Security Service Co. v. Chertoff*, 553 U.S. 571, 589, 128 S. Ct. 2007, 170 L. Ed. 2d 960 (2008).

³⁴ See *Stick v. City of Omaha*, 289 Neb. 752, 857 N.W.2d 561 (2015).

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waiving the government's immunity.³⁵ But even in balancing those considerations, we are constrained by the language utilized by the Legislature. A broad reading of the phrase "arising out of" corresponds to a strict reading of the situations under which a sovereign would be entitled to immunity.

Nor is this inconsistent with the definition of the term "tort claim" in § 81-8,210(4), which requires, in relevant part, "the negligent or wrongful act or omission of any employee of the state." The broad definition of the phrase "arising out of" encompasses and provides immunity for, at a minimum, the acts of both a State actor alleged to have committed an intentional tort and one alleged to have been negligent in a situation that includes the commission of an intentional tort.

Although we do not dispute the dissent's contention that one injury can arise from multiple wrongful acts, the plain language of the intentional tort exception in § 81-8,219(4) provides that if that injury "arise[s] out of," in this case an assault or battery, the exception applies to bar the claim. With the exception of *Doe*, our interpretation of this language has been consistent and the Legislature has not seen fit to correct us.³⁶

[9,10] Respect for precedent should not prevent us from restoring our adherence to the Nebraska Constitution and statutes.³⁷ 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.³⁸ And we have recognized that overruling precedent is justified when the purpose is to eliminate inconsistency.³⁹ Thus, we said that remaining true to an intrinsically sounder doctrine better serves the values of stare

³⁵ See *Dolan v. U.S. Postal Service*, 546 U.S. 481, 126 S. Ct. 1252, 163 L. Ed. 2d 1079 (2006).

³⁶ See *Doe v. Omaha Pub. Sch. Dist.*, *supra* note 8.

³⁷ *Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017).

³⁸ *Id.*

³⁹ *Id.*

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decisis than following a more recently decided case inconsistent with the decisions that came before it.⁴⁰

Our decision in *Doe* was inconsistent with the approach we have taken in other cases as it relates to the “arising out of” language, and it does not comply with our obligation to strictly construe the State’s waiver of immunity.⁴¹ That decision was wrong, and as such, we overrule it.

We are therefore left to determine whether the intentional tort exception set forth in § 81-8,219(4) applies to provide the State immunity from Moser’s suit. We find that it does.

Although Moser’s complaint plainly alleges a negligence cause of action, in that complaint, Moser alleged that Schroeder “assault[ed]” Berry. A reading of the complaint makes it clear that all of Moser’s allegations, including her claims of negligence in the decision to double bunk Berry and Schroeder, flow from this assault.

Of course, the assault that Moser outlines in her complaint was horrific. But in accordance with our case law with respect to the intentional tort exception discussed above, we must conclude that Moser’s allegations arose out of an intentional tort for purposes of the STCA. To find otherwise would require this court to engage in the very “semantic recasting of events” that we rejected in *Britton*.⁴² This we will not do.

The Legislature may wish to revisit the State’s sovereign immunity in cases such as the one presented by this appeal, as indeed that body has done previously in response to decisions of this court.⁴³ But it is clear that it is the province of the Legislature, and not of this court, to make such policy judgments.

⁴⁰ *Id.*

⁴¹ See *Doe v. Omaha Pub. Sch. Dist.*, *supra* note 8.

⁴² *Britton v. City of Crawford*, *supra* note 22, 282 Neb. at 386, 803 N.W.2d at 518.

⁴³ See § 81-8,219(5) (Cum. Supp. 2018) (as amended by 2018 Neb. Laws, L.B. 729, § 1, effective July 19, 2018).

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Because we conclude that the State had immunity from suit under the intentional tort exception of the STCA, as set forth in § 81-8,219(4), we need not address Moser's assignments of error on appeal relating to immunity under the discretionary function exception.

CONCLUSION

Over 50 years ago, the Legislature set the parameters for the State's immunity from suit in various scenarios. This court strictly construes those parameters. We conclude that in this case, the State has immunity from suit under the intentional tort exception. As such, the district court did not err in dismissing Moser's complaint. The decision of the district court is affirmed.

AFFIRMED.

FREUDENBERG, J., not participating.

MILLER-LERMAN, J., dissenting.

I respectfully disagree with the majority's conclusion to dismiss this complaint based on immunity where the complaint generally alleges that the death of an inmate was negligently caused by the State's violating its duties and its formal regulations, and specifically alleges that the State's employees negligently "doubled bunked" a "talkative" inmate "days away from his parole hearing" with an expected release date in 8 months with a known "bad temper[ed]" inmate serving a life sentence, the latter of whom after 5 days of sharing a cell "wrapped his arm around [the former's] neck and squeezed for five minutes" until "he felt certain [the former] was dead."

In *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007), this court followed the reasoning of the U.S. Supreme Court's holding in *Sheridan v. United States*, 487 U.S. 392, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988), but today the majority chooses instead to follow the dissent in *Sheridan* and overrules *Doe* based on its dubious notion that the U.S. Supreme Court and the Nebraska Supreme Court interpret the same statutory language so differently that adhering to

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U.S. Supreme Court precedent would offend Nebraska. As explained below, finding no meaningful difference between statutory interpretation habits of the Nebraska Supreme Court and the U.S. Supreme Court in this regard and reading the language of Neb. Rev. Stat. § 81-8,219(4) (Reissue 2014) in the context of the State Tort Claims Act provisions of which it is a part, I conclude that the intentional tort assault exception to the waiver of sovereign immunity does not apply; hence, the State is subject to suit in this case.

This is one of a number of recent cases in which the State introduced a new theory for the first time on appeal—in this instance, in its appellate brief. See *Candyland, LLC v. Nebraska Liquor Control Comm.*, 306 Neb. 169, 944 N.W.2d 740 (2020) (Miller-Lerman, J., concurring) (noting that theory raised for first time at oral argument); *State v. Vann*, 306 Neb. 91, 944 N.W.2d 503 (2020), (Miller-Lerman, J., concurring) (noting that theory raised for first time at oral argument resulted in overruling precedent). Unlike its approach in the trial court, the State now contends that *Doe, supra*, should be overruled and that the complaint should be dismissed based on the intentional tort assault exception to the waiver of sovereign immunity. Although appellant may have a heavy burden in being able to prove negligence by the State, in my view, she has alleged sufficient facts described below to survive a motion to dismiss.

The complaint filed by Telena Moser, as personal representative of the estate of Terry L. Berry, Jr., alleged that the State was negligent when on April 10, 2017, it placed Berry in the same restrictive housing cell as Patrick W. Schroeder at the Tecumseh State Correctional Institution (TSCI). On April 15, Schroeder wrapped his arm around Berry’s neck and squeezed for 5 minutes until he felt certain Berry was dead. Restrictive housing is defined by Neb. Rev. Stat. § 83-170(13) (Cum. Supp. 2016) as “conditions of confinement that provide limited contact with other offenders, strictly controlled movement while out of cell, and out-of-cell time of less than twenty-four

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hours per week.” The purpose of restrictive housing is to separate a violent inmate from the general population or to separate an inmate at risk of violence from the general population.

According to the allegations, Schroeder was serving a life sentence for first degree murder, was known for “having a bad temper,” and expressly warned a caseworker of his unwillingness to bunk with Berry. Berry was days away from a parole hearing, with a tentative release date of December 8, 2017.

According to the allegations, although TSCI unit managers knew of the risks and warnings associated with placing Berry and Schroeder together, they nonetheless decided to house the inmates together. A staff member had expressed her concerns regarding the placement to several other staff members, stating that she “‘personally felt that it was not the best idea,’” since Berry “‘was known to be very talkative and bothersome,’” and that Schroeder “‘in for life, with a temper[,] would not want someone like’” Berry as a cellmate.

The complaint alleges the following failures of the TSCI staff:

- “Two unit managers of TSCI were responsible for making the joint decision to double bunk Berry and Schroeder in restrictive housing, but they failed to complete the statement required by Administrative Regulation 210.01, wherein they state why the cell assignment provides each cellmate with reasonable safety from assault.”
- “Further, the unit managers did not complete the compatibility assessment until after each inmate was warned that they would be double bunked with another inmate if they did not comply with the directive to move cells.”
- “In short, TSCI staff did not follow proper procedure required by Administrative Regulation 210.01(VIII)(G).”

STATUTORY INTERPRETATION OF THE ASSAULT
EXCEPTION IS THE SAME IN NEBRASKA
AND U.S. SUPREME COURT

At issue is the meaning of the “arising out of assault” language found in the State Tort Claims Act, § 81-8,219(4), and its federal counterpart in the Federal Tort Claims Act (FTCA),

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28 U.S.C. § 2680(h) (2012), and specifically, whether this intentional tort exception to the waiver of sovereign immunity applies when the State is being sued for its allegedly negligent acts which occurred before an assault was committed by a non-governmental actor.

We have stated that the waiver of sovereign immunity should be strictly construed and, as a corollary thereto, that the exceptions should be read broadly. See *Brown v. State*, 305 Neb. 111, 939 N.W.2d 354 (2020). We have specifically applied this approach to the intentional tort exception portion of the State Tort Claims Act, § 81-8,219(4), which exception is derived from the FTCA. See *Jill B. & Travis B. v. State*, 297 Neb. 57, 899 N.W.2d 241 (2017). The U.S. Supreme Court has addressed the waiver of sovereign immunity and the “arising out of assault” exception language. Just like Nebraska, the U.S. Supreme Court has stated that a sovereign immunity waiver “will be strictly construed . . . in favor of the sovereign.” *Lane v. Pena*, 518 U.S. 187, 192, 116 S. Ct. 2092, 135 L. Ed. 2d 486 (1996). And just like Nebraska, one justice has summarized the applicable U.S. Supreme Court law as follows: “In cases where, as here, the question whether a particular claim is subject to an exception is disputed, we have construed the FTCA exceptions broadly to preclude claims for actions Congress intended to except from the FTCA’s general waiver of immunity.” *Dolan v. Postal Service*, 546 U.S. 481, 499 n.3, 126 S. Ct. 1252, 163 L. Ed. 2d 1079 (2006) (Thomas, J., dissenting).

The U.S. Supreme Court has warned, however, that “‘unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute,’ . . . which ‘waives the Government’s immunity from suit’” *Id.*, 546 U.S. at 492 (Thomas, J., dissenting). And we too have resisted the temptation to accord unduly generous interpretations of exceptions which would defeat the waiver. See, e.g., *Brown*, 305 Neb. at 122, 939 N.W.2d at 361 (declining to read language of exception “so broadly” that it “would judicially expand” exception).

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Applying U.S. Supreme Court precedent and according a broad reading to the exception provisions of the FTCA to a fact pattern akin to the instant case, the U.S. Court of Appeals for the Second Circuit stated: “Despite the broad reading given to [the FTCA] section 2680(h)’s ‘arising out of’ language [equivalent to Nebraska’s § 81-8,219(4)], [the section] may not bar mixed claims of negligence and intentional conduct in the relatively uncommon case” where the negligence claim is independent of the intentional tort. *Guccione v. U.S.*, 847 F.2d 1031, 1037 (2d Cir. 1988). So even applying a broad reading to the intentional tort exception, cases like the instant matter are not barred where there is independent negligence by the government.

Given the above, the Nebraska Supreme Court and the U.S. Supreme Court clearly share the same approach to the statutory language at issue. Nevertheless, without making an apt comparison, the majority insists the Nebraska approach to statutory interpretation is so different that reading the same language requires a result in Nebraska different from that of the U.S. Supreme Court’s controlling authority.

The majority takes this position because it insists on complete fidelity to the “strictly construe waiver” but “broadly construe exceptions” language. But this approach overlooks Nebraska’s jurisprudential experience with the “strict-broad” language. For example, as recently as in 2017, we considered another portion of the intentional tort exception provision, misrepresentation, and said: “We must *strictly construe* the misrepresentation *exception* to the waiver of sovereign immunity in favor of the State” *Jill B. & Travis B. v. State*, 297 Neb. 57, 95, 899 N.W.2d 241, 266 (2017) (emphasis supplied). This verbage simply illustrates why we should thoughtfully examine the language and provisions of the State Tort Claims Act for their coherent meaning rather than decide meaning based on imposition of a “strict-broad” label devoid of analysis. “Our object should be to read the Act so as to make it ‘consistent and equitable’, Feres, 340 U.S. at page 139, 71 S.Ct. at page

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156, in which we should be untrammelled by any rule of ‘strict’ or ‘liberal’ construction.” *Panella v. United States*, 216 F.2d 622, 624 (2d Cir. 1954).

STATE TORT CLAIMS ACT IS PATTERNED AFTER
THE FTCA SO WE LOOK TO U.S. SUPREME
COURT DECISIONS UNDER THE FTCA

We have long recognized that Nebraska’s State Tort Claims Act is patterned after the FTCA. See *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005). And the FTCA was the culmination of a long effort to eliminate thousands of private claims bills at every session of Congress and thus mitigate the consequences of sovereign immunity from suit. *United States v. Muniz*, 374 U.S. 150, 83 S. Ct. 1850, 10 L. Ed. 2d 805 (1963); *Feres v. United States*, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950). Where the U.S. Supreme Court cases have been clear, we have looked to U.S. Supreme Court precedent and legislative history of the FTCA to inform our reading of Nebraska statutes patterned after federal legislation. In *Jill B. & Travis B.*, *supra*, where we were considering the “misrepresentation” exception in § 81-8,219(4), we first looked to the U.S. Supreme Court decisions for guidance. But where the U.S. Supreme Court does not directly provide the answer, we then consider other federal authority. See *Haffke v. Signal 88*, 306 Neb. 625, 947 N.W.2d 103 (2020) (explaining that it is appropriate to look to federal court decisions construing similar and parent legislation). Fortunately in this case, the U.S. Supreme Court’s decision in *Sheridan v. United States*, 487 U.S. 392, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988), supplies guidance and resolution.

SHERIDAN OPINION (PLUS JUSTICE KENNEDY’S
CONCURRENCE) SHOW THE STATE IS
NOT IMMUNE FROM SUIT

In the instant case, appellant alleged that the decision of the TSCI staff to double bunk the victim, Berry, with the inmate assailant, Schroeder, was negligent because it violated their

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duty of care to Berry in a variety of ways. The district court and the majority in this case found that the negligence cause of action should be dismissed based on the exception provisions of § 81-8,219.

LANGUAGE OF INTENTIONAL TORT ASSAULT EXCEPTION
APPLIES TO INTENTIONAL TORTS COMMITTED BY
GOVERNMENTAL EMPLOYEES BUT NOT TO
INTENTIONAL TORTS COMMITTED BY
NONGOVERNMENTAL ASSAILANT

As an initial matter, we quote Nebraska's State Tort Claims Act as relevant to our analysis of whether appellant stated a cause of action. Neb. Rev. Stat. § 81-8,210(4) (Reissue 2014) defines the "[t]ort claims" for which sovereign immunity is waived. This statute provides that such claims involve "the negligent or wrongful act or omission of any employee of the [S]tate." See, similarly, 28 U.S.C. § 1346(b) (2012) (providing for "claims . . . caused by the negligent or wrongful act or omission of any employee of the Government"). Later in § 81-8,219, the State Tort Claims Act provides exceptions, i.e., that there will be no liability for such act or omission of any employee of the State when the employee's acts or omissions giving rise to the claim arise from his or her intentional torts. Section 81-8,219(4), the intentional tort exception, states that the State Tort Claims Act shall not apply to: "Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." The FTCA exception language is comparable to § 81-8,219(4), but the FTCA includes an additional proviso not relevant here. The intentional tort exception, 28 U.S.C. § 2860(h), provides the United States shall not be liable for "[a]ny claim arising out of assault, battery" I note that Congress and the Legislature did not bar any "suit" arising out of an assault; they barred only "claims," which suggests that the exception was associated with intentional acts of governmental employees against whom a claim could be filed as distinguished from

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a nongovernmental intentional tort-feasor against whom a suit can be filed.

CASES INTERPRETING INTENTIONAL TORT ASSAULT
EXCEPTION AND LEGISLATIVE HISTORY SHOW THAT
IT APPLIES TO INTENTIONAL TORTS COMMITTED
BY GOVERNMENTAL EMPLOYEES BUT NOT
TO INTENTIONAL TORTS COMMITTED BY
NONGOVERNMENTAL ASSAILANT

We have stated that the State Tort Claims Act, like the FTCA, represented the legislators’ willingness “to waive sovereign immunity where *its employees acted negligently but not where they acted deliberately or recklessly*—at least as to the specified torts.” *Jill B. & Travis B. v. State*, 297 Neb. 57, 73, 899 N.W.2d 241, 254 (2017) (emphasis supplied). That is, we have recognized that the intentional tort-feasor addressed in § 81-8,219(4) is a governmental employee.

The FTCA legislative history pertaining to the assault exception was summarized in *Panella v. United States*, 216 F.2d 622 (2d Cir. 1954), the case relied upon in *Sheridan, supra*, for its conclusion that a cause of action may exist where there is an allegation of antecedent negligence by the government, notwithstanding the existence of an assault in the narrative. In particular, the legislative history of the FTCA shows that the “‘assault and battery’ exception related to acts of government employees.” *Panella*, 216 F.2d at 626. The debate of “Hearings on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess. p. 33” in 1942 shows the following questions and answers: “‘Mr. Robsion: On that point of deliberate assault[,] that is where some agent of the Government gets in a fight with some fellow? Mr. Shea: Yes. Mr. Robsion: And socks him? Mr. Shea: That is right.’” *Panella*, 216 F.2d at 626 (emphasis omitted).

Most of our string of cases discussing the intentional tort assault exception under the State Tort Claims Act, and its roughly comparable counterpart in the Political Subdivisions Tort Claim Act, have involved intentional acts committed by

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state or local governmental employees, and we have applied the exception and found immunity thus resulting in dismissal. E.g., *Rutledge v. City of Kimball*, 304 Neb. 593, 935 N.W.2d 746 (2019) (involving city employee choking victim); *Britton v. City of Crawford*, 282 Neb. 374, 803 N.W.2d 508 (2011) (involving law enforcement shooting the decedent); *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005) (involving sexual assault by Department of Correctional Services employee). However, in *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007), a student was the assailant and the exception did not apply; hence, the political subdivision waived immunity.

The majority relies on this string of cases (except for *Doe*) to support its decision. As I noted above, in these cases, the assailant was a governmental employee and it was the conduct of these actors to which the statutory assault exception was addressed and from whose acts the governmental entity remained immunized. These cases merely say that the government does not lose its immunity in cases where injuries arise from assaults by government actors.

The majority opinion's reliance on this string of cases is not helpful where, as here, the assault was committed by a nongovernmental individual, i.e., an inmate. As explained, the State Tort Claims Act's general waiver of immunity applies only to governmental employees. The claims covered by the State Tort Claims Act are those claims which involve "the negligent or wrongful act or omission of any employee of the [S]tate." § 81-8,210(4). It logically follows that, as stated in *Sheridan*,

[t]he exception should therefore be construed to apply only to claims that would otherwise be authorized by the basic waiver of sovereign immunity. Since an assault by a person who was not employed by the Government could not provide the basis for a claim under FTCA [or the State Tort Claims Act], the [intentional tort] exception could not apply to such an assault; rather, the exception

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only applies in cases arising out of assaults by federal [or State] employees.

Sheridan v. United States, 487 U.S. 392, 400, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988).

For completeness, I note that I am aware of more nuanced considerations where there is some question as to whether the government-employed assailant was acting within the scope of his or her duties at the time of the incident and other cases where the government is being sued for preceding acts of negligent hiring, retention, or supervision of a government-employed assailant. See Rebecca L. Andrews, *So the Army Hired an Ax-Murderer: The Assault and Battery Exception to the Federal Tort Claims Act Does Not Bar Suits for Negligent Hiring, Retention and Supervision*, 78 Wash. L. Rev. 161 (2003). But these issues are not implicated in the instant case. Indeed, with respect to the former, *Sheridan* clarifies that in permitting the negligence claim to go forward, the assailant's "employment status [at the moment of the incident] has [no] bearing on the basis for petitioners' [negligence] claim for money damages, [and § 2680(h),] the intentional tort exception to the FTCA[,] is not applicable in this case." 487 U.S. at 403. Here, the basis for appellant's claim is the tort of negligence, independent from the injury resulting from an intentional act by an assailant who was not a governmental employee. That should end the matter, but given the majority opinion, the analysis must continue.

SHERIDAN REJECTS THE "BUT FOR THE ASSAULT"

RATIONALE RELIED ON BY THE

MAJORITY IN THIS CASE

The majority finds that the assault need not be by a governmental employee so long as there is an assault somewhere in the picture. That is, the majority states that the State's alleged antecedent negligence arises only as a result of the subsequent assault albeit by a nongovernmental actor. The majority reasons that "but for" the assault, there can be no alleged negligence by the State. The "but for" rationale of the majority

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here is reminiscent of the plurality view in *United States v. Shearer*, 473 U.S. 52, 105 S. Ct. 3039, 87 L. Ed. 2d 38 (1985), but that view was later expressly rejected in the *Sheridan* opinion. See *Andrews*, *supra*.

The “but for” rationale adopted by the majority suffers from several defects, including confusing “claim” with “injury.” Not only is it belied by the language of the statute discussed above, but it ignores a basic precept of tort law that one injury “can arise from more than one wrongful act[s]”—in this case, a negligence “claim” which is distinct from an assault. See *Sheridan v. United States*, 487 U.S. 392, 405, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988) (Kennedy, J., concurring). See, also, 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 34 (2010). An event may have more than one proximate cause. See 1 Restatement (Third), *supra*. An intentional act intervening between a negligent act and the result does not always vitiate liability for the negligence. *Id.* A superseding cause of harm will not excuse an actor’s negligence where the actor should have realized the likelihood that such a situation might be created and the third person might avail himself of the opportunity to commit such a tort or crime. *Id.* As Justice Kennedy stated in *Sheridan*, the “but for” approach adopted by the *Sheridan* dissent (and by this court’s majority) implies that the “intentional act somehow obliterates the legal significance of any negligence that precedes or follows it.” 487 U.S. at 406 (Kennedy, J., concurring).

Contrary to the majority, I read the complaint to allege negligence by the TSCI staff in a variety of ways, e.g., violating duty of care for inmates, not following regulations regarding the decision to double bunk, ignoring the known dangerous propensity of Schroeder, et cetera, which acts are distinct and predate the intentional assault by the nongovernmental assailant. In *Block v. Neal*, 460 U.S. 289, 298, 103 S. Ct. 1089, 75 L. Ed. 2d 67 (1983), the U.S. Supreme Court explained that given the language and history of the FTCA, even where a governmental employee’s conduct makes certain claims not

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actionable due to an exception in 28 U.S.C. § 2680(h), a claimant is not barred by that statute from pursuing a distinct claim “arising out of other aspects of the Government’s conduct.” As stated in a concurrence to an opinion of the U.S. Court of Appeals for the 11th Circuit: “So it is clear that any suggestion that [the intentional tort exception,] § 2680(h)[,] bars all claims for which the injuries arose directly out of an excepted tort is overly broad, incorrect, and inconsistent with the governing law of *Sheridan*.” *Alvarez v. U.S.*, 862 F.3d 1297, 1314 (11th Cir. 2017) (Rosenbaum, J., concurring).

APPELLANT’S NEGLIGENCE CAUSE OF ACTION
AGAINST THE STATE DID NOT “ARISE” FROM
THE NONGOVERNMENTAL ASSAILANT’S
INTENTIONAL ASSAULT

Appellant alleged a cause of action for negligence against the State by virtue of certain governmental employees allegedly having failed in their duty to protect and care for the inmate Berry. Although another inmate, Schroeder, assaulted Berry, the State’s alleged antecedent negligence is premised on breach of a “different duty,” see *Block*, 460 U.S. at 297, sometimes referred to as an “independent affirmative duty.” See *LaFrancis v. U.S.*, 66 F. Supp. 2d 335 (D. Conn. 1999) (collecting cases under doctrine of independent affirmative duty). The injury from the assault on Berry can be traced back to more than one type of tortious conduct, and the two torts at issue, negligence and an intentional tort, do not rely on the same factual allegations.

Sheridan, *supra*, has been described as carving out an “exception to an exception to an exception to a general rule.” *CNA v. United States*, 535 F.3d 132, 148 (3d Cir. 2008). The general rule is sovereign immunity, the first exception is the FTCA’s limited waiver of the government’s immunity, the second exception is the intentional tort exception that reinstates the government’s immunity, and the third exception is the narrow category of cases, identified in *Sheridan*, which may

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proceed against the sovereign. As noted, the third category reflects the independent affirmative duty doctrine.

The *Sheridan* Court held that “in at least some situations[,] the fact that an injury was directly caused by an assault or battery will not preclude liability against the Government for negligently allowing the assault to occur.” 487 U.S. at 398. Contrary to the majority’s view to the effect that the State’s alleged negligence arises from the assault, the roots of the assault lie in the State’s own alleged negligence. So it would be contrary to the language of the State Tort Claims Act and unsound to afford immunity to an alleged breach of duty by a governmental entity because an intervening event, the very anticipation of which made that governmental entity’s conduct negligent, has brought about the expected harm. *Doe v. Durtschi*, 110 Idaho 466, 716 P.2d 1238 (1986).

The U.S. Court of Appeals for the 10th Circuit, relying on U.S. Supreme Court precedent, summarized the key inquiry in cases of two torts as “can an FTCA plaintiff escape the bar of § 2680(h) by arguing that the battery was the natural consequence of prior governmental negligence . . . ?” *Franklin v. U.S.*, 992 F.2d 1492, 1498 (10th Cir. 1993). If the answer to this question is in the affirmative, the complaint survives. The complaint in this case does make this argument, and in my view, should not be dismissed at this stage of the proceedings.

In *Sheridan v. United States*, 487 U.S. 392, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988), where liability against the government was not precluded, the Court relied on two cases which involved assaults by inmates rather than by governmental employees. Both cases alleged negligence by federal employees by failing to prevent the assault that caused injury: *United States v. Muniz*, 374 U.S. 150, 83 S. Ct. 1850, 10 L. Ed. 2d 805 (1963) (allowing 12 inmates to gather to beat up one inmate, the plaintiff), and *Panella v. United States*, 216 F.2d 622 (2d Cir. 1954). The *Sheridan* Court agreed with Judge (later Justice) Harlan’s reasoning in *Panella* based on statutory interpretation to the effect that the intentional tort

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exception only applied to claims already authorized by the waiver of sovereign immunity, that is, to claims involving torts committed by governmental employees. In Nebraska, that concept is found in § 81-8,210(4), which provides that the claims to which sovereign immunity is waived are “the negligent or wrongful act or omission of any employees of the [S]tate.” Contrary to § 81-8,210(4), the majority’s reasoning assumes that the waiver of the State’s immunity includes a claim against the State under the State Tort Claims Act based solely on an inmate’s assault of another inmate. But there is no such cognizable claim under the State Tort Claims Act, so one cannot logically apply an exception to a nonexistent claim. See *Sheridan*, *supra*.

An assault by a nongovernmental employee could not provide the basis for a claim under the FTCA, and the U.S. Supreme Court held that the assault exception “only applies in cases arising out of assaults by federal employees.” *Sheridan*, 487 U.S. at 400. This conclusion is based on federal statutory language comparable to that of Nebraska’s State Tort Claims Act. In view of the foregoing, the *Sheridan* Court found it unnecessary to rely on the temporal reasoning in *Muniz* to the effect that the plaintiff’s claim did not “‘arise out of’” the assault by the inmates that caused the injuries, but instead the focus is on

the Government’s negligent act or omission [in failing to prevent the assault that caused injury]; the intentional commission is simply considered as part of the causal link leading to the injury. Under this view, the assailant’s individual involvement would not give rise to Government liability, but antecedent negligence by Government agents could

Sheridan, 487 U.S. at 399. In both *Muniz* and *Panella*, upon which *Sheridan* relied, just as in the instant case, recovery was sought based on the negligence of the governmental entity, and given the fact that the assaults were committed by inmates, the intentional tort exception was not applicable.

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CONCLUSION

Given the foregoing analysis, in my view, this complaint should not be dismissed under the intentional torts assault exception to the waiver of sovereign immunity because the complaint adequately alleges negligence by the State in violation of its own regulations for the act of “double bunking” a “talkative,” soon-to-be-released inmate with a “bad temper[ed]” inmate serving a life sentence, the latter of whom within 5 days of sharing a cell “wrapped his arm around the [former’s] neck and squeezed for five minutes” until “he felt certain [the former] was dead.”

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AVG PARTNERS I v. GENESIS HEALTH CLUBS
Cite as 307 Neb. 47



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

AVG PARTNERS I, LLC, ALSO KNOWN AS AVG PARTNERS,
APPELLEE AND CROSS-APPELLANT, V. GENESIS HEALTH
CLUBS OF MIDWEST, LLC, AND 24 HOUR
FITNESS USA, INC., APPELLANTS
AND CROSS-APPELLEES.

948 N.W.2d 212

Filed September 4, 2020. No. S-19-857.

1. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
2. **Standing; Jurisdiction; Parties.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.
3. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.
4. **Directed Verdict: Appeal and Error.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
5. ____: _____. In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
6. **Motions for New Trial: Appeal and Error.** An appellate court reviews a denial of a motion for new trial or, in the alternative, to alter or amend the judgment, for an abuse of discretion.
7. **Rules of Evidence: Appeal and Error.** When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the

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trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.

8. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection or exclude evidence on hearsay grounds.
9. **Prejudgment Interest: Appeal and Error.** Awards of prejudgment interest are reviewed de novo.
10. **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.
11. **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.
12. **Courts: Appeal and Error.** Appellate review of a district court's use of inherent power is for an abuse of discretion.
13. **Standing: Jurisdiction: Proof.** A party invoking a court's or tribunal's jurisdiction bears the burden of establishing the elements of standing.
14. **Standing: Jurisdiction.** Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf.
15. **Leases: Words and Phrases.** A lease is a species of contract for the possession and profits of land and tenements, either for life or for a certain period of time, or during the pleasure of the parties, and the essential elements of a contract must be present.
16. **Actions: Landlord and Tenant.** In an action for rent, it is sufficient to show a contract with plaintiff and a holding under him or her; plaintiff's title or right of possession is immaterial.
17. **Rules of Evidence: Proof.** There is no general rule of evidence that a party must produce the best evidence which the nature of the case permits.
18. **Trial: Evidence: Appeal and Error.** In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.
19. ____: ____: _____. Erroneous admission of evidence does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.
20. **Prejudgment Interest.** Neb. Rev. Stat. § 45-104 (Reissue 2010) applies to four types of judgments: (1) money due on any instrument in writing; (2) settlement of the account from the day the balance shall

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- be agreed upon; (3) money received to the use of another and retained without the owner's consent, express or implied, from the receipt thereof; and (4) money loaned or due and withheld by unreasonable delay of payment.
21. **Rules of the Supreme Court: Pleadings: Prejudgment Interest: Notice.** Compliance with Neb. Ct. R. Pldg. § 6-1108(a) is not determinative where entitlement to interest is based on statute and the adverse party had notice and an opportunity to be heard prior to judgment.
 22. **Leases: Prejudgment Interest.** Interest under Neb. Rev. Stat. § 45-104 (Reissue 2010) can be recovered on a lease, although the statute's provisions may be superseded by terms set forth in the lease.
 23. **Claims: Prejudgment Interest.** Whether a claim is liquidated or unliquidated is immaterial with respect to a litigant's ability to recover prejudgment interest under Neb. Rev. Stat. § 45-104 (Reissue 2010).
 24. **Rules of Evidence: Words and Phrases.** Authentication or identification of evidence is a condition precedent to its admission and is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
 25. **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.
 26. **Rules of Evidence: Records: Words and Phrases.** The term "data compilation" in Neb. Rev. Stat. § 27-803(5)(b) (Reissue 2016) is broad enough to include records furnished by third parties with knowledge of the relevant acts, events, or conditions if the third party has a duty to make the records and the holder of the record routinely compiles and keeps them.
 27. **Leases: Real Estate: Taxes: Assessments.** The right to recover real estate taxes and assessments under a lease depends upon the wording of the lease contract.
 28. **Taxes: Interest: Penalties and Forfeitures: Costs.** It is a general rule that in the absence of an express statute to the contrary, interest, penalties, and costs collected on delinquent taxes follow the tax.
 29. **Appeal and Error.** An argument that does little more than restate an assignment of error does not support the assignment, and an appellate court will not address it.
 30. **Actions: Pleadings: Notice.** Under Nebraska's liberal pleading regime for civil actions, a party is required to set forth only a short and plain statement of the claim showing the pleader's entitlement to relief and is not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted.
 31. **Leases: Damages.** When a lease provides for late charges, they may be recoverable as damages.

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32. **Appeal and Error: Words and Phrases.** 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.
33. **Courts: Jurisdiction.** A district court, as a court of general jurisdiction, has inherent power to do all things necessary for the proper administration of justice and equity within the scope of its jurisdiction.
34. **Rules of the Supreme Court: Judges: Motions for Continuance.** Trial judges are encouraged to implement firm, consistent procedures for minimizing continuances to meet case progression standards.
35. **Trial: Judges.** A trial judge has broad discretion over the conduct of a trial.
36. **Affidavits: Public Officers and Employees.** In connection with an affidavit, a notary public completes a certificate, known as a jurat, which confirms that the affiant appeared before the notary, attested to the truth of his or her statements, and signed the affidavit.
37. **Oaths and Affirmations: Affidavits: Public Officers and Employees.** The fact that an affiant signed an affidavit in the presence of a notary and that the affiant's signature was in fact notarized is sufficient as an oath or affirmation.
38. **Affidavits.** Unless required by statute, an omission in a jurat that an affidavit was sworn to will not be fatal if the fact otherwise appears.
39. **Judgments: Words and Phrases.** A court abuses its discretion when its decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
40. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Douglas County: J
RUSSELL DERR, Judge. Affirmed.

W. Patrick Betterman, P.C., L.L.O., for appellants.

William F. Hargens and Lauren R. Goodman, of McGrath,
North, Mullin & Kratz, P.C., L.L.O., and Gregory M. Bordo and
Christopher J. Petersen, of Blank Rome, L.L.P., for appellee.

HEAVICAN, C.J., CASSEL, STACY, FUNKE, PAPIK, and
FREUDENBERG, JJ.

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CASSEL, J.

I. INTRODUCTION

After a tenant breached its written leases on two commercial properties, the landlord obtained a money judgment—based upon a jury’s special verdict for “[u]npaid rent and late fees” and “[u]npaid taxes.” The tenant appeals, and the landlord cross-appeals. We find no merit in the tenant’s numerous arguments—challenging the landlord’s standing, evidentiary rulings, damages based on lease provisions governing late fees and real estate taxes, statutory prejudgment interest,¹ and expenses awarded for a trial delay caused by the tenant’s last-minute discharge of its lawyer. Not reaching the cross-appeal of an evidentiary ruling, we affirm the district court’s judgment.

II. BACKGROUND

We begin with a brief background. Additional facts will be discussed, as necessary, in the analysis section.

As landlord, AVG Partners I, LLC, also known as AVG Partners (AVG), sued its tenant’s assignee, Genesis Health Clubs of Midwest, LLC, and its original tenant, 24 Hour Fitness USA, Inc. (collectively Genesis), for breaches of two commercial leases for property in Omaha, Nebraska. Each written lease was for a building that was used as a fitness club. One was located on South 145th Plaza (145th Plaza) and the other on North 118th Circle (North Circle).

In April 2017, Genesis closed the North Circle facility and vacated the premises even though the lease did not expire until October 2019. It failed to make any of the monthly \$63,154.29 rent payments for April 2017 or thereafter and failed to pay property taxes. AVG sent Genesis a notice of default each month from April 2017 to April 2019.

With respect to the 145th Plaza lease, Genesis paid one-half of the \$56,291.67 monthly rent due from September 2017 through June 2018. In response to the insufficient rent

¹ See Neb. Rev. Stat. § 45-104 (Reissue 2010).

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payments, AVG sent notices of default. Despite the notices of default, Genesis never paid the remaining half of the rent due from September 2017 through June 2018. Since June 2016, Genesis had not paid any of the property taxes levied on 145th Plaza.

The matter proceeded to a jury trial. Genesis did not dispute the amounts of monthly rent owed under the written leases. Nor was there any dispute that Genesis breached the leases by failing to pay rent and real property taxes. In Genesis' opening statement, counsel informed the jury that there were two reasons why AVG was not owed all the money it claimed: AVG's failure to mitigate the loss and its failure to give the required notice.

The jury returned a special verdict in AVG's favor. Regarding the North Circle property, it found that AVG met its burden of proving Genesis breached the lease agreement, causing AVG damages of \$1,657,800 for unpaid rent and late fees from April 1, 2017, to the date of the verdict and of \$264,937.47 for unpaid taxes payable to that date. The jury found that Genesis did not meet its burden of proving AVG failed to take reasonable steps to minimize its damages. Regarding the property at 145th Plaza, the jury found that AVG met its burden of proving Genesis breached the lease agreement. According to the verdict, AVG's damages were \$303,974.96 in unpaid rent and late fees from September 20, 2017, to the date of the verdict and \$236,745.77 in unpaid taxes payable to that date. The court entered judgment on the verdict and further awarded prejudgment interest.

Genesis appealed, and AVG cross-appealed. We moved the case to our docket.²

III. ASSIGNMENTS OF ERROR

[1] Genesis assigned 14 errors, most of which contained multiple subparts. An alleged error must be both specifically

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

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assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.³ We address only those errors both assigned and argued.

Genesis alleges, consolidated and restated, that the court erred in (1) failing to find that AVG lacked standing because it failed to prove its ownership of the properties at issue, (2) awarding prejudgment interest, (3) failing to reduce the special verdict for penalty interest on taxes and late fees for both properties and failing to grant Genesis a new trial on late fees, (4) admitting certain exhibits and testimony into evidence, and (5) awarding sanctions of \$69,179.19.

On cross-appeal, AVG assigns that the court erred in sustaining Genesis' hearsay objection to the admission of exhibit 132.

IV. STANDARD OF REVIEW

[2,3] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court.⁴ The question of jurisdiction is a question of law, upon which an appellate court reaches a conclusion independent of the trial court.⁵

[4,5] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.⁶ 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

³ *TNT Cattle Co. v. Fife*, 304 Neb. 890, 937 N.W.2d 811 (2020).

⁴ *In re Maint. Fund Trust of Sunset Mem. Park Chapel*, 302 Neb. 954, 925 N.W.2d 695 (2019).

⁵ *Id.*

⁶ *Anderson v. Babbe*, 304 Neb. 186, 933 N.W.2d 813 (2019).

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controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.⁷

[6] An appellate court reviews a denial of a motion for new trial or, in the alternative, to alter or amend the judgment, for an abuse of discretion.⁸

[7,8] When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.⁹ Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection or exclude evidence on hearsay grounds.¹⁰

[9] Awards of prejudgment interest are reviewed de novo.¹¹

[10,11] When reviewing a jury verdict, the appellate court considers the evidence and resolves evidentiary conflicts in favor of the successful party.¹² 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.¹³

[12] Appellate review of a district court's use of inherent power is for an abuse of discretion.¹⁴

⁷ *Jacobs Engr. Group v. ConAgra Foods*, 301 Neb. 38, 917 N.W.2d 435 (2018).

⁸ *Armstrong v. Clarkson College*, 297 Neb. 595, 901 N.W.2d 1 (2017).

⁹ *Id.*

¹⁰ *Pantano v. American Blue Ribbon Holdings*, 303 Neb. 156, 927 N.W.2d 357 (2019).

¹¹ *Weyh v. Gottsch*, 303 Neb. 280, 929 N.W.2d 40 (2019).

¹² *Jacobs Engr. Group v. ConAgra Foods*, *supra* note 7.

¹³ *Id.*

¹⁴ *Bohling v. Bohling*, 304 Neb. 968, 937 N.W.2d 855 (2020).

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V. ANALYSIS

1. ASSIGNMENT OF LEASES TO AVG

(a) Additional Background

Genesis moved for a directed verdict on the basis that there was no evidence of an assignment of the lessor's interest. Genesis' counsel noted that there was no deed showing the conveyance of the leased property to AVG and moved to dismiss on the ground that AVG did not have standing. The court overruled the motion, stating that the evidence as a whole demonstrated AVG had the right to enforce the agreements and collect rent. The court also overruled Genesis' posttrial motion to set aside the verdict and judgment and motion for new trial asserting that AVG failed to prove the assignments.

(b) Discussion

[13,14] Genesis argues that AVG's claims fail, because AVG did not prove an assignment of the written leases to it. And in the absence of the assignment, it challenges AVG's standing. A party invoking a court's or tribunal's jurisdiction bears the burden of establishing the elements of standing.¹⁵ Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf.¹⁶ As discussed below, the evidence supported AVG's status as the landlord under the leases, and as the landlord, AVG obviously had a personal stake in this action.

[15,16] This is an action for two claims of breach of a written contract. A lease is a species of contract for the possession and profits of land and tenements, either for life or for a certain period of time, or during the pleasure of the parties, and the essential elements of a contract must be present.¹⁷

¹⁵ *In re Maint. Fund Trust of Sunset Mem. Park Chapel*, *supra* note 4.

¹⁶ *Id.*

¹⁷ *Krance v. Faeh*, 215 Neb. 242, 338 N.W.2d 55 (1983).

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In an action for rent, it is sufficient to show a contract with plaintiff and a holding under him or her; plaintiff's title or right of possession is immaterial.¹⁸ Generally the relation of landlord and tenant is founded upon express contract, but such relation may be presumed from the conduct of the parties in the premises.¹⁹ One in exclusive possession of the real estate of another with the latter's knowledge, in the absence of all evidence on the subject, will be presumed in possession by the owner's permission.²⁰ It is well settled that a tenant cannot, while occupying the premises, dispute his or her landlord's title.²¹ And the estoppel of a tenant to deny the title of his or her landlord extends to everyone in privity with the landlord, and it inures to the benefit of any person to whom the landlord's title may pass, and continues until possession is actually surrendered.²²

[17] Genesis emphasizes the absence of a document assigning the leases, but it was not essential. There is no general rule of evidence that a party must produce the best evidence which the nature of the case permits.²³ Thus, we have explained that there is no hierarchy of evidence.²⁴ Here, the evidence at trial demonstrated Genesis' understanding that AVG was its landlord under the leases; there was no evidence to the contrary. Genesis made rent checks payable to "AVG Partners I, LLC." When 24 Hour Fitness USA entered into a June 2016 lease assignment

¹⁸ *Bartlett v. Robinson*, 52 Neb. 715, 72 N.W. 1053 (1897).

¹⁹ *Steen v. Scheel*, 46 Neb. 252, 64 N.W. 957 (1895).

²⁰ *Skinner v. Skinner*, 38 Neb. 756, 57 N.W. 534 (1894).

²¹ See, *Bender v. James*, 212 Neb. 77, 321 N.W.2d 436 (1982); *Penn Mutual Life Ins. Co. v. Sweeney*, 132 Neb. 624, 273 N.W. 46 (1937); *Kouma v. Murphy*, 129 Neb. 892, 263 N.W. 211 (1935); *Carson v. Broady*, 56 Neb. 648, 77 N.W. 80 (1898).

²² *Hackney v. McIninch*, 79 Neb. 128, 112 N.W. 296 (1907).

²³ *Burgardt v. Burgardt*, 304 Neb. 356, 934 N.W.2d 488 (2019).

²⁴ *Id.*

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agreement with Genesis, it listed the leases involved here and identified the chain of assignments leading to the assignments of the leases to AVG. In April 2017, when Genesis vacated the North Circle premises, its law firm notified AVG, stating that “AVG Partners I, LLC” and Genesis were parties to the lease. Letters from the Douglas County treasurer concerning delinquent real estate taxes for 145th Plaza and North Circle were addressed to “AVG Partners I LLC” as the owner of the properties.

[18,19] In connection with this issue, Genesis argues that the court erred in admitting the opinion of Tere Throenle, AVG’s chief financial officer, regarding AVG’s ownership of the properties. In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.²⁵ Erroneous admission of evidence does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.²⁶ Here, other properly admitted evidence demonstrated AVG’s status as landlord under the leases. Assuming, without deciding, that it was error to admit Throenle’s opinion on ownership of the properties, any such error was harmless.

We conclude that the assignments of error directed to AVG’s alleged failure to prove assignment of the leases lack merit.

2. PREJUDGMENT INTEREST

(a) Additional Background

AVG filed its operative complaint in November 2017, setting forth when breaches occurred. The complaint requested damages in an amount to be proved at trial and “[f]or all other relief that the Court deems just and proper.” But it did not specifically request prejudgment interest.

²⁵ *Weyh v. Gottsch*, *supra* note 11.

²⁶ See *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007).

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Prejudgment interest was litigated at trial. Throenle testified that AVG calculated 12 percent interest on the outstanding rent. It was Throenle's understanding that 12 percent interest was the statutory amount of interest applicable under Nebraska law. In connection with Genesis' motion for directed verdict, counsel and the court discussed interest and the liquidated nature of the claims. In closing arguments, AVG's counsel stated, "[W]hen . . . Throenle was testifying, we showed you a couple of charts that had some numbers on them Those numbers that were provided during . . . Throenle's testimony, included, . . . a 12 percent prejudgment interest amount that was added to it." Counsel stated that the court would calculate the interest charge after trial.

The court awarded AVG "prejudgment interest in the amount of \$254,118.78 (as of May 22, 2019, with prejudgment interest accruing thereon at \$611.50 per day until entry of judgment)."

(b) Discussion

(i) *Application of Recent Decision*

Genesis argues that our recent decision in *Weyh v. Gottsch*²⁷ should be applied only prospectively. *Weyh* was released after trial but 11 days before the court entered its order on the jury verdict and on prejudgment interest. Genesis contends that it would be inequitable to apply *Weyh* retroactively, because litigants have operated under the belief that prejudgment interest under § 45-104 was not allowed for unliquidated claims except when Neb. Rev. Stat. § 45-103.02 (Reissue 2010) applied.

In *Weyh*, we clarified Nebraska's existing law on prejudgment interest. We held that § 45-103.02(2) was not the exclusive means of recovering prejudgment interest. We explained that "§§ 45-103.02 and 45-104 provide[d] separate and independent means of recovering prejudgment interest,

²⁷ *Weyh v. Gottsch*, *supra* note 11.

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and we h[e]ld that when a claim is of the types enumerated in § 45-104, then prejudgment interest may be recovered without regard to whether the claim is liquidated.”²⁸ As we discuss below, § 45-104 has long been part of Nebraska law.

In rare circumstances, fairness and equity dictate that a newly announced rule of law be effective as of the date of the court’s opinion.²⁹ Nearly half a century ago, the U.S. Supreme Court set forth the following standard for prospective application of a substantive change in law:

First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed Second, [the court] “must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.” . . . Finally, [the court must weigh] the inequity imposed by retroactive application, for “[w]here a decision of [the court] could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the ‘injustice or hardship’ by a holding of nonretroactivity.”³⁰

Genesis’ rationale seems to be that one who violates a contract falling squarely within the statute should nonetheless avoid prejudgment interest because this court had judicially imposed a limitation appearing nowhere in the statute. We see no unfairness, inequity, injustice, or hardship in enforcing the statute as written. We will apply *Weyh* here.

²⁸ *Id.* at 283, 929 N.W.2d at 45.

²⁹ See *Commercial Fed. Sav. & Loan v. ABA Corp.*, 230 Neb. 317, 431 N.W.2d 613 (1988).

³⁰ *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971) (citations omitted).

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(ii) *Compliance With
Neb. Ct. R. Pldg. § 6-1108(a)*

Genesis argues that AVG's failure to comply with a pleading rule is fatal to its claim for prejudgment interest. Section 6-1108(a) states in part, "If the recovery of money be demanded, the amount of special damages shall be stated but the amount of general damages shall not be stated; and if interest thereon be claimed, the time from which interest is to be computed shall also be stated."

The above-quoted language of § 6-1108(a) is not a new requirement. It was long codified in statute.³¹ The statutory language was repealed in 2002,³² when the Legislature "amend[ed] the civil procedure code of Nebraska from that of a code pleading system to a notice pleading system."³³ In connection with the repeal, the Legislature enacted a statute empowering this court to promulgate rules of pleading to apply in civil actions.³⁴ Hence, the statutory language became part of pleading rule § 6-1108(a).

Genesis directs our attention to our cases stating that a party was not entitled to prejudgment interest where it was not requested in the party's complaint.³⁵ In *Higgins v. Case Threshing Machine Co.*,³⁶ we observed that the petition did not mention interest, that a statute required the time from which interest is to be computed to be stated, and that we did not allow interest in two earlier cases where it was not prayed for

³¹ See, e.g., Rev. Stat. §§ 92 (1867) and 7664 (1913), Comp. Stat. §§ 8608 (1922) and 20-804 (1929), and Neb. Rev. Stat. § 25-804 (1943).

³² See 2002 Neb. Laws, L.B. 876, § 92.

³³ Introducer's Statement of Intent, L.B. 876, Judiciary Committee, 97th Leg., 2d Sess. (Jan. 25, 2002).

³⁴ See, 2002 Neb. Laws, L.B. 876, § 1; Neb. Rev. Stat. § 25-801.01 (Reissue 2016).

³⁵ See, *Life Investors Ins. Co. v. Citizens Nat. Bank*, 223 Neb. 663, 392 N.W.2d 771 (1986); *Higgins v. Case Threshing Machine Co.*, 95 Neb. 3, 144 N.W. 1037 (1914).

³⁶ *Higgins v. Case Threshing Machine Co.*, *supra* note 35.

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in the petition. In one of those earlier cases, we stated that where “the plaintiff does not pray for interest, but simply prays a judgment for \$200 and costs,” it was error to authorize the jury to add interest to whatever damages it found due.³⁷ In the other, we cited the statute and stated that it was error to permit the jury to include interest on the sum claimed in the absence of a prayer for interest in the petition.³⁸ In *Life Investors Ins. Co. v. Citizens Nat. Bank*,³⁹ we cited *Higgins* and stated that prejudgment interest could not be awarded because it was not requested in the petition.

Significantly, there is no indication in these earlier cases of any statutory basis for an award of prejudgment interest. We stated in *Weyh*: “In Nebraska, there are two statutes that authorize recovery of prejudgment interest. The first, § 45-104, was enacted in 1879, and the second, § 45-103.02, was enacted in 1986 and amended in 1994.”⁴⁰

Section 45-103.02 could not have supplied a basis for an award in the cases Genesis cites, because it was not in effect at the time of these pre-1987 cases. As originally adopted, § 45-103.02 applied to “all causes of action accruing on or after January 1, 1987.”⁴¹

[20] Section 45-104 and its prior codifications were in effect, but it is not clear that the statute would have applied to the earlier cases. “Since its adoption more than a century ago, § 45-104 has identified four types of claims—all contract based—under which prejudgment interest is allowed.”⁴² Section 45-104 applies to four types of judgments: (1) money due on any instrument in writing; (2) settlement of the

³⁷ *City of South Omaha v. Ruthjen*, 71 Neb. 545, 549, 99 N.W. 240, 242 (1904).

³⁸ See *Rawlings v. Anheuser-Busch Brewing Ass’n.*, 1 Neb. (Unoff.) 555, 95 N.W. 792 (1901).

³⁹ *Life Investors Ins. Co. v. Citizens Nat. Bank*, *supra* note 35.

⁴⁰ *Weyh v. Gottsch*, *supra* note 11, 303 Neb. at 301, 929 N.W.2d at 55.

⁴¹ *Id.* at 306, 929 N.W.2d at 58. See § 45-103.02 (Reissue 1988).

⁴² *Weyh v. Gottsch*, *supra* note 11, 303 Neb. at 301, 929 N.W.2d at 55.

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account from the day the balance shall be agreed upon; (3) money received to the use of another and retained without the owner's consent, express or implied, from the receipt thereof; and (4) money loaned or due and withheld by unreasonable delay of payment.⁴³ But *Higgins* was an action upon an appeal bond, *City of South Omaha v. Ruthjen* was an action for damages to property resulting from grading of a street, and *Life Investors Ins. Co.* was an action to recover overpayment of insurance proceeds under alternative theories of fraudulent misrepresentation and mutual mistake.⁴⁴ It does not appear that there would have been any entitlement to prejudgment interest under § 45-104 in these cases.

Genesis also relies on *Albrecht v. Fettig*,⁴⁵ a recent decision by the Nebraska Court of Appeals. There, the court rejected an argument that a plaintiff's request for "further relief as the Court deems just and equitable" sufficiently put the defendant on notice that prejudgment interest could be awarded.⁴⁶ The decision did not mention *Weyh*⁴⁷—decided 1 month earlier—and erroneously stated that "[p]rejudgment interest may be awarded only as provided in . . . § 45-103.02."⁴⁸ The Court of Appeals recognized that § 45-103.02(2) was adopted after *Life Investors Ins. Co.* and that tension appeared to exist between the language of § 45-103.02(2) that prejudgment interest "shall accrue" and § 6-1108(a). The Court of Appeals reasoned:

[W]e do not believe that this tension is irreconcilable. Section 45-103.02(2) clearly sets out the availability of prejudgment interest. However, the court rule (adopted as

⁴³ *Weyh v. Gottsch*, *supra* note 11.

⁴⁴ See, *Life Investors Ins. Co. v. Citizens Nat. Bank*, *supra* note 35; *Higgins v. Case Threshing Machine Co.*, *supra* note 35; *City of South Omaha v. Ruthjen*, *supra* note 37.

⁴⁵ *Albrecht v. Fettig*, 27 Neb. App. 371, 932 N.W.2d 331 (2019).

⁴⁶ *Id.* at 387, 932 N.W.2d at 342.

⁴⁷ *Weyh v. Gottsch*, *supra* note 11.

⁴⁸ *Albrecht v. Fettig*, *supra* note 45, 27 Neb. App. at 387, 932 N.W.2d at 342.

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part of the introduction of notice pleading to Nebraska) is concerned with litigants having adequate notice of the relief a plaintiff is seeking to obtain. Therefore, although the rule does place a procedural condition on a plaintiff's ability to recover prejudgment interest, it does not negate a plaintiff's ability to recover. Moreover, the rule secures a defendant's ability to have notice of the entire scope of the relief requested and prepare defenses thereto.⁴⁹

In *Albrecht*, like in the earlier cases, there was no indication that the defendant had notice of a claim for prejudgment interest or had an opportunity to argue against an award of such interest prior to entry of judgment.

The district court cited a case decided by the Court of Appeals shortly before *Albrecht*. In *Farm & Garden Ctr. v. Kennedy*,⁵⁰ the complaint requested interest under Neb. Rev. Stat. § 45-101.04 (Reissue 2010), but the plaintiff ultimately sought interest under § 45-104. The Court of Appeals reasoned that “[t]here was no question [the plaintiff] was seeking interest on unpaid balances preceding the entry of a final judgment” and that “there was no surprise or prejudice” to the defendant.⁵¹ The court then stated the Nebraska Supreme Court has held that “if a statutory basis exists for an award of interest, . . . interest can be awarded even if the petition is silent as to a request for interest.”⁵² For that proposition, the Court of Appeals cited to *Thacker v. State*,⁵³ an eminent domain proceeding. In *Thacker*, interest was awarded under Neb. Rev. Stat. § 76-711 (1943), but the condemnor claimed the award was erroneous because

⁴⁹ *Albrecht v. Fettig*, *supra* note 45, 27 Neb. App. at 389, 932 N.W.2d at 343.

⁵⁰ *Farm & Garden Ctr. v. Kennedy*, 26 Neb. App. 576, 921 N.W.2d 615 (2018).

⁵¹ *Id.* at 600, 921 N.W.2d at 632.

⁵² *Id.*

⁵³ *Thacker v. State*, 193 Neb. 817, 229 N.W.2d 197 (1975), *overruled in part on other grounds*, *Langfeld v. Department of Roads*, 213 Neb. 15, 328 N.W.2d 452 (1982).

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the petition did not pray for interest. We disagreed, stating that “[t]he owner’s right to interest rests upon the provisions of [§ 76-711], and not upon the prayer of the petition.”⁵⁴ In a 2009 case, the Court of Appeals reached the same conclusion, noting that although the plaintiff did not request interest in the prayer of its petition, the plaintiff was entitled to interest under § 76-711 (Reissue 2003).⁵⁵

[21] Under the circumstances before us, we agree with the district court that AVG is not precluded from recovering prejudgment interest under § 6-1108(a). Specifically requesting interest in the complaint is encouraged, because it clearly puts the opposing party on notice. But compliance with § 6-1108(a) is not determinative where entitlement to interest is based on statute and the adverse party had notice and an opportunity to be heard prior to judgment. That is the situation here, where prejudgment interest was the subject of extensive argument prior to judgment.

*(iii) Liquidated Nature of Claims
and Commencement*

Genesis advances two more reasons why AVG should not be able to recover prejudgment interest: AVG’s rent claims were unliquidated and it failed to prove when prejudgment interest commenced. Both reasons fail.

[22,23] Section 45-104 allows for interest “on money due on any instrument in writing.” We have recognized that interest under § 45-104 can be recovered on a lease, although the statute’s provisions may be superseded by terms set forth in the lease.⁵⁶ And in *Weyh*, we clarified that § 45-104 contained no requirement that the claims described therein must also be liquidated in order to recover prejudgment interest.⁵⁷ Thus,

⁵⁴ *Id.* at 821, 229 N.W.2d at 201.

⁵⁵ See *Walter C. Diers Partnership v. State*, 17 Neb. App. 561, 767 N.W.2d 113 (2009).

⁵⁶ See *Prudential Ins. Co. v. Greco*, 211 Neb. 342, 318 N.W.2d 724 (1982).

⁵⁷ *Weyh v. Gottsch*, *supra* note 11.

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whether a claim is liquidated or unliquidated is immaterial with respect to a litigant's ability to recover prejudgment interest under § 45-104.

Genesis also argues that there was a failure of proof regarding when interest should commence. According to Genesis, "AVG failed to prove it gave notice in any manner specified in §19.2 and thus failed to prove the date prejudgment interest commenced, if at all."⁵⁸ We disagree.

Section 19.2 of the written leases addressed the notice that must be given, stating that notice must be given in writing and would be deemed effective "(2) business days after deposit in the United States mail in the County, certified and postage prepaid" or "upon receipt if sent in any other way." The notices of default showed that all were sent via email and that some were additionally sent via certified mail. The co-owner and president of Genesis admitted receiving letters, emails, and notices of default from AVG's counsel. The evidence sufficiently established Genesis' receipt of the notices of default.

Section 15.1 of the leases provided that default occurs if the tenant fails to pay rent within 10 days of written notice of nonpayment. The first notice of default for North Circle was sent on April 4, 2017. Thus, prejudgment interest on that claim of unpaid rent commenced running on April 15. The commencement date for prejudgment interest for the other claims of unpaid rent can similarly be ascertained by adding 11 days to the date on which the notice of default was sent.

We conclude that Genesis' challenges to the award of prejudgment interest lack merit.

3. TAX PENALTIES

(a) Additional Background

The written leases addressed payment of real property taxes. They obligated the tenant to pay "any tax, assessment, charge, license, fees, levy, real property or other tax" levied against the premises. The leases required that the landlord send the

⁵⁸ Brief for appellants at 34.

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tax-due notice to the tenant and that the tenant “pay said taxes prior to delinquency dates.” There is no dispute that Genesis failed to pay the property taxes due under both leases for tax years 2016 through 2018.

Throenle instructed AVG’s law firm to issue notices of default for delinquent property taxes concerning 145th Plaza. Because property taxes on these properties were “billed” every 6 months, the notices were sent August 2, 2017; April 2 and August 2, 2018; and April 10, 2019. The notices of default identified the amount of unpaid property taxes. To obtain such information, AVG consulted the Douglas County treasurer’s website. AVG followed up with a telephone call to confirm whether any payment had been made that was not posted to the website.

Throenle testified that she received a letter in the mail from the Douglas County treasurer regarding a listing for a tax lien sale of the delinquent property taxes for 145th Plaza. She relied on the information in the letter to provide Genesis with the amounts that were unpaid. According to Throenle, the letter was something that AVG maintains in its files for the property in the ordinary course of its business. Douglas County also charged interest and penalties for late payment. To ascertain the amount owed on any given day, Throenle testified that she called the “Assessor’s” office to obtain the interest charges through that actual day. She last called on April 26, 2019.

Similarly, Throenle instructed AVG’s law firm to send notices of default to Genesis for nonpayment of property taxes on the North Circle property. The amounts stated on the notices were obtained from documentation from the Douglas County treasurer. Throenle testified regarding her efforts to determine the amount of property taxes, interest, and penalties due for the North Circle property on any given day. She obtained the total amount due as of April 26, 2019.

The court received into evidence exhibits 117 and 123, which set forth a compilation of AVG’s alleged damages for each respective lease. Throenle testified that she prepared the exhibits with one of AVG’s attorneys and that she obtained

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the information contained in the exhibits from AVG's accounting records and from the "County Assessor." Throenle also testified that the information on the exhibits was contained in exhibits that had been admitted into evidence.

The exhibit for 145th Plaza, exhibit 117, showed unpaid rent from September 2017 through June 2018 of \$281,458.30, with late charges at 5 percent amounting to \$14,072.92. Late charges for August, September, and November 2018 totaled \$8,443.74. The unpaid property taxes, including interest and late fees, as of April 26, 2019, were calculated to be \$236,745.77. According to the exhibit, AVG's total damages for 145th Plaza as of May 6, 2019, were \$540,720.73. The exhibit for North Circle, exhibit 123, showed total unpaid rent from April 2017 to April 2019 to be \$1,578,857.25 and total late charges at 5 percent during that period to be \$78,942.75. The total unpaid property taxes, including interest and late fees, were \$264,937.47. The exhibit showed AVG's total damages as of May 6, 2019, to be \$1,922,737.47.

(b) Discussion

(i) Admissibility of Exhibits and Testimony

Genesis both assigned and argued that the court erred in admitting exhibits 116 and 122, which contained tax information from the Douglas County treasurer, and exhibits 117 and 123, which showed a compilation of damages for the respective leases. Genesis also argues that Throenle's testimony about her telephone calls to the "Assessor's Office" should not have been admitted.

a. Exhibits 116 and 122

Exhibit 116—pertaining to 145th Plaza—and exhibit 122—concerning North Circle—were five-page documents containing similar information from the Douglas County treasurer regarding taxes for the two properties. The first two pages of each exhibit were black-and-white printouts titled "Douglas County Treasurer - Real Property Tax Inquiry," with each page appearing to contain identical information, purportedly

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from the treasurer’s official website. The third page was a February 2018 letter from the treasurer to AVG setting forth the amount of delinquent taxes and the amount that needed to be paid by February 28 to avoid additional penalty interest and prevent a tax lien. The fourth and fifth pages showed the tax billed each year, tax paid, and interest paid. The fourth page contained the interest calculation to February 28, and the “Grand Total Due” matched the amount stated in the letter. Throenle testified that the fourth and fifth pages were enclosed with the letter.

When AVG offered exhibits 116 and 122 into evidence, Genesis objected on numerous grounds, including that they failed to comply with the authenticity requirements of Neb. Rev. Stat. §§ 27-901 and 27-902 (Reissue 2016), that foundation was incomplete under Neb. Rev. Stat. § 27-1005 (Reissue 2016), and that they were hearsay. The court overruled the objections and received the exhibits. In Genesis’ brief, it asserts that the exhibits were “unauthenticated hearsay.”⁵⁹

[24,25] Authentication or identification of evidence is a condition precedent to its admission and is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.⁶⁰ A proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity.⁶¹

Throenle’s testimony about the exhibits satisfied the authentication requirement. She identified the first two pages of each exhibit as a “print screen” or “printout.” Although she incorrectly stated at times that an exhibit was from the assessor’s website rather than that of the treasurer, the exhibit clearly showed that the documents were from the treasurer. A computer printout is admissible as a business record if the

⁵⁹ Brief for appellants at 38.

⁶⁰ See § 27-901(1).

⁶¹ *State v. Savage*, 301 Neb. 873, 920 N.W.2d 692 (2018), *modified on denial of rehearing* 302 Neb. 492, 924 N.W.2d 64 (2019).

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offeror establishes a sufficient foundation in the record for its introduction.⁶² Throenle testified that the last three pages were received by AVG from the Douglas County treasurer and maintained in AVG's files in the ordinary course of business and in connection with establishing the taxes due. Through Throenle's testimony, AVG provided the court with sufficient evidence to show that the documents were what they purported to be.

[26] To the extent the exhibits were hearsay, an exception to the hearsay rule applied. Under Neb. Rev. Stat. § 27-803(5)(b) (Reissue 2016), an exception to the hearsay rule includes

[a] memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, other than opinions or diagnoses, that was received or acquired in the regular course of business by an entity from another entity and has been incorporated into and kept in the regular course of business of the receiving or acquiring entity; that the receiving or acquiring entity typically relies upon the accuracy of the contents of the memorandum, report, record, or data compilation; and that the circumstances otherwise indicate the trustworthiness of the memorandum, report, record, or data compilation, as shown by the testimony of the custodian or other qualified witness.

The term "data compilation" in § 27-803(5)(b) is broad enough to include records furnished by third parties with knowledge of the relevant acts, events, or conditions if the third party has a duty to make the records and the holder of the records routinely compiles and keeps them.⁶³ It is not disputed that the county treasurer had a duty to make such records.

Throenle testified extensively concerning her duties in administering the leases for AVG. She obtained the necessary information to include in notices of default regarding the amount of unpaid taxes. To do so, she would consult

⁶² *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006), *abrogated on other grounds*, *State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

⁶³ See *Arens v. NEBCO, Inc.*, 291 Neb. 834, 870 N.W.2d 1 (2015).

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information displayed on the treasurer's website. She followed up with a telephone call, ensuring the accuracy of the website's data. She also relied on the letter mailed to AVG from the treasurer, which letter AVG maintained in its files in the ordinary course of its business. The exhibits fit within the business record exception to hearsay.

We find no error or abuse of discretion in admitting exhibits 116 and 122.

b. Throenle's Testimony and
Exhibits 117 and 123

After the court had received notices of default for 145th Plaza and data from the county treasurer in exhibit 116, Throenle testified that AVG determined the outstanding taxes, interest, and penalties for 145th Plaza via an April 26, 2019, telephone call. When asked what that amount was, Throenle answered, "I don't recall the exact amount." AVG's counsel responded: "All right. We'll provide that for you." Counsel then had Throenle look at exhibit 117, which had not been offered into evidence at that point. Shortly thereafter, the exhibit was offered and received, and Throenle proceeded to testify to the amounts shown on the exhibit.

Throenle confirmed that she ascertained the unpaid property taxes for the North Circle property in the same manner as for 145th Plaza. After the court received notices of default concerning North Circle and the county treasurer's data contained in exhibit 122, counsel showed Throenle exhibit 123. Throenle identified it as summaries that she prepared with counsel and testified that she obtained the information from documents that had been admitted into evidence and about which she had already testified. When asked if exhibit 123 would be helpful to Throenle in testifying to the amounts owed by Genesis for the property, Throenle answered, "Yes." AVG then offered the exhibit into evidence, and the court received it over Genesis' objections. Throenle testified that she reviewed a chart for accuracy, and she later testified about the amounts displayed thereon.

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Genesis argues that Throenle’s testimony about the April 26, 2019, telephone call to the treasurer’s office was hearsay and that exhibits 117 and 123—which contained the amount of unpaid property taxes, interest, and penalties based on the telephone call—were also hearsay. Genesis additionally challenges the overruling of its objections to exhibits 117 and 123 based on improper foundation for a summary under Neb. Rev. Stat. § 27-1006 (Reissue 2016). Even if we assume there was error in admitting Throenle’s testimony or the exhibits, it would not be reversible error.

Exhibits 117 and 123 were offered during Throenle’s testimony. Throenle helped prepare the exhibits and was familiar with the information they contained. Importantly, she was subject to cross-examination at trial. The exhibits compiled evidence from the notices of default sent by AVG and from the county treasurer’s documents—evidence that, with one caveat, was already received at trial. The only information contained on exhibits 117 and 123 that was not already in evidence was the interest charges through a particular day. Aside from calling the treasurer’s office, Throenle was unaware of any other means to obtain the amount of unpaid taxes and interest charges due through any particular day. But determining that amount involved only a mathematical calculation. Because exhibits 117 and 123 were based on information already in evidence and otherwise determinable by use of a calculator, the only possible “prejudice” to Genesis was that it made the jury’s duty to determine damages too easy. We find no reversible error on that basis.

*(ii) Inclusion of “Penalties”
in Award for Taxes*

Genesis argues that the jury’s special verdict erroneously included “[t]ax [p]enalties.”⁶⁴ The tax penalties to which Genesis refers are amounts assessed as statutory interest at

⁶⁴ Brief for appellants at 34.

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the rate of 14 percent on delinquent payments of taxes.⁶⁵ The county treasurer's documents show that it also imposed a \$5 advertising charge. We have declared that interest imposed on an unpaid tax is a penalty.⁶⁶ Genesis contends that because the court instructed the jury that the measure of the damages was "[t]he amount of unpaid real estate taxes due," it was error to include penalties as part of the award.

[27] *Prudential Ins. Co. v. Greco*⁶⁷ provides insight on the right to recover taxes and assessments under a lease. There, the lease provided: "'Tenant shall be liable for and shall pay to either the Owner or the taxing authority before delinquent all taxes levied or assessed against or for leasehold improvements'"⁶⁸ Landlord presented testimony that it paid the full amount due on the taxes, including amounts due on tenant's improvements. We stated: "The elements necessary to establish a right of recovery were that [landlord] paid taxes levied to the taxing authority; that included in the amount paid as taxes was a sum based upon tenant's improvements; and that [tenant] owes [landlord] a sum certain for the payment of the taxes."⁶⁹ We determined that landlord made out a prima facie case under provisions of the lease establishing the right to recover taxes paid for improvements. In other words, the right to recover real estate taxes and assessments under a lease depends upon the wording of the lease contract.

[28] The lease agreements here broadly defined Genesis' obligation to pay real estate taxes. Under a statute governing collection of delinquent real estate taxes, interest is "collected the same as the tax upon which the interest accrues."⁷⁰ Another statute declares taxes on real property to be a first lien on

⁶⁵ See Neb. Rev. Stat. § 45-104.01 (Reissue 2010).

⁶⁶ See *Ameritas Life Ins. v. Balka*, 257 Neb. 878, 601 N.W.2d 508 (1999).

⁶⁷ *Prudential Ins. Co. v. Greco*, *supra* note 56.

⁶⁸ *Id.*, 211 Neb. at 344, 318 N.W.2d at 726.

⁶⁹ *Id.* at 345, 318 N.W.2d at 727.

⁷⁰ Neb. Rev. Stat. § 77-207 (Reissue 2018).

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the property taxed.⁷¹ It is a general rule that in the absence of an express statute to the contrary, interest, penalties, and costs collected on delinquent taxes follow the tax.⁷² Here, §§ 2.1 and 7.2 of the leases define “‘Real Property Taxes’” to be “any tax, assessment, charge, license, fees, levy, real property or other tax” levied against the premises. (Although § 2.1 refers to the definition contained in § 7.5, this appears to be a typographical error insofar as § 7.5 addresses utilities and makes no mention of taxes.) One definition of “charge” is “[p]ecuniary burden; expense, cost.”⁷³ We conclude that the county treasurer’s collections of statutory interest and the advertising fee fit within that definition. Because the county’s interest and advertising imposed a pecuniary burden on the real estate, they were “charges” as that term was used in the lease. Thus, the provisions of the lease made them recoverable as a component of “real estate taxes.”

(iii) *Failure to Mitigate
Tax Penalties*

[29] Genesis assigned that AVG was barred from recovering tax penalties because it failed to mitigate them, but we do not resolve the insufficiently argued assignment. The totality of Genesis’ support for the assigned error contained in the argument section of its brief stated: “The tax penalties AVG seeks are avoidable. AVG’s failure to mitigate them bars its recovery. *Tedd Bish Farm, Inc. v. Southwest Fencing Services, LLC*, 291 Neb. 527 (2015).”⁷⁴ An argument that does little more than restate an assignment of error does not support the assignment, and an appellate court will not address it.⁷⁵

⁷¹ See Neb. Rev. Stat. § 77-203 (Reissue 2018).

⁷² *School District of the City of Omaha v. Adams*, 147 Neb. 1060, 26 N.W.2d 24 (1947).

⁷³ “Charge,” Oxford English Dictionary Online, <http://www.oed.com/view/Entry/30686> (last visited Aug. 26, 2020).

⁷⁴ Brief for appellants at 37.

⁷⁵ *Marcuzzo v. Bank of the West*, 290 Neb. 809, 862 N.W.2d 281 (2015).

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4. LATE CHARGES FOR NONPAYMENT OF RENT

(a) Additional Background

The written leases contained similar terms on payment of rent and late charges. They specified that rent was due on the first day of each month. According to the leases, the tenant acknowledged that its late payment of rent “will cause Landlord to incur costs not contemplated by this Lease, the exact amount of which is extremely difficult or impracticable to determine.” Therefore, if any installment of monthly rent was not received by the landlord within 10 days of the tenant’s receipt of a written notice of nonpayment, the tenant shall pay to the landlord “a one-time additional sum equal to five percent (5%) of the amount overdue as a late charge for each such overdue payment.”

Throenle explained that late rent payments caused AVG to incur administrative costs to calculate and verify amounts owed and to alert AVG’s attorneys to prepare a notice of default for the tenant. AVG then incurred legal fees in connection with counsel’s preparation of the notices. Throenle estimated that she spent 2 to 3 hours per month assisting with the notices of default and that the actual cost to AVG for her services in that regard was \$150 an hour. Throenle testified that she was assisted by an individual who spent approximately 30 minutes to 1 hour each month at a cost of \$30 to \$40. Thus, Throenle testified that \$370 a month for her work and that of the other individual was a fair estimate of costs incurred by AVG’s staff associated with notices of default, but AVG also incurred attorney fees. In contrast, the 5-percent late charge amounted to around \$2,500 for the 145th Plaza lease and over \$3,000 for the North Circle lease.

(b) Discussion

(i) *Whether AVG Claimed
Late Charges*

Genesis argues that AVG should not have been able to recover late charges, because it failed to claim them. According

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to Genesis, the complaint did not allege Genesis breached the leases by failing to pay late charges. We disagree.

[30] Under Nebraska’s liberal pleading regime for civil actions, a party is required to set forth only a short and plain statement of the claim showing the pleader’s entitlement to relief and is not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted.⁷⁶ The complaint alleged that the leases required Genesis to “[p]ay late charges in the event of a failure to make timely rent payments.” It set forth an “amount of rent including late charges pursuant [to] the 145th Plaza Lease” that was due. And it further alleged that Genesis breached both leases by “[f]ailing to make timely rent payments” The complaint gave fair notice that AVG was seeking to recover late charges as a part of rent.

*(ii) Whether Late Charges
Are Recoverable*

Genesis next contends that late charges were not recoverable for three reasons. We find no merit to its arguments.

First, Genesis argues that late fees were not included as recoverable damages in the jury instructions. The instructions stated that the “measure of the damage” was “[t]he amount of unpaid rent due” and “[t]he amount of unpaid real estate taxes due.” While the instructions did not separately identify late charges as a measure of damages, such charges fall within the definition of “rent” under the leases. Both of the leases define “rent” as “Monthly Rent and Additional Rent, collectively.” And they define “additional rent” to mean “any and all sums (whether or not specifically called ‘Additional Rent’ in this Lease) other than Monthly Rent which [tenant] is or becomes obligated to pay to Landlord under this Lease.” Thus, late charges are recoverable as a component of “rent.”

[31] Second, Genesis argues that late fees are a penalty and thus not recoverable as a matter of law. When a lease provides

⁷⁶ See *Vasquez v. CHI Properties*, 302 Neb. 742, 925 N.W.2d 304 (2019).

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for late charges, they may be recoverable as damages.⁷⁷ Here, the leases provided for a 5-percent late charge on overdue payments and the leases' definition of rent encompassed such charges. They were recoverable as damages.

Third, Genesis claims that AVG failed to prove Genesis received default notices. The leases provide that Genesis shall pay to AVG a late charge if any payment of rent due "is not received by Landlord within ten (10) days of [tenant's] receipt of a written notice of nonpayment." As we explained above regarding prejudgment interest, the evidence sufficiently established Genesis' receipt of the notices of default.

*(iii) Whether New Trial on
Late Charges Is Required*

Alternatively, Genesis argues that a new trial on late fees is required. During the jury instruction conference, Genesis objected to the verdict form, claiming that "the late fees based on the testimony of . . . Throenle were for the purpose of penalty and are unenforceable under Nebraska law, and it would be error to instruct on late fees." The court responded, "I'm going to go with the verdict form that we've talked about and the one I've provided to you." Later, Genesis timely filed a motion for new trial asserting, among other things, that the court committed plain error by adding "late fees" after "[u]npaid rent" on the verdict form, by failing to instruct the jury not to award late fees if the jury determined they were a penalty, and by including late fees with damages on the verdict form when such fees were not recoverable. The court overruled the motion.

[32] Genesis argues that the court committed plain error by failing to instruct the jury on Genesis' penalty and condition precedent defenses to late charges. It further asserts that there was plain error in the jury's award of late charges for August, September, and November 2018. Plain error is error plainly

⁷⁷ See *GFH Financial Serv. Corp. v. Kirk*, 231 Neb. 557, 437 N.W.2d 453 (1989).

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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.⁷⁸ We see no plain error.

5. AWARD OF SANCTIONS

(a) Additional Background

Six days before trial was originally set to begin, Genesis moved for a continuance. Genesis stated in the motion that it had terminated the attorney-client relationship with its counsel and requested 3 weeks to retain new counsel. Genesis' attorney submitted an affidavit which stated that his representation of Genesis was terminated "as a result of a good faith disagreement . . . regarding trial strategy."

Two days later, the court held a hearing on the motion for continuance. Genesis' attorney recognized that it was "two business days before trial is to begin," but stated that there was "no time for new counsel to get up to speed and to try the case on Monday." Counsel explained that he and Genesis had a difference of opinion about trial strategy and that the disagreement "came to a head" as they prepared to file documents with the court indicating how they planned to proceed at trial. The court allowed the attorney, having been fired by Genesis, to withdraw. But the court declined to continue the trial.

Genesis obtained counsel to make a limited appearance on its behalf in order to file a renewed motion for continuance of trial and to appear at a hearing on the motion. The court heard the motion on February 4, 2019, the day trial was to commence. The court explained that it earlier declined to continue the trial because the matter had been on file for nearly 2 years, the request for continuance was a late one, and only a vague reason of dispute in trial strategy was given.

AVG opposed a continuance. It asserted that it has "\$60,000 a month of continuing damages" and did not see why Genesis' decision to terminate its representation by counsel should force AVG to continue incurring over \$2,000 a day in damages.

⁷⁸ *In re Application No. OP-0003*, 303 Neb. 872, 932 N.W.2d 653 (2019).

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Because trial was set to begin, the court observed that 35 jurors had been called “at great expense to the county.” And AVG had in attendance its chief financial officer, its chief operating officer, and an expert witness. The court asked AVG’s attorneys: “[I]n the last, say, five days, what have you incurred in travel expenses, witness — expert witnesses, your time? Just a ballpark estimate. Twenty thousand, 25,000?” One attorney responded that \$25,000 “was what was in my head,” and the other stated, “I think that sounds fair from what they’ve told me.”

The court inquired whether Genesis was prepared to “pay a substantial sanction, which would include, at a minimum, all of [AVG’s] costs, travel costs, preparation costs, our juror costs, [and] their expert witness costs” if the court continued the trial. Counsel responded that if the court so ordered, he believed Genesis would pay.

The court sustained the motion to continue. The court cautioned that Genesis would have to pay for substantial costs incurred as a result:

The sanction’s going to consist of our cost of jurors, [c]ounsel’s time — all three of them — their travel expenses, their prep time over the last four or five days, their client’s travel time and their time that they’re here, and I’d like an affidavit, if you would, to that effect. If necessary, I’ll — we can conduct a telephonic hearing on it. But, please, include all your related costs, prep costs, expert witness costs for being here. You know, not that unusual to have prep time for any trial, but specifically the prep time in the last four or five days, the time we spent at this hearing, the time we spent on Thursday, and — because I anticipate it’s going to be very significant.

Attorney Gregory M. Bordo submitted an affidavit setting forth AVG’s expenses. He averred that his hourly rate was \$550 and that cocounsel’s rate was \$475 per hour. Their attorney fees for January 29 through February 4, 2019, amounted to \$42,780, and their travel and lodging expenses were

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\$2,878.66. AVG's local counsel charged \$450 per hour, and he billed \$5,556.78 for those 5 business days. AVG incurred fees of \$4,500 for its expert's services during that time. Bordo asserted that the value of AVG's chief operating officer's time to prepare and appear at trial was \$6,375 and that his travel and lodging expenses were \$1,212.40. Bordo averred that the value of AVG's chief financial officer's time to prepare and appear at trial was \$4,750 and that her travel and lodging expenses were \$1,126.35. Thus, Bordo requested fees and costs of \$69,179.19.

The court's February 13, 2019, order recounted that it heard the renewed motion to continue on an expedited basis on February 4—the first day of the scheduled jury trial—while summoned jurors were in the courthouse awaiting trial to begin. The order stated that on February 7, AVG submitted Bordo's affidavit with exhibits demonstrating a total of \$69,179.19 in costs and fees incurred by AVG from January 29 to February 4 in preparation for the scheduled trial. The order recited that as of February 12, it had received no opposition from Genesis. It ordered Genesis to pay for AVG's fees and costs in the amount of \$69,179.19.

A week later, Genesis filed a motion to alter or amend the order. Among other things, Genesis requested that Bordo's affidavit be stricken because it did not contain a proper jurat showing that Bordo was sworn and because it was not marked and offered at a hearing on the record at which Genesis could object and be heard. Alternatively, Genesis asked that the court reduce the award to take into account the reasonable local hourly rate of lawyers practicing in Douglas County, to include the expense of only one out-of-state lawyer, and to eliminate compensation of AVG's personnel.

The court held a hearing on the motion to reconsider the sanctions. AVG offered Bordo's affidavit into evidence, Genesis objected, and the court reserved ruling.

Nine days after the hearing, Genesis filed objections to Bordo's affidavit. It objected that the jurat did not recite that

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the affidavit was duly sworn to by the party making the same. The document further set forth numerous specific objections to parts of the affidavit.

On March 13, 2019, the court overruled the motion to alter or amend and the objections to Bordo's affidavit. After quoting its dialogue with Genesis' counsel during the February 4, 2019, hearing, the court stated:

The Court made it clear at the hearing on February 4 . . . that [AVG] had no doubt incurred considerable expenses in preparing for the trial in the previous four days, had incurred considerable expenses to travel to Omaha from Los Angeles, CA, with client representatives who were necessary witnesses at trial, had incurred considerable lodging expenses, and had retained an expert witness who was present for trial. It would be inequitable for [AVG] to have incurred these expenses to appear at trial as ordered by the Court, only to have the trial continued because [Genesis], on the eve of trial (which had been specially set for more than six (6) months) fired its attorney for reasons still largely unknown. The Court does not believe, under the circumstances presented, that failure to continue the trial would have been an abuse of discretion.

The court explained that it did not use local rates in its award of attorney fees because, consistent with its stated intention during the February 4 colloquy, it awarded AVG its actual fees, costs, and expenses. The court also clarified that although it had referred to the award as a “sanction,” it was not one: “The Court was not sanctioning [Genesis]—this was an equitable award to [AVG] for doing what the Court ordered—be prepared for trial, and appear at the trial, on February 4, 2019. [AVG] should not be penalized for [Genesis'] last minute firing of its attorney.”

On June 18, 2019, the court entered an order addressing, among other things, pretrial motions. With respect to Bordo's affidavit, the court recognized Genesis' lengthy objection filed on March 7 but stated that “[h]aving submitted the matter to

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the Court on February 26, 2019, the Court sustained the objection to [Genesis'] objections . . .” and received the exhibit.

(b) Discussion

(i) *Jurisdiction*

[33-35] We quickly dispose of Genesis’ first argument. It claims that the court lacked subject matter jurisdiction to award sanctions. A district court, as a court of general jurisdiction, has inherent power to do all things necessary for the proper administration of justice and equity within the scope of its jurisdiction.⁷⁹ Trial judges are encouraged to implement firm, consistent procedures for minimizing continuances to meet case progression standards.⁸⁰ And a trial judge has broad discretion over the conduct of a trial.⁸¹ As the court clarified, its so-called “sanction” was an equitable award. Through its inherent authority, the court possessed the power to make such an award.

(ii) *Lack of Hearing
on Amount*

Genesis next faults the court for not holding a de novo hearing on the amount of the award. It cites no authority to support entitlement to such a hearing. As recounted above, the court asked AVG to submit an affidavit setting forth the expenses it incurred in connection with its trial preparation over the days before the original trial date and stated that “[i]f necessary, . . . we can conduct a telephonic hearing on it.” Genesis did not request a hearing at the time; nor did it ask for time to respond. Bordo submitted his affidavit on February 7, 2019, and when the court entered its order on February 13, it had heard no opposition from Genesis.

⁷⁹ See *Holt County Co-op Assn. v. Corkle’s, Inc.*, 214 Neb. 762, 336 N.W.2d 312 (1983).

⁸⁰ *Putnam v. Scherbring*, 297 Neb. 868, 902 N.W.2d 140 (2017), citing Neb. Ct. R. § 6-101(B)(5) (rev. 2013).

⁸¹ *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009).

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Despite Genesis’ inaction prior to the February 13, 2019, order, the court provided Genesis an opportunity to respond to the reasonableness of the expenses claimed by AVG. The court stated that there would not be a “trial” on the matter and that it could be done by affidavit. Genesis’ counsel agreed that “typically these are done on affidavit,” adding that “there’s no use making this more painful.” The court then allowed Genesis 7 days to submit any affidavits and any objections to Bordo’s affidavit. Here, the court afforded Genesis with a means to be heard regarding the reasonableness of AVG’s claimed expenses and considered Genesis’ response. No more was required.

(iii) Objections to Bordo Affidavit

a. Specific Objections

Genesis argues that the court failed to consider the myriad specific objections it directed to the affidavit. The court’s order stated that it overruled Genesis’ objection to Bordo’s affidavit and received it as an exhibit. As Genesis correctly observes, the order did not specifically reference Genesis’ numerous specific objections and instead added only that Bordo’s affidavit met the criteria set out in *Johnson v. Neth*.⁸²

At a later hearing, the court stated that it “overruled [Genesis’] objections” in the earlier order. It inquired of Genesis’ counsel, “[W]hat you’re asking me to do is make a specific ruling on each objection you made . . . ?” Counsel responded: “Right. Or it could be a general denial.” The court stated it would “take a look,” but added, “[M]y intent was, based on what I had at the time of the February 27th hearing in preparation to issue the March 13th order, I generally overruled any objection” In a posttrial motion, Genesis asserted that the court erred in failing to rule on each specific objection to Bordo’s affidavit. The court overruled the motion.

Genesis has not cited any authority requiring the court to specifically address the merits of each objection to an exhibit.

⁸² *Johnson v. Neth*, 276 Neb. 886, 758 N.W.2d 395 (2008).

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By receiving the affidavit and holding firm to that ruling, the court essentially overruled every objection to the exhibit. We see no abuse of discretion. The court's ruling preserved Genesis' opportunity to appeal from the evidentiary rulings; but Genesis has not assigned and argued error in those rulings except regarding the sufficiency of the certification of an oath or affirmation.

b. Jurat

[36] Genesis' other argument is directed to the jurat of the affidavit. Under Nebraska law, an affidavit is one mode by which testimony of a witness may be taken.⁸³ As defined by statute, "[a]n affidavit is a written declaration under oath, made without notice to the adverse party."⁸⁴ Oaths and affirmations may be administered by notaries public.⁸⁵ In connection with an affidavit, a notary public completes a certificate, known as a jurat, which confirms that the affiant appeared before the notary, attested to the truth of his or her statements, and signed the affidavit.⁸⁶ The certificate of a notary public to an affidavit is presumptive evidence of the facts stated in such certificate, including the statement that affiant signed the affidavit.⁸⁷ The customary form of a jurat has long been understood.⁸⁸ It differs from an acknowledgment.

Bordo executed his affidavit in California. Under Neb. Rev. Stat. § 25-1245 (Reissue 2016) and Neb. Ct. R. Disc. § 6-328(b), an affidavit may be used in support of a motion in a court of this state if the affidavit is made and authenticated, out of state, before a person authorized to administer

⁸³ See Neb. Rev. Stat. § 25-1240 (Reissue 2016).

⁸⁴ Neb. Rev. Stat. § 25-1241 (Reissue 2016).

⁸⁵ Neb. Rev. Stat. § 64-107.01 (Reissue 2018).

⁸⁶ See *In re Interest of Fedalina G.*, 272 Neb. 314, 721 N.W.2d 638 (2006).

⁸⁷ *Smith v. Johnson*, 43 Neb. 754, 62 N.W. 217 (1895).

⁸⁸ See 1 Winsor C. Moore, Nebraska Practice § 539 (1964) (including both short form and long form).

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oaths in the place where the affidavit is made.⁸⁹ Attached to the affidavit was an “[a]cknowledgment,” in the form authorized by California law,⁹⁰ which stated that Bordo “personally appeared” before the notary public. In a certificate of acknowledgment under California law, the notary public certifies that the signer acknowledged executing the document.⁹¹ Like in Nebraska, a notary public in California is authorized by law to administer oaths.⁹² In a jurat under California law, the notary public certifies that the signer signed the document in the presence of the notary public and that the notary public administered an oath or affirmation.⁹³ A California court has said that an “acknowledgment appearing at the end of the document reciting only that [an individual] appeared before a notary public ‘and acknowledged that she executed the same’ is not in any sense the equivalent of a jurat or of a verification.”⁹⁴

Genesis points out that the jurat did not recite that the affidavit was duly sworn to by the party making it. The affidavit began by stating that “Bordo, being first duly sworn, deposes and states as follows” And the acknowledgment was signed by a notary public. The notary public signed the acknowledgment under penalty of perjury and affixed her notarial seal.

[37,38] But we have stated that the fact that an affiant signed an affidavit in the presence of a notary and that the affiant’s signature was in fact notarized is sufficient as an oath or affirmation.⁹⁵ Unless required by statute, an omission in a

⁸⁹ See *In re Interest of Fedalina G.*, *supra* note 86.

⁹⁰ See Cal. Civ. Code § 1189 (West 2015).

⁹¹ *Id.*

⁹² See Cal. Civ. Proc. Code § 2093(a) (West 2019).

⁹³ See Cal. Gov’t Code § 8202 (West 2015).

⁹⁴ *Palm Springs Alpine Estates, Inc. v. Superior Court for Los Angeles Cty.*, 255 Cal. App. 2d 883, 888, 63 Cal. Rptr. 618, 621 (1967).

⁹⁵ See *Moyer v. Nebraska Dept. of Motor Vehicles*, 275 Neb. 688, 747 N.W.2d 924 (2008).

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jurat that an affidavit was sworn to will not be fatal if the fact otherwise appears.⁹⁶ Here, the affidavit states on its face that it was sworn, and it was signed before an official authorized to administer oaths. Although the affidavit was irregular in the sense that an acknowledgment rather than a jurat was attached, Genesis suffered no prejudice. As set forth earlier, the admission of evidence in a civil case is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.⁹⁷ There is no reversible error here.

While the confusion associated with the distinctions between forms of notarial acts is not prejudicial, it is easily avoidable. A notary public or other authorized officer should use a traditional jurat (long or short) to certify the administration of an oath or affirmation and employ an acknowledgment for documents requiring that type of proof. Both are types of notarial acts, “which the laws and regulations of this state authorize notaries public of this state to perform, including the administering of oaths and affirmations, taking proof of execution and acknowledgments of instruments, and attesting documents.”⁹⁸ An acknowledgment is the act by which a party who has executed an instrument goes before a competent officer and declares or acknowledges the same as his or her genuine and voluntary act and deed.⁹⁹ A statute defines the words typically used in the customary short form of an acknowledgment.¹⁰⁰ Acknowledgments are employed mainly in connection with transactions involving real estate,¹⁰¹ wills,¹⁰²

⁹⁶ 2A C.J.S. *Affidavits* § 31 (2013).

⁹⁷ See *Weyh v. Gottsch*, *supra* note 11.

⁹⁸ Neb. Rev. Stat. § 64-201 (Reissue 2018).

⁹⁹ *McCauley v. Stewart*, 177 Neb. 759, 131 N.W.2d 174 (1964). See, also, 1 Moore, *supra* note 88, § 121.

¹⁰⁰ See Neb. Rev. Stat. § 64-205 (Reissue 2018).

¹⁰¹ See, e.g., Neb. Rev. Stat. §§ 40-104 (Reissue 2016) and 76-203 through 76-205, 76-211, 76-216, 76-235, and 76-241 (Reissue 2018).

¹⁰² See, e.g., Neb. Rev. Stat. § 30-2329 (Reissue 2016).

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powers of attorney,¹⁰³ and establishment of a filial relationship.¹⁰⁴ Adding to this confusion is the largely historical form of an affidavit described as a verification. Prior to 1969,¹⁰⁵ every pleading of fact in a civil action had to be verified by the affidavit of the party, his or her agent, or attorney.¹⁰⁶ In most instances, it was sufficient if the affidavit stated that the affiant believed the facts stated in the pleading to be true.¹⁰⁷ In some situations, however, the pleading was required to be “positively verified, and a verification based upon mere belief [was] inadequate.”¹⁰⁸ The form for a positive verification¹⁰⁹ ended with the word “true,”¹¹⁰ thereby omitting the words “as he believes” used at the end of the usual verification form.¹¹¹ Either version, being a type of affidavit, was followed by the jurat of the officer administering the oath (and not by an acknowledgment).¹¹² Here, the question could have been avoided by adherence to well-settled and understood language. As Winston Churchill is reputed to have said: Broadly speaking, the short words are the best, and the old words best of all.

(iv) Amount of Award

[39] Finally, Genesis argues that the court abused its discretion in awarding AVG \$69,179.19. A court abuses its discretion

¹⁰³ See, e.g., Neb. Rev. Stat. § 30-4005 (Reissue 2016).

¹⁰⁴ See, e.g., Neb. Rev. Stat. §§ 43-1408.01 and 43-1409 (Reissue 2016).

¹⁰⁵ See 1969 Neb. Laws, L.B. 375.

¹⁰⁶ See Neb. Rev. Stat. § 25-824 (1943).

¹⁰⁷ See, Neb. Rev. Stat. § 25-827 (1943); *Harden v. A. & N. R. R.*, 4 Neb. 521 (1876).

¹⁰⁸ *State ex rel. Van Cleave v. City of No. Platte*, 213 Neb. 426, 429, 329 N.W.2d 358, 360 (1983).

¹⁰⁹ See 7 Winsor C. Moore, Nebraska Practice § 5813 (1967).

¹¹⁰ *Id.*

¹¹¹ *Id.*, § 5805.

¹¹² *Id.*, §§ 5805 and 5813.

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when its decision is based upon reasons that are *untenable* or *unreasonable* or if its action is *clearly* against justice or conscience, reason, and evidence.¹¹³ As we have previously observed, “[t]his is a fairly deferential standard.”¹¹⁴

Genesis challenges the amount of the awards for AVG’s chief financial officer and chief operating officer, asserting that any reimbursement should be based on statutory witness fees. It further contends that the court abused its discretion in awarding the attorneys their hourly rate and that a reasonable hourly rate would be the local hourly rate.

Before agreeing to grant a continuance, the court made clear that it would award AVG its actual expenses. In other words, payment of those expenses was a condition required to obtain the continuance. The court cogently explained that “[i]t would be inequitable for [AVG] to have incurred these expenses to appear at trial as ordered by the Court, only to have the trial continued because [Genesis], on the eve of trial . . . fired its attorney for reasons still largely unknown.” To award AVG only a statutory witness fee or an Omaha attorney’s prevailing hourly rate would frustrate the purpose of the award.

The record does not show that the court rendered its award for any reasons that were untenable or unreasonable. Rather, “the record reflects that the court carefully considered its decision and sought to achieve a balanced outcome for both parties.”¹¹⁵ The court’s decision allowed Genesis the continuance it desired for new counsel to prepare for trial, and it reimbursed AVG for its expenses incurred to be present and ready for the scheduled trial. Although the court’s award was substantial, it represented the significant costs that AVG suffered. Under the circumstances, the court’s award was not untenable or unreasonable.

¹¹³ See *Putnam v. Scherbring*, *supra* note 80.

¹¹⁴ *Id.* at 878, 902 N.W.2d at 146.

¹¹⁵ *Id.* at 878, 902 N.W.2d at 147.

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6. AVG's CROSS-APPEAL

[40] On cross-appeal, AVG assigns that the court erred in sustaining Genesis' hearsay objection to exhibit 132, a 2017 Delaware lawsuit that 24 Hour Fitness USA filed against Genesis Health Clubs of Midwest. Because we are affirming the judgment in AVG's favor, we need not resolve this issue. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.¹¹⁶

VI. CONCLUSION

As landlord, AVG had standing in this action for breach of written leases and was not required to produce the actual assignment of the leases in order to prevail. We find no error in the award of prejudgment interest under § 45-104 or in the special verdicts awarding late fees associated with tardy rent payments and penalties in the form of interest and advertising in connection with delinquent property taxes. Further, the court had inherent authority to award AVG its actual expenses as a condition of sustaining Genesis' motion for continuance of trial. Finding no abuse of discretion or reversible error in any of the respects alleged, we affirm the judgment of the district court.

AFFIRMED.

MILLER-LERMAN, J., not participating.

¹¹⁶ *Saylor v. State*, 304 Neb. 779, 936 N.W.2d 924 (2020).

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

TRINA L. THOMAS, APPELLANT, v. THE HONORABLE
DOUGLAS J. PETERSON, ATTORNEY GENERAL OF THE
STATE OF NEBRASKA, IN HIS OFFICIAL CAPACITY, AND
THE HONORABLE ROBERT B. EVNEN, SECRETARY
OF STATE OF THE STATE OF NEBRASKA, IN
HIS OFFICIAL CAPACITY, APPELLEES,
AND ALBERT DAVIS III ET AL.,
INTERVENORS-APPELLEES.

948 N.W.2d 698

Filed September 10, 2020. No. S-20-596.

1. **Judgments: Jurisdiction.** A jurisdictional question which does not involve a factual dispute is a matter of law.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Initiative and Referendum.** Whether a ballot title is insufficient or unfair is a question of law.
4. **Judgments: Appeal and Error.** On questions of law, an appellate court is obligated to reach a conclusion independent of the decision by the trial court.
5. **Appeal and Error.** When reviewing the trial court's factual findings, an appellate court reviews for clear error.
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 words which are plain, direct, and unambiguous.
7. **Statutes: Jurisdiction.** Jurisdictional statutes must be strictly construed.
8. **Legislature: Intent.** The intent of the Legislature is generally expressed by omission as well as by inclusion.
9. **Statutes: Appeal and Error.** An appellate court is not at liberty to add language to the plain terms of a statute to restrict its meaning.

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10. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.
11. **Evidence.** Unless an exception applies, only a preponderance of evidence is required in civil cases.
12. **Public Officers and Employees: Presumptions.** Absent contrary evidence, public officers are presumed to faithfully perform their official duties.
13. **Initiative and Referendum: Proof.** A deferential standard is to be applied to a ballot title prepared by the Attorney General, and a dissatisfied person must prove by the greater weight of the evidence that the ballot title is insufficient or unfair.
14. **Initiative and Referendum.** A ballot title is sufficient if it recites the general purposes of the proposed law and if the ballot title contains enough information to sufficiently advise voters of the true contents of the proposed law.

Appeal from the District Court for Lancaster County: LORI A. MARET, Judge. Affirmed.

J.L. Spray and Stephen D. Mossman, of Mattson Ricketts Law Firm, for appellant.

Douglas J. Peterson, Attorney General, Ryan S. Post, and L. Jay Bartel, for appellees.

Mark C. Laughlin and Daniel J. Gutman, of Fraser Stryker, P.C., L.L.O., for intervenors-appellees.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

PER CURIAM.

Trina L. Thomas appealed to the district court from the Attorney General's submission of an explanatory statement and ballot title for an initiative petition that would amend provisions of the Delayed Deposit Services Licensing Act (the Act), Neb. Rev. Stat §§ 45-901 to 45-931 (Reissue 2016 & Cum. Supp. 2018). The court found that it lacked jurisdiction to review the explanatory statement, and it certified the ballot title prepared by the Attorney General. Thomas appeals, requesting that this court hold that the inclusion of the phrase

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“payday lenders” creates an insufficient and unfair ballot title. We affirm.

BACKGROUND

Albert Davis III; Thomas A. Wagoner, Jr.; and Fr. Damian Zeurlein are the sponsors of an initiative petition that would establish a 36-percent statutory cap on the annual percentage rate that may be charged by delayed deposit services licensees.¹ To achieve its objective of reducing the amount that licensees can charge, the initiative petition seeks to amend Nebraska statutes to prohibit licensees from evading the new rate cap and to deem any transaction in violation void and uncollectible.

On June 25, 2020, the sponsors submitted signatures to the Secretary of State for validation. In accordance with Neb. Rev. Stat. § 32-1410(1) (Reissue 2016), on July 8, the Secretary of State transmitted a copy of the measure to the Attorney General. On July 20, the Attorney General transmitted to the Secretary of State the explanatory statement and ballot title to be placed on Nebraska’s November 3 general election ballot. The text of the explanatory statement and ballot title prepared by the Attorney General is as follows:

[EXPLANATORY STATEMENT]

A vote “FOR” will amend Nebraska statutes to: (1) reduce the amount that delayed deposit services licensees, also known as payday lenders, can charge to a maximum annual percentage rate of thirty-six percent; (2) prohibit payday lenders from evading this rate cap; and (3) deem void and uncollectable any delayed deposit transaction made in violation of this rate cap.

A vote “AGAINST” will not cause the Nebraska statutes to be amended in such manner. [(Emphasis in original.)]

[BALLOT TITLE]

Shall Nebraska statutes be amended to: (1) reduce the amount that delayed deposit services licensees, also

¹ See § 45-902.

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known as payday lenders, can charge to a maximum annual percentage rate of thirty-six percent; (2) prohibit payday lenders from evading this rate cap; and (3) deem void and uncollectable any delayed deposit transaction made in violation of this rate cap?

Dissatisfied with the Attorney General's submission, on July 27, 2020, Thomas, a resident of Lancaster County, a taxpayer, a registered voter, and an operator of Paycheck Advance, a delayed deposit services business, filed a "Complaint and Ballot Title Appeal," pursuant to § 32-1410(3), in the district court for Lancaster County. Thomas named the Attorney General and the Secretary of State, in their official capacities, as defendants. Thomas alleged that the explanatory statement and ballot title are insufficient and unfair, because they use "the slang term 'payday lenders.'" Thomas alleged that the term "payday lenders" is not contained within § 45-918 or § 45-919, the provisions of the Act which the initiative petition seeks to amend. Thomas alleged the explanatory statement and ballot title are "deceptive to the voters as [they] unfairly cast[] the measure in a light that would prejudice the vote in favor of the initiative." Thomas prayed that the court remove the phrase "also known as payday lenders" and certify a modified explanatory statement and ballot title to the Secretary of State.

The Attorney General and Secretary of State filed a joint answer. They alleged that under § 32-1410(3), the court is authorized to review only the ballot title and lacks jurisdiction to alter the explanatory statement. They alleged that the ballot title provided by the Attorney General is sufficient, fair, and not misleading and that thus, a different ballot title is not warranted.

The court granted a complaint in intervention filed by the sponsors. The sponsors alleged that the term "payday lenders" is sufficient and fair and that it provides an accurate description of what the initiative petition would accomplish. They alleged that the payday loan industry identifies licensees as "payday

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lenders” and that the term is used by Nebraska’s Department of Banking and Finance (DBF) and the general public. They stated that Thomas did not allege that the general public knows the meaning of the term “delayed deposit services licensee.” Therefore, the sponsors contended, Thomas’ alternative language would increase the likelihood of voter confusion.

The court held a hearing on the matter on August 10, 2020. The court received affidavits with attached exhibits from Thomas, the Attorney General and the Secretary of State, and the sponsors. Thomas argued that the term “payday lenders” is not present in the measure and, except for one provision,² is not present in the Act. Thomas argued that according to the DBF’s interpretive opinion No. 8 filed in 2014, which she offered into evidence, licensees do not offer loans. She argued that licensees are not lenders, because they charge a fee, and therefore including the phrase “also known as payday lenders” would be unfair because it makes the initiative petition “something else than what it is.”

On August 19, 2020, the court issued a written order entering judgment in favor of the Attorney General, the Secretary of State, and the sponsors. That court found that it lacked jurisdiction to review the explanatory statement prepared by the Attorney General, because § 32-1410(3) states that “[a]ny person who is dissatisfied with the *ballot title* provided by the Attorney General for any measure may appeal from his or her decision to the district court” (Emphasis supplied.)

The court also found that a deferential standard applied to its review of the ballot title prepared by the Attorney General. In doing so, the court relied upon previous orders from the district court for Lancaster County which found that in cases brought under § 32-1410(3), the court will not alter a ballot title absent clear evidence that the proposed language is insufficient or unfair.

² § 45-920(2).

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The court found no legal support for Thomas' argument that the term "payday lenders" "is not part of the statute being amended by the initiative petition." The court further found that the Attorney General satisfied the requirement under § 32-1410(1) that the ballot title "shall express the purpose of the measure in not exceeding one hundred words." The court determined that the term "payday lenders" is not improper, as it is familiar to the general public. The court relied upon the DBF's interpretive opinion No. 8, which states in relevant part:

The definition of "delayed deposit services business" does not include offering loans. The [DBF] interprets this to mean that delayed deposit transactions are not recognized as loans, and therefore, should not be represented as loans by the licensee.

In order to operate in accordance with the Act, a licensee may use the phrase "payday loan" in its advertising, signage, coupons, contracts, or other customer contacts, but may not use the term "loan" by itself for any purpose. . . . Licensees may not be listed, or advertise, in a telephone book under the Loans section. Permissible telephone book sections include: Cash Advance Services, Payday Loan, and Payroll Advancement.

The court found that Thomas "failed to meet her burden to demonstrate that the Attorney General's ballot title is clearly insufficient or unfair." The court's order stated:

The ballot title clearly expresses that the purpose of the measure is to prevent the licensees from imposing an annual percentage rate greater than thirty-six percent by rendering any transaction in violation of this requirement void and uncollectable, and to prohibit the licensees from evading this requirement. The Court cannot perceive how the inclusion of the term "payday lenders," which is used by the licensees, the [DBF], and the general public alike, would deceive or mislead voters into supporting the initiative. Thus, the Court finds that the Attorney General's ballot title is sufficient and fair.

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Thomas timely appealed. We moved the case to our docket and granted expedited review.

ASSIGNMENTS OF ERROR

Thomas assigns, restated, that the district court erred in (1) concluding that it lacked jurisdiction to review the explanatory statement, (2) relying upon evidence other than the initiative measure, (3) applying a deferential standard in reviewing the Attorney General's proposed ballot title, and (4) failing to find that the explanatory statement and ballot title are insufficient or unfair.

STANDARD OF REVIEW

[1-5] A jurisdictional question which does not involve a factual dispute is a matter of law.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.⁴ Whether a ballot title is insufficient or unfair is a question of law.⁵ On questions of law, an appellate court is obligated to reach a conclusion independent of the decision by the trial court.⁶ When reviewing the trial court's factual findings, we review for clear error.⁷

ANALYSIS

NO JURISDICTION OVER
EXPLANATORY STATEMENT

This court has not previously had occasion to address the legal standards governing ballot title challenges under § 32-1410. Before reaching the legal issues presented for

³ *Christensen v. Gale*, 301 Neb. 19, 917 N.W.2d 145 (2018).

⁴ *Hargesheimer v. Gale*, 294 Neb. 123, 881 N.W.2d 589 (2016).

⁵ See *Humane Society of Missouri v. Beetem*, 317 S.W.3d 669 (Mo. App. 2010).

⁶ See *Stewart v. Advanced Gaming Tech.*, 272 Neb. 471, 723 N.W.2d 65 (2006).

⁷ See *Eicher v. Mid America Fin. Invest. Corp.*, 275 Neb. 462, 748 N.W.2d 1 (2008).

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review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.⁸

Here, the district court determined that it lacked jurisdiction to review the explanatory statement prepared by the Attorney General, reasoning that under § 32-1410(3), the Legislature did not provide the courts the authority to review anything other than the ballot title. On appeal, the Attorney General, the Secretary of State, and the sponsors agree with the district court's interpretation. Thomas disagrees and argues that a ballot title and explanatory statement are inextricably linked under § 32-1410 and that thus, the district court had jurisdiction to review both. Upon de novo review, we conclude that under the plain text of § 32-1410, the district court's jurisdiction extends only to the ballot title and not to the explanatory statement.

[6-9] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of words which are plain, direct, and unambiguous.⁹ Jurisdictional statutes must be strictly construed.¹⁰ The intent of the Legislature is generally expressed by omission as well as by inclusion.¹¹ We are not at liberty to add language to the plain terms of a statute to restrict its meaning.¹²

Section 32-1410 indicates that any person who is dissatisfied with the ballot title provided by the Attorney General for any measure may appeal from his or her decision to the district court. Nothing within the text of the statute authorizes an appeal when a person is dissatisfied with an explanatory statement. As such, § 32-1410 did not authorize the district court to consider Thomas' challenge to the explanatory statement. We

⁸ *Webb v. Nebraska Dept. of Health & Human Servs.*, 301 Neb. 810, 920 N.W.2d 268 (2018).

⁹ *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

¹⁰ *Lombardo v. Sedlacek*, 299 Neb. 400, 908 N.W.2d 630 (2018).

¹¹ *Id.*

¹² *Id.*

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express no opinion as to whether Thomas had any other path to assert an appeal based on the explanatory statement, nor have we been asked to consider another path.

If there truly is no mechanism to challenge the Attorney General's explanatory statement, that could lead to a curious result. If, for instance, the district court found that the ballot title contained language which was insufficient or unfair and that same language was contained within the explanatory statement, the district court would lack authority under § 32-1410 to address the offending language in the explanatory statement. When possible, an appellate court will try to avoid a statutory construction that would lead to an absurd result.¹³ However, based on our disposition of this matter more fully discussed below, we cannot say in this case that the potential for a hypothetical insufficient or unfair explanatory statement that is unalterable is so absurd that the Legislature could not possibly have intended it. Accordingly, we believe it best to leave any corrective action regarding § 32-1410 to the Legislature.¹⁴

EVIDENCE ARGUMENT NOT PRESENTED

[10] Thomas' next argument is that the court erred in receiving and considering evidence beyond the initiative petition measure. However, it is clear that Thomas did not assert this argument during the proceedings in district court. Thomas herself requested that the court consider evidence beyond the measure, and the court granted that request and relied upon evidence adduced by Thomas. While Thomas lodged evidentiary objections to other exhibits, she did not argue that a court is prohibited from considering evidence outside the measure in a ballot title appeal. We will not consider Thomas' argument. An appellate court will not consider an issue on appeal that was not passed upon by the trial court.¹⁵

¹³ *First Nat. Bank of Omaha v. Davey*, 285 Neb. 835, 830 N.W.2d 63 (2013).

¹⁴ See *Lombardo*, *supra* note 10. See, also, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 234-39 (2012).

¹⁵ *Siedlik v. Nissen*, 303 Neb. 784, 931 N.W.2d 439 (2019).

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BURDEN OF PROOF

The next issue before this court is the appropriate burden of proof for a court to apply in a ballot title challenge under § 32-1410. This raises a matter of first impression under Nebraska law.

[11] Section 32-1410(3) states that the person who has appealed the Attorney General’s decision to the district court “shall file a petition asking for a different title and setting forth the reasons why the title prepared by the Attorney General is insufficient or unfair.” Section 32-1410(3) establishes that in a ballot challenge proceeding, the burden of proof is on the challenger to prove that the ballot title is insufficient or unfair. The trial court here relied upon decades of unchallenged rulings in the Lancaster County District Court and found that a challenger to a ballot title fails to sustain its burden of proof unless it can establish that a ballot title is clearly insufficient or unfair. Thomas argues on appeal that the court erred by adding “clearly” to § 32-1410(3). We agree. Although § 32-1410(3) does not specify a burden of proof to be applied by a court, unless an exception applies, only a preponderance of evidence is required in civil cases.¹⁶

[12] Section 32-1410(3) begins with the presumption that the ballot title prepared by the Attorney General is valid, and it places the burden upon the dissatisfied party to dispel this presumption. This is consistent with the long-held principle in Nebraska that, absent contrary evidence, public officers are presumed to faithfully perform their official duties.¹⁷ “The process of producing a 100 word purpose statement that constitutes a ‘true and impartial explanation’ of the measure ‘involves a

¹⁶ *In re Application No. OP-0003*, 303 Neb. 872, 932 N.W.2d 653 (2019).

¹⁷ *County of Webster v. Nebraska Tax Equal. & Rev. Comm.*, 296 Neb. 751, 896 N.W.2d 887 (2017). See, also, *In re App. No. C-4973 of Skrdlant*, 305 Neb. 635, 942 N.W.2d 196 (2020); *Johnson v. Neth*, 276 Neb. 886, 758 N.W.2d 395 (2008); *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005); *Nye v. Fire Group Partnership*, 263 Neb. 735, 642 N.W.2d 149 (2002); *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001).

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degree of discretion entrusted to the Attorney General by the Legislature that we will not overturn absent noncompliance with the statute.”¹⁸

Other states have adopted similar standards. The Supreme Court of South Dakota has explained, because the Attorney General is charged with the statutory duty of preparing a ballot title, a court’s review of a challenge to the Attorney General’s submission serves a limited function.¹⁹ “‘We merely determine if the Attorney General has complied with his statutory obligations and we do not sit as some type of literary editorial board.’”²⁰ Similarly, the Supreme Court of North Dakota has aptly stated that “[i]f the ballot title is neither misleading nor unfair, it is not our responsibility to draft a better one.”²¹

[13] As a matter of first impression, we hold that a deferential standard is to be applied to a ballot title prepared by the Attorney General and that a dissatisfied person must prove by the greater weight of the evidence that the ballot title is insufficient or unfair.

BALLOT TITLE NOT
INSUFFICIENT OR UNFAIR

Turning to the merits, Thomas contends that the ballot title prepared by the Attorney General and certified by the district court is insufficient and unfair under § 32-1410(3) and that the ballot title should be modified to remove the phrase “also known as payday lenders.” Thomas argues that the term “payday lenders” is not found in the measure nor the Act, that the term “lenders” is misleading because licensees do not offer loans, and that the term “payday lenders” is a slang term

¹⁸ *Montana Consumer Finance Ass’n v. State*, 357 Mont. 237, 243, 238 P.3d 765, 768 (2010).

¹⁹ *Ageton v. Jackley*, 878 N.W.2d 90 (S.D. 2016).

²⁰ *Id.* at 96, quoting *Schulte v. Long*, 687 N.W.2d 495 (S.D. 2004) (superseded by statute as stated in *SD AFL-CIO v. Jackley*, 786 N.W.2d 372 (S.D. 2010)).

²¹ *Municipal Services Corp. v. Kusler*, 490 N.W.2d 700, 703 (N.D. 1992).

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which prejudices voters. Based on the record before us, and applying our newly adopted burden of proof, we agree with the district court that none of Thomas' arguments have any merit. Therefore, Thomas failed to carry her burden to prove that the ballot title prepared by the Attorney General is insufficient or unfair.

Section 32-1410(1) provides that the ballot title "shall express the purpose of the measure in not exceeding one hundred words" and "shall be so worded that those in favor of adopting the measure shall vote For and those opposing the adoption of the measure shall vote Against." Section 32-1410(3) provides that "[a]ny person who is dissatisfied with the ballot title provided by the Attorney General" may appeal to the district court and file a petition setting forth the reasons why the ballot title is "insufficient or unfair." The word "insufficient" means "'inadequate; especially lacking adequate power, capacity, or competence.'" ²² The word "unfair" means to be "'marked by injustice, partiality, or deception.'" ²³

[14] A ballot title is sufficient if it recites the general purposes of the proposed law and if the ballot title contains enough information to sufficiently advise voters of the true contents of the proposed law. ²⁴ A court's task is not to require or draft the perfect proposed ballot title in an initiative election, but merely to determine if the title presented is legally sufficient. ²⁵ In reviewing a ballot title, the court must not concern itself with the merit or lack of merit of the proposed measure, because that determination rests with the electorate. ²⁶

²² *Beetem*, *supra* note 5, 317 S.W.3d at 673.

²³ *Id.*

²⁴ See, *In re Initiative Petition No. 347 State Question No. 639*, 813 P.2d 1019 (Okla. 1991); 82 C.J.S. *Statutes* § 173 (2009).

²⁵ *Cox v. Daniels*, 374 Ark. 437, 288 S.W.3d 591 (2008); 42 Am. Jur. 2d *Initiative and Referendum* § 45 (2020); 82 C.J.S., *supra* note 24, § 172.

²⁶ *Kusler*, *supra* note 21.

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In *Brown v. Carnahan*,²⁷ the Supreme Court of Missouri considered a ballot challenge to a payday loan initiative that would limit the annual percentage rate for payday, title, installment, and other high-cost consumer credit and small loans to 36 percent annually. Because the summary statement stated only that the initiative would “‘limit the annual rate of interest’” without specifying the rate, the trial court found that the statement was not fair or sufficient.²⁸ The trial court found that it was necessary to rewrite the statement to qualify that the limitation would be 36 percent. The appellate court reversed, finding that the summary statement was not misleading because it accurately communicated the purpose of the initiative, which was to limit the permissible interest rate for payday loans. The court found that even if the language provided by the trial court is more specific, and even if that level of specificity might be preferable, whether the summary statement prepared by the public official is the best language is not the test. Rather, all that is required is that the public official prepare a statement which adequately states the consequences of the initiative without bias, prejudice, deception, or favoritism.²⁹

Here, Thomas argues that the phrase “payday lenders” creates an insufficiency, because the phrase is not part of the measure, or the Act, and because licensees do not offer loans. However, the phrase “also known as payday lenders” appears in the objective statement of the draft initiative petition in our record. Moreover, as Thomas acknowledges, § 45-920(2) refers to “delayed deposit services businesses, *payday lenders*, or similar entities.” (Emphasis supplied.) In addition, § 45-917 requires that every licensee, at the time any delayed deposit transaction is made, give to the maker of the check a written notice which states, in part, “THE LAW DOES NOT ALLOW THIS TYPE OF TRANSACTION TO BE MORE THAN FIVE

²⁷ *Brown v. Carnahan*, 370 S.W.3d 637 (Mo. 2012).

²⁸ *Id.* at 663.

²⁹ See *Brown*, *supra* note 27.

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HUNDRED DOLLARS (\$500) IN TOTAL, INCLUDING FEES AND CHARGES, FROM ONE *LENDER*.” (Emphasis supplied.) Additionally, Paycheck Advance’s own deferred deposit agreement, offered into evidence by Thomas, references the agreement as a “Truth-In Lending Act Disclosure.” Lastly, the DBF’s interpretive opinion No. 8 offered into evidence by Thomas provides that licensees are permitted to use the term “payday loan” in advertising. Thomas has not asserted any other reasons why the ballot title does not provide an accurate description of the initiative petition’s purpose, which is to prevent licensees from imposing an annual percentage rate greater than 36 percent and to enforce this requirement by rendering any transaction in violation of this requirement void and uncollectible.

Thomas argues that the term “payday lenders” creates an unfairness, because it is a slang term. However, Thomas has not offered any evidence to support this position. This is not a case where a colloquial term is substituted for a statutory term; rather, it supplements the statutory term with a commonly used term. We agree with the district court that the term “payday lenders” would not deceive or mislead voters regarding the initiative petition, because the record shows “payday lenders” is a term commonly known by the general public and used within the payday loan industry. We further agree with the district court that the Attorney General’s decision to use “payday lenders” clarifies the measure, because no evidence was presented that the general public knows the meaning of the term “delayed deposit services licensees.” As a result, Thomas has failed to carry her burden.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court, which certified the ballot title prepared by the Attorney General.

AFFIRMED.

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

STATE OF NEBRASKA EX REL. M. LYNNE McNALLY AND
KEEP THE MONEY IN NEBRASKA, RELATORS, AND
NEBRASKA HORSEMEN'S BENEVOLENT & PROTECTIVE
ASSOCIATION, INC., ET AL., RELATORS-INTERVENORS,
v. ROBERT B. EVNEN, SECRETARY OF STATE OF
THE STATE OF NEBRASKA, RESPONDENT, AND
DR. RICHARD LOVELESS, AND ANN ZOHNER
AND TODD ZOHNER, WIFE AND HUSBAND,
RESPONDENTS-INTERVENORS.

948 N.W.2d 463

Filed September 10, 2020. No. S-20-612.

1. **Constitutional Law: Initiative and Referendum.** The right of initiative is precious to the people and one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter.
2. ____: _____. The power of initiative must be liberally construed to promote the democratic process, and provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is effectual.
3. **Constitutional Law.** A constitution represents the supreme written will of the people regarding the framework for their government.
4. **Constitutional Law: Initiative and Referendum.** The people of Nebraska may amend their Constitution in any way they see fit, provided the amendments do not violate the federal Constitution or conflict with federal statutes or treaties.
5. **Initiative and Referendum: Appeal and Error.** The Nebraska Supreme Court makes no attempt to judge the wisdom or the desirability of enacting initiative amendments.
6. **Initiative and Referendum: Intent.** The interests that propel both proponents and opponents of initiative petitions may often involve self-interest rather than the public interest. But a court's focus in deciding whether an initiative petition reaches the voters must be on the actual law proposed by the petition, not on the motives that may lie behind

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it; the voters may consider those motives in deciding how they vote on the petition.

7. **Constitutional Law: Initiative and Referendum.** A purpose of the language in Neb. Const. art. III, § 2, that “[i]nitiative measures shall contain only one subject” is to avoid logrolling, which is the practice of combining dissimilar propositions into one proposed amendment so that voters must vote for or against the whole package even though they would have voted differently had the propositions been submitted separately.
8. **Initiative and Referendum.** Where the limits of a proposed law, having natural and necessary connection with each other, and, together, are a part of one general subject, the proposal is a single and not a dual proposition.
9. **Constitutional Law: Initiative and Referendum: Intent.** The controlling consideration in determining the singleness of a subject for purposes of article III, § 2, of the Nebraska Constitution is its singleness of purpose and relationship of the details to the general subject, not the strict necessity of any given detail to carry out the general subject. The general subject is defined by its primary purpose.
10. **Initiative and Referendum.** When initiatives are presented separately, even if on the same ballot, a voter has the option to vote for one initiative but not the other, even if the initiatives have some connection to one another. Because voters can vote differently on each separate initiative, single subject review should focus on the specific initiative being reviewed without reference to the content of another initiative that is submitted separately.

Original action. Writ of mandamus granted.

Andre R. Barry and John F. Zimmer, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for relators.

Douglas J. Peterson, Attorney General, James A. Campbell, Solicitor General, Ryan S. Post, L. Jay Bartel, and Lynn A. Melson for respondent.

David A. Lopez and Kyle J. Gilster, of Husch Blackwell, L.L.P., for intervenor Dr. Richard Loveless.

Stephen D. Mossman, J.L. Spray, and Joseph A. Wilkins, of Mattson Ricketts Law Firm, for intervenors Ann Zohner and Todd Zohner.

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Jefferson Downing, of Keating, O'Hara, Nedved & Peter, P.C., L.L.O., for amicus curiae Gambling With the Good Life, Inc.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE, and FREUDENBERG, JJ., and WELCH, Judge.

MILLER-LERMAN, J.

NATURE OF CASE

M. Lynne McNally and Keep the Money in Nebraska (collectively McNally), along with other sponsors, filed three proposed ballot initiative petitions with Nebraska Secretary of State Robert B. Evnen (the Secretary). Generally, the first initiative would amend the prohibition against gambling contained in Nebraska Const. art. III, § 24, by permitting enactment of an exception which would authorize games of chance conducted within licensed racetrack enclosures; the second initiative would enact certain statutes and amend certain existing statutes to regulate games of chance operated by licensed gaming operators within licensed racetrack enclosures; and the third initiative would enact statutes that impose a tax on revenues from games of chance and specify how such taxes would be distributed.

After signatures had been collected, the Secretary received letters objecting to the initiatives and asking that they be withheld from the ballot due to claimed legal insufficiencies. Separate letters were received from Dr. Richard Loveless and from Ann Zohner and Todd Zohner.

The Secretary requested and received additional letters from the sponsors and from the objectors, and the Secretary thereafter granted the objectors' request to withhold the proposed initiatives from the November 3, 2020, general election ballot. The Secretary generally determined that each initiative was facially invalid under the "single subject" provision of Neb. Const. art. III, § 2. The Secretary further determined that even if either the regulatory initiative or the tax initiative was

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in itself legally sufficient, both initiatives should be withheld because all three initiatives have a common primary purpose.

After the Secretary announced his decision to withhold the initiatives from the ballot, McNally applied for leave to commence an original action in this court for a writ of mandamus requiring the Secretary to place the initiatives on the ballot. We granted leave, and based on McNally's verified petition for writ of mandamus, we issued an alternative writ of mandamus requiring the Secretary to place the initiatives on the ballot or show cause why they should not be placed on the ballot. We expedited the proceeding and set a briefing schedule and date for oral argument.

During the pendency of this case, several parties intervened. Loveless and the Zohners intervened and essentially aligned with the Secretary. Nebraska Horsemen's Benevolent & Protective Association, Inc.; Ho-Chunk, Inc.; and Omaha Exposition and Racing, Inc., intervened and essentially aligned with McNally. We have considered the arguments and claims of all parties, and within our disposition with respect to issues identified as raised by McNally and the Secretary, we have also considered arguments of all intervenors. Our disposition disposes of all claims asserted before us.

We exercise original jurisdiction under Neb. Const. art. V, § 2, because this is a cause of action relating to revenue, in which the State has a direct interest, and because McNally has requested a writ of mandamus. See *State ex rel. Loontjer v. Gale*, 288 Neb. 973, 853 N.W.2d 494 (2014).

As we explain, we conclude that none of the initiatives is legally insufficient and that all three should be placed on the ballot. By separate order, the alternative writ is vacated; a writ of mandamus is issued by separate order ordering the Secretary to place all three initiatives on the ballot.

STATEMENT OF FACTS

Three Initiatives.

In the verified petition for writ of mandamus, McNally alleges that the sponsors of the three initiatives at issue in this

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case are Keep the Money in Nebraska, Nebraska Horsemen's Benevolent & Protective Association, Ho-Chunk, and Omaha Exposition and Racing. McNally alleges that Keep the Money in Nebraska is a registered ballot question committee and that M. Lynne McNally is a resident of Lancaster County, Nebraska, who is a member of Keep the Money in Nebraska and the executive vice president of Nebraska Horsemen's Benevolent & Protective Association. McNally alleges that on April 10, 2019, the sponsors filed with the Secretary the text of the three proposed ballot initiatives, along with the required object statements and sworn statements of sponsors, and that on July 3, 2020, the sponsors submitted sufficient and valid signatures for the petitions. McNally further alleges that in late July 2020, the Nebraska Attorney General sent the Secretary letters setting forth the ballot title and explanatory statement for each of the initiatives.

The first initiative, hereinafter referred to as "the Constitutional Initiative," included the following object statement: "The object of this petition amends the Nebraska Constitution to state that laws may be enacted allowing for the licensing, authorization, taxation, and regulation of all forms of games of chance to be conducted by authorized gaming operators within licensed racetrack enclosures in the state." The text of the Constitutional Initiative was set forth as proposing that Neb. Const. art. III, § 24, be amended to add a subsection (5), which would provide:

This section shall not apply to any law which is enacted contemporaneously with the adoption of this subsection or at any time thereafter and which provides for the licensing, authorization, regulation, or taxation of all forms of games of chance when such games of chance are conducted by authorized gaming operators within a licensed racetrack enclosure.

The second initiative, hereinafter referred to as "the Regulatory Initiative," included the following object statement: "The object of this petition enacts a statute allowing all games of chance to be conducted by authorized gaming

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operators within licensed racetrack enclosures in Nebraska and establishes a Nebraska Gaming Commission to regulate such gaming in Nebraska.” The text of the Regulatory Initiative was set forth as proposing the enactment of “the Nebraska Racetrack Gaming Act,” which included enactment of various statutory provisions to, inter alia, permit operation of games of chance by authorized gaming operators within licensed racetrack enclosures, define terms used within the proposed act, set forth regulations regarding operation of such games, create the “Nebraska Gaming Commission,” and set forth authority and duties of such commission. The text of the initiative also proposed to amend various existing statutes to include references to “games of chance,” “the Nebraska Racetrack Gaming Act,” “the Nebraska Gaming Commission,” and other language relevant to regulation of games of chance. Of particular note in this original action, the initiative proposed to amend existing Neb. Rev. Stat. § 77-2704.20 (Reissue 2018), which currently provides: “Sales and use taxes shall not be imposed on the gross receipts from the sale, lease, or rental of and the storage, use, or other consumption in this state of purchases made by licensees of the State Racing Commission.” The Regulatory Initiative proposed to amend § 77-2704.20 by adding “or of purchases made by licensees of the Nebraska Gaming Commission.” The Regulatory Initiative also proposed to revise Neb. Rev. Stat. § 77-3001 (Supp. 2019), which defines the term “mechanical amusement device” for purposes of the Mechanical Amusement Device Tax Act and which includes a list of devices that are excluded from the definition. The Regulatory Initiative proposed to amend § 77-3001 to include in the list of exclusions, and therefore exclude from the definition, “gaming devices or limited gaming devices as defined in and operated pursuant to the Nebraska Racetrack Gaming Act.”

The third initiative, hereinafter referred to as “the Tax Initiative,” included the following object statement: “The object of this petition enacts a statute establishing an annual tax on gross gaming revenue generated by authorized gaming

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operators of games of chance within licensed racetrack enclosures and directs the collection, enforcement, and distribution of revenue from such gaming tax.” The text of the Tax Initiative was set forth as proposing statutory language to, among other things, impose an annual gaming tax; define statutory terms; set the tax at 20 percent of gross gaming revenue; authorize the Nebraska Gaming Commission to collect, account for, and remit the tax; and provide that specific percentages of the tax imposed be remitted to the Compulsive Gamblers Assistance Fund, the State’s General Fund, the Property Tax Credit Cash Fund, and the county and/or the city or village in which the licensed racetrack enclosure is located. Of particular note to this original action, the Tax Initiative provided that 70 percent of the tax imposed was to be credited to the Property Tax Credit Cash Fund.

Secretary of State.

As indicated above, on August 7, 2020, the Secretary received separate letters from the objectors asking that the three initiatives be withheld from the ballot due to claimed legal insufficiency. After requesting and receiving additional letters from the objectors and from McNally and the other sponsors, the Secretary issued a letter dated August 25, 2020, in which he determined that the three initiatives should be withheld from the ballot, generally for the reason that the initiatives violated the single subject rule set forth in Neb. Const. art. III, § 2.

The Secretary set forth the reasoning for his decision in the letter. He began the analysis by determining that “the primary purpose for each [of the three initiatives] is the same: to permit previously prohibited games of chance to be conducted in the State of Nebraska.” He further stated that “without the Constitutional Initiative, neither the Regulatory Initiative nor the Tax Initiative serves any purpose.” But, he stated, even if there were separate primary purposes for each of the initiatives, the outcome would be the same. The Secretary then set forth law relating to the single subject rule. He stated that

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in prior cases involving a single initiative, the question was whether the single initiative contained more than a single subject. But he noted that this case presented “a novel situation that has not been present in any case heretofore decided by the Supreme Court,” namely, a situation in which “a single general subject constitutes the primary purpose of all three of the initiatives.” The Secretary then reviewed each of the initiatives individually.

Regarding the Constitutional Initiative, the Secretary rejected certain arguments advanced by the objectors, but the Secretary found merit to an alternate argument advanced by the objectors regarding the Constitutional Initiative: that it contained a ““hidden authorization”” of certain types of gambling on tribal lands in Nebraska. The Secretary agreed with the objectors’ reasoning that under the federal Indian Gaming Regulatory Act, permitting gaming activities by any organization in the State would require the State to negotiate with tribes to allow that type of gambling activity on tribal lands. The Secretary reasoned that the Constitutional Initiative would “likely . . . mislead voters into thinking that they are voting for an initiative that would prohibit the conduct of games of chance anywhere but at racetracks” but that instead, if the initiative were adopted, “gambling would not be limited to racetracks.” The Secretary determined that if the initiative were adopted, the legal implications under the Indian Gaming Regulatory Act were not merely speculative, and he noted that there were three tribal casinos in the State that could engage in additional types of gaming and that one of the sponsors of the initiatives was “affiliated with a tribal . . . casino in Iowa within a few miles of the Nebraska border that is not operating within a racetrack.” The Secretary found that the Constitutional Initiative creates the appearance that games of chance could be conducted only in racetrack enclosures. However, referring to *State ex rel. Loontjer v. Gale*, 288 Neb. 973, 853 N.W.2d 494 (2014), the Secretary reasoned that given the implications under the Indian Gaming Regulatory Act, the Constitutional Initiative was “likely to confuse voters,” “likely

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to materially mislead voters,” and “create[] doubt about what action would be authorized.”

The Secretary concluded that the Constitutional Initiative “effectively puts forth dual proposals: (1) authorizing expanded gambling at tribal casinos and (2) authorizing expanded gambling at racetracks by authorized operators.” The Secretary stated that the first purpose was “hidden from the voters and impossible to ascertain from the text of the proposal.” He concluded that the Constitutional Initiative violated the single subject rule by “[p]utting forth dual propositions in a single proposal” and “not permit[ting] voters to express a clear preference on dual propositions.” Referring to the first proposal, the Secretary concluded that the Constitutional Initiative was “legally insufficient and for that reason [he would] withhold it from the ballot.”

Although the Secretary rested his decision regarding the Constitutional Initiative on the reasoning set forth above, he noted an additional argument by the objectors that the initiative violated the single subject rule because it had “two subjects, which are, first, permitting the conduct of games of chance by authorized operators, and second, that such activity is permitted only at racetracks.” The Secretary stated that this was a “strong argument” and that limiting gambling to racetracks was “not a benign purpose” but was “misleading.” However, the Secretary did not explicitly reject or accept this argument as a basis for his decision to withhold the Constitutional Initiative from the ballot.

Regarding the Regulatory Initiative, the Secretary noted that the opponents argued that the initiative violated the single subject rule by including multiple purposes, including authorizing games of chance at racetracks, creating a gaming commission, imposing a license fee, providing tax breaks to operators, and decriminalizing gaming activities. The Secretary reviewed precedent regarding initiatives setting forth a regulatory scheme and reviewed each of the parts of the Regulatory Initiative based on such precedent. As to most of the parts of the Regulatory Initiative, the Secretary determined that “[t]he

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regulatory requirements set forth in the Regulatory Initiative have a natural and necessary connection to the general subject” of permitting previously prohibited games of chance. The Secretary specifically addressed the imposition of the \$1 million licensing fee and determined it had a natural and necessary connection.

The Secretary, however, also reviewed portions of the initiative that provided “[t]ax breaks . . . which exempt purchases by licensees of the gaming commission from sales and use taxes and the mechanical amusement device tax.” The Secretary stated it was a “close question” whether such tax exemptions constituted a separate subject from the regulatory measures in the initiative. But the Secretary concluded that the “tax breaks [did] not have a natural and necessary connection to” a primary purpose of regulating gambling. The Secretary also noted that the tax exemptions were “not mentioned in the object statement” and that the sales and use tax exemption was “incorrectly stated in the introduction to the bill” as applying to the gaming commission rather than to licensees of the gaming commission. The Secretary stated that the descriptions were “misleading.” The Secretary further noted that the Tax Initiative provided for taxation of newly expanded gaming activities. He reasoned that “dividing the tax proposals between two initiatives, and by failing to disclose the tax breaks contained in the Regulatory Initiative,” the Regulatory Initiative created a condition confusing to voters and creating doubt as to the effect of the initiatives. The Secretary therefore concluded that the Regulatory Initiative was “not legally sufficient.”

The Secretary then stated that there was “an additional, separate basis for the legal insufficiency” of the Regulatory Initiative. He reasoned that because he had determined that the Constitutional Initiative must be withheld from the ballot, the Regulatory Initiative, which shared a primary purpose with the Constitutional Initiative and which had a natural and necessary connection to that primary purpose, would have “no purpose at all.” The Secretary concluded that if the Constitutional

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Initiative were not on the ballot, adoption of the Regulatory Initiative “would be an idle act.”

Regarding the Tax Initiative, the Secretary noted that the objectors argued that it violated the single subject rule because it had two distinct and independent proposals: (1) to raise revenue by imposing an annual gaming tax and (2) to “distribute the bulk of the tax revenue for property tax relief.” The Secretary noted that the objectors indicated that other distributions of tax revenue “had a natural and necessary connection with the tax proposed, but that property tax relief is a separate topic included only to entice voters to vote in favor of the gaming tax.”

In reaction, the Secretary noted precedent in which this court determined that provisions for property tax relief included in other initiatives violated the single subject rule. The Secretary reasoned that “[w]ere the contents of the Tax Initiative contained in the Constitutional Initiative, the initiative would be legally insufficient and would be withheld from the ballot as logrolling.” The Secretary stated that the sponsors of the initiatives “attempt[ed] to avoid the prohibition against logrolling by setting forth the logrolling provisions in one of the Initiatives but not the others.”

The Secretary rejected McNally’s argument that “the property tax enticement” was proper because it was “contained in a separate initiative from that which expands gambling.” The Secretary instead reasoned that the primary purpose of all three initiatives was the same and that the provisions of the Tax Initiative, other than the property tax feature, had a natural and necessary connection to the extension of gambling. The Secretary reasoned that property tax relief had no natural and necessary connection to the expansion of gambling. The Secretary reasoned that whether the Tax Initiative had the same primary purpose as the other initiatives, or whether its primary purpose was taxation of gambling revenues, “the property tax relief provisions contained in the Tax Initiative constitute logrolling and violate the single subject rule.” Similar to his reasoning with regard to the Regulatory

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Initiative, the Secretary reasoned that taxation provisions are “confusingly split between the Regulatory Initiative and the Tax Initiative.” The Secretary concluded that the Tax Initiative was legally insufficient.

Also similar to his reasoning with regard to the Regulatory Initiative, the Secretary concluded that there was an additional separate basis for the legal insufficiency of the Tax Initiative. He reasoned that because he had decided the Constitutional Initiative must be withheld, that without the Constitutional Initiative, adoption of the Tax Initiative “would be an idle act.”

The Secretary finally noted that the opponents raised certain constitutional challenges to the initiatives. However, the Secretary determined that it was not clear whether such challenges were “within the purview of a legal sufficiency review by the Secretary of State” and that the issues did not appear to be ripe for decision. He therefore expressed no opinion on those objections.

The Secretary stated in conclusion that “[p]art of the protection of the right of initiative is to assure that such petitions are neither misleading nor manipulative.” He concluded that based on his review and the reasons set forth in his letter, he would withhold all three initiatives from the ballot “unless otherwise ordered by a court of competent jurisdiction.”

Original Action for Writ of Mandamus.

After the Secretary withheld the three initiatives from the ballot, McNally filed this original action for writ of mandamus. We accepted jurisdiction and issued an alternative writ of mandamus requiring the Secretary to place the three initiatives on the ballot or show cause why they should not be placed on the ballot. We set schedules for briefing and oral argument. Several parties identified previously in the opinion intervened.

Summary of Issues Presented in This Action.

In response to our alternative writ of mandamus, the Secretary asserts that the issues presented in this original action are whether he correctly concluded that (1) the Constitutional

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Initiative violates the single subject rule; (2) because the Constitutional Initiative must be withheld from the ballot, the Regulatory Initiative and the Tax Initiative must also be withheld from the ballot because they will have no effect without the Constitutional Initiative; (3) the Regulatory Initiative violates the single subject rule; and (4) the Tax Initiative violates the single subject rule.

McNally asserts that the Secretary incorrectly (1) applied the single subject rule by considering all three initiatives together, even though voters will vote on each separately; (2) determined that the Constitutional Initiative violates the single subject rule; (3) determined that the Regulatory Initiative violates the single subject rule; (4) determined that the Tax Initiative violates the single subject rule; and (5) determined that adoption of the Regulatory Initiative and the Tax Initiative without the simultaneous adoption of the Constitutional Initiative would be an “idle act.”

We note that the Secretary does not appear to dispute that the initiative petitions garnered sufficient signatures, nor does he appear to dispute the validity of the initiatives with respect to any other issue such as verification or submission by a specific date. We therefore presume such requirements were met and would not prevent placement of the initiatives on the ballot.

ANALYSIS

As set forth above, we issued an alternative writ of mandamus requiring the Secretary to place the three initiatives on the ballot or show cause why a peremptory writ requiring such action should not issue. The Secretary has responded to our alternative writ, and therefore, we must determine whether the Secretary has shown cause why we should not issue a peremptory writ requiring him to place any or all of the initiatives on the ballot.

The Secretary contends that all three initiatives should not be placed on the ballot. In his response to the alternative writ, the Secretary argues that the Constitutional Initiative violates the single subject rule because it has two subjects: (1) authorizing

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games of chance and (2) limiting such activity to licensed racetrack enclosures. As an alternative second argument, the Secretary maintains that the Constitutional Initiative has the hidden purpose of authorizing games of chance on tribal lands. The Secretary argues that because the Constitutional Initiative must be withheld from the ballot, the Regulatory Initiative and the Tax Initiative must also be withheld from the ballot for the reason that they could not stand on their own because they would directly conflict with the current constitutional provision generally prohibiting games of chance.

The Secretary alternatively argues that if we determine the Regulatory Initiative and the Tax Initiative need not be withheld for this reason, each initiative in itself violates the single subject rule. The Secretary argues that the Regulatory Initiative, like the Constitutional Initiative, violates the single subject rule because it both authorizes games of chance and limits their operation to licensed racetrack enclosures. The Secretary also argues that the Regulatory Initiative violates the single subject rule because it includes provisions that would exempt licensees from sales and use tax and that would exempt authorized gaming devices from the Mechanical Amusement Device Tax Act; he argues that these tax-related topics do not have a natural and necessary connection to regulation of games of chance.

In considering the Tax Initiative, the Secretary maintains that because the sponsors have inextricably bound the Tax Initiative and the Regulatory Initiative together by including taxation issues in both, the propriety of putting the Tax Initiative on the ballot is entirely dependent on the placement of the Regulatory Initiative. The Secretary argues that because the Tax Initiative must be analyzed with the Regulatory Initiative, the Tax Initiative presents a problem of “logrolling” because voters who want to vote for the Tax Initiative in order to provide property tax relief would be forced to also vote for the Regulatory Initiative, which authorizes the activity to be taxed to provide funds for such property tax relief.

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In response, McNally generally argues that the single subject rule provides that voters must be allowed to cast separate votes on separate subjects and that because voters could vote for or against each separate initiative, the legal sufficiency of each initiative must be evaluated separately without reference to the other initiatives. McNally argues that if any initiative is legally sufficient in itself, it must be placed on the ballot whether or not either or both of the other ballot issues are legally sufficient. McNally argues that, viewed individually, none of the three initiatives violates the single subject rule and that therefore, each of the three initiatives must be placed on the ballot.

Summary of Legal Determinations.

Immediately below, we set forth standards related to the single subject rule. As set forth below, we determine that each initiative must be analyzed individually for its legal sufficiency, and we thereafter analyze each initiative separately. Based on such analysis, we conclude that neither the Constitutional Initiative, nor the Regulatory Initiative, nor the Tax Initiative violates the single subject rule. We therefore conclude that the Secretary has not shown cause why we should not issue a peremptory writ requiring him to place the Constitutional Initiative, the Regulatory Initiative, and the Tax Initiative on the ballot.

Our Precedent Generally Sets Forth a Natural and Necessary Connection Test for the Single Subject Rule Found in Neb. Const. art. III, § 2.

[1,2] The people have the power to amend the Nebraska Constitution and enact statutes by the initiative process pursuant to Neb. Const. art. III, § 2, which provides in part: “The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature.” We have repeatedly said that the right of initiative is precious to the people and one which the courts are zealous to preserve to the

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fullest tenable measure of spirit as well as letter. *Christensen v. Gale*, 301 Neb. 19, 917 N.W.2d 145 (2018); *Hargesheimer v. Gale*, 294 Neb. 123, 881 N.W.2d 589 (2016); *Stewart v. Advanced Gaming Tech.*, 272 Neb. 471, 723 N.W.2d 65 (2006); *State ex rel. Lemon v. Gale*, 272 Neb. 295, 721 N.W.2d 347 (2006); *Loontjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003); *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 602 N.W.2d 465 (1999). The power of initiative must be liberally construed to promote the democratic process, and provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is effectual. *Stewart v. Advanced Gaming Tech.*, *supra*.

[3-6] A constitution represents the supreme written will of the people regarding the framework for their government. *State ex rel. Johnson v. Gale*, 273 Neb. 889, 734 N.W.2d 290 (2007). The people of Nebraska may amend their Constitution in any way they see fit, provided the amendments do not violate the federal Constitution or conflict with federal statutes or treaties. *State ex rel. Johnson v. Gale*, *supra*. This court makes no attempt to judge the wisdom or the desirability of enacting initiative amendments. *Id.* We agree with the statement elsewhere that

the interests that propel both proponents and opponents of initiative petitions may often involve self-interest rather than the public interest. But our focus in deciding whether an initiative petition reaches the voters must be on the actual law proposed by the petition, not on the motives that may lie behind it; the voters may consider those motives in deciding how they vote on the petition.

Bogertman v. Attorney General, 474 Mass. 607, 618-19, 53 N.E.3d 627, 636 (2016).

[7] Among other matters related to initiatives, Neb. Const. art. III, § 2, provides that “[i]nitiative measures shall contain only one subject.” We have stated that a purpose of this language is to avoid logrolling, which is the practice of combining dissimilar propositions into one proposed amendment so

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that voters must vote for or against the whole package even though they would have voted differently had the propositions been submitted separately. *Christensen v. Gale, supra*.

[8,9] Like the majority of jurisdictions, we follow the natural and necessary connection test which we have set forth as follows: Where the limits of a proposed law, having natural and necessary connection with each other, and, together, are a part of one general subject, the proposal is a single and not a dual proposition. *Id.* The controlling consideration in determining the singleness of a subject for purposes of article III, § 2, of the Nebraska Constitution is its singleness of purpose and relationship of the details to the general subject, not the strict necessity of any given detail to carry out the general subject. *Christensen v. Gale, supra*. The general subject is defined by its primary purpose. *Id.* Here, because the parts of the proposed Constitutional Initiative all relate to the same general subject, the expanding of games of chance, the Constitutional Initiative does not violate the single subject rule nor logrolling.

We note that this case appears to present an issue of first impression regarding application of the single subject rule when separate but related initiatives are reviewed for legal sufficiency. The Secretary argues in this case that because the three initiatives share a common primary purpose, they must be considered with one another when determining whether any or all of the initiatives violate the single subject rule. McNally disputes that the three initiatives have the same primary purpose, but argues that, in any event, each initiative must be analyzed individually to determine whether it violates the single subject rule. The parties appear to agree that our precedent does not address that issue.

[10] As noted above, a purpose of the single subject rule is to avoid forcing voters to vote for or against the whole package even though they would have voted differently had the propositions been submitted separately. When initiatives are presented separately, even if on the same ballot, a voter has the option to vote for one initiative but not the other, even if the initiatives have some connection to one another. Because

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voters can vote differently on each separate initiative, we conclude and hold that single subject review should focus on the specific initiative being reviewed without reference to the content of another initiative that is submitted separately.

Finally, we note that the Secretary's arguments rely in large part on language in an opinion in which we stated:

“a proposed municipal ballot measure is invalid if it would (1) compel voters to vote for or against distinct propositions in a single vote—when they might not do so if presented separately; (2) confuse voters on the issues they are asked to decide; or (3) create doubt as to what action they have authorized after the election.”

State ex rel. Loontjer v. Gale, 288 Neb. 973, 1000, 853 N.W.2d 494, 513 (2014) (quoting *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011)). The Secretary's arguments focus in large part on asserting that the initiatives in this case are misleading and that they would “confuse voters” and “create doubt.” We take this opportunity to clarify the quoted language in *State ex rel. Loontjer v. Gale*, *supra*.

As is clear from the language quoted above, we were quoting *City of North Platte v. Tilgner*, *supra*, which set forth standards related to municipal ballot measures and the common-law rules that have been applied to such standards. In *State ex rel. Loontjer v. Gale*, *supra*, we were considering constitutional amendments proposed by the Legislature and the separate vote requirement of Neb. Const. art. XVI, § 1, which governs constitutional amendments proposed by the Legislature. We referred to *Tilgner*, which described a natural and necessary test for the single vote requirement set forth in subsection (1) of the quoted language regarding municipal ballot measures. We concluded that the natural and necessary test for the single vote requirement for municipal ballot measures should also be used in connection with the separate vote provisions of Neb. Const. art. XVI, § 1, governing constitutional amendments proposed by the Legislature.

In *State ex rel. Loontjer v. Gale*, *supra*, we recognized that among the reasons for a single subject rule is that including

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multiple subjects could confuse voters and create doubt, but we have not said that confusion or doubt are separate requirements for a legally insufficient measure or that they are required elements of the test to determine whether a measure violates the single subject requirement. As we noted above, in *Christensen v. Gale*, 301 Neb. 19, 917 N.W.2d 145 (2018), we said that the natural and necessary test described in *State ex rel. Loontjer v. Gale*, *supra*, for the separate vote requirement under Neb. Const. art. XVI, § 1, for constitutional amendments proposed by the Legislature is also an applicable framework to consideration of the single subject rule for initiatives brought under Neb. Const. art. III, § 2. Therefore, the natural and necessary test governs our single subject analysis in this case.

We apply the foregoing principles regarding the single subject rule to review the Secretary's arguments regarding each of the three initiatives at issue in this case and to determine whether or not each initiative violates the single subject rule and is therefore legally insufficient.

*Constitutional Initiative Does Not
Violate Single Subject Rule.*

In his response to the alternative writ, the Secretary argues that the Constitutional Initiative violates the single subject rule in two different ways, because (1) it both authorizes games of chance and limits them to racetrack enclosures and (2) in addition to authorizing games of chance at racetrack enclosures, it authorizes games of chance on tribal lands. Because we conclude that there is no violation of the single subject rule, we reject the Secretary's arguments and conclude that the Secretary has not shown cause why the Constitutional Initiative should not be placed on the ballot.

In reviewing the Secretary's arguments regarding the Constitutional Initiative, we note that a review for legal sufficiency should focus on the actual text of the initiative. We therefore repeat the text of the Constitutional Initiative at this point. The initiative proposes to amend the existing Neb. Const. art. III, § 24, by adding another exception to the

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prohibition against gambling by providing the following new subsection (5):

This section shall not apply to any law which is enacted contemporaneously with the adoption of this subsection or at any time thereafter and which provides for the licensing, authorization, regulation, or taxation of all forms of games of chance when such games of chance are conducted by authorized gaming operators within a licensed racetrack enclosure.

That is the entirety of the amendment proposed by the Constitutional Initiative.

The text of the amendment refers to games of chance within a licensed racetrack enclosure. The dissent is concerned that the racetrack where games of chance are located would serve as host and could profit therefrom. Regarding profit, we note that other subsections in art. III, § 24, such as subsection 2, limit the scope to charitable and community betterment; this Constitutional Initiative does not. We limit our analysis to the text of the Constitutional Initiative, which simply specifies the place of games of chance.

We first address the Secretary's assertion that the Constitutional Initiative contains two subjects. With respect to the first manner of alleged violation, Neb. Const. art. III, § 2, the Secretary asserts the Constitutional Initiative contains two subjects: (1) authorizing all forms of games of chance and (2) restricting those new forms of gambling to racetracks. The Secretary generally argues that authorizing games of chance is the primary purpose and that restricting games of chance to racetrack enclosures does not have a natural and necessary connection to authorizing games of chance. We find the Secretary's reading of the one sentence proposed to be added to the Constitution to be an inaccurate application of the single subject rule.

By reviewing the proposed amendment in context, we believe the Secretary's characterization of the initiative as having two subjects is inaccurate. Article III, § 24, of the Nebraska Constitution, which the Constitutional Initiative

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proposes to amend, begins: “[e]xcept as provided in this section, the Legislature shall not authorize any game of chance or any lottery” (Emphasis supplied.) This is an invitation to authorize expanded gambling by way of exceptions and, indeed, that has occurred. Both the people (through initiative) and the Legislature (by authorization) have accepted the invitation in art. III, § 24(1), to expand gambling. See art. III, § 24(2) through (4). Art. III, § 24, has been amended to include exceptions which permit, inter alia, wagering on horses at racetracks and, separately, lotteries. The proposed Constitutional Initiative exception accepts the constitutional offer to expand gambling and would permit games of chance at racetracks.

By definition, an exception to art. III, § 24, is an expansion of gambling. When gambling is expanded, it naturally follows that the enlarged activity shall occur somewhere, hence the description “within a licensed racetrack enclosure.” See *Bogertman v. Attorney General*, 474 Mass. 607, 53 N.E.3d 627 (2016) (discussing location in the context of expanded gambling). Gambling, i.e., wagering on horses, is already located “within a licensed racetrack enclosure.” Art. III, § 24(4)(a). We do not read the Constitutional Initiative to prevent games of chance being located at additional places by later amendments.

In the present case, the sponsors of the Constitutional Initiative concluded that the new gambling exception activity—which art. III, § 24(1), invites—should occur at racetracks where other gambling already occurs as a result of a previous exception. The Constitutional Initiative asks voters if they want games of chance to be permitted within racetrack enclosures. Voters who want games of chance nearby or elsewhere can vote against it.

Identifying and limiting the location of a new activity is a detail naturally and necessarily connected to its creation and not a separate subject. *Christensen v. Gale*, *supra*. Voters naturally want to know the locale of expanded gambling. We have said that provisions in a proposal must be closely related to be presented to the electorate for a single vote. *State ex rel.*

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Loontjer v. Gale, 288 Neb. 973, 853 N.W.2d 494 (2014). The Constitutional Initiative meets these tests.

The Secretary argues that logrolling is occurring because there may be voters who might support authorization of new games of chance but who dislike the “favored treatment” given to racetracks and would be forced to vote for the racetrack limitation in order to authorize new games of chance. We do not read the proposal as vulnerable to the claim of logrolling. In *State ex rel. Loontjer v. Gale*, 288 Neb. at 995, 853 N.W.2d at 510, we said that

logrolling is the practice of combining dissimilar propositions into one proposed amendment so that voters must vote for or against the whole package even though they would have voted differently had the propositions been submitted separately. It is sometimes described as including favored but unrelated propositions in a proposed amendment to ensure passage of a provision that might otherwise fail.

The premise of these descriptions of logrolling is that the two propositions are unrelated. Logrolling has no application when propositions are related.

Under the Constitutional Initiative, each voter gets to decide whether authorization of games of chance is a sufficiently important goal that he or she will support the incremental expansion provided by this initiative. If so, he or she could vote for it. Or he or she could decide that the racetrack limitation is an unfavorable feature and therefore he or she could vote against it. When the parts have a natural and necessary connection, there is no logrolling. When an unattractive feature is paired with an attractive feature and they do not have a natural and necessary connection to one another, then logrolling is a problem. No logrolling occurs here.

We have observed that the provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is effectual. *State ex rel. Loontjer v. Gale*, *supra*; *State ex rel. Lemon v. Gale*, 272 Neb. 295, 721 N.W.2d 347 (2006). Elsewhere, discussing the single subject

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rule, it has been cautioned that “defining the constitutionally-valid topic too broadly would render the safeguards of [a single subject rule] inert. Conversely, the requirements of [a single subject rule] must not become a license for the judiciary to ‘exercise a pedantic tyranny’” over efforts to change the law. *PA Against Gambling Expansion Fund v. Com.*, 583 Pa. 275, 296, 877 A.2d 383, 395-96 (2005).

We have stated that the power of initiative must be liberally construed to promote the democratic process. *State ex rel. Loontjer v. Gale*, *supra*; *State ex rel. Lemon v. Gale*, *supra*. Whether or not games of chance conducted at racetracks should become the law is for the people to decide.

We next consider the Secretary’s argument that the Constitutional Initiative violates the single subject rule because in addition to authorizing games of chance at racetrack enclosures, it also authorizes games of chance on tribal lands. We reject this argument. As we stated above, a legal sufficiency review should focus on the actual text of the proposed initiative. The Secretary’s argument rests on the notion that there is a “hidden” subject in the Constitutional Initiative that simply is not present in the text of the proposal. That is, the Secretary concludes that the initiative violates the single subject rule because it contains this second hidden subject.

When reviewing legal sufficiency, we do not speculate on the hidden motives or self-interest of the sponsors. By that same token, we do not speculate on the potential motives or self-interest of those who object to placing the initiative on the ballot. To the extent the proposed initiative might have repercussions that are not apparent from the text of the initiative, whether such repercussions are unintended consequences or ulterior motives, is an argument that should be made to the voters rather than to the Secretary or to a court conducting a legal sufficiency review. See *Hargesheimer v. Gale*, 294 Neb. 123, 881 N.W.2d 589 (2016) (noting that referendum statutes provide for disclosure of sponsors and financial contributors so that voters can know who is backing the proposal and based on

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that information make their own decisions whether the motives of the backers will affect their vote).

We need not delve into federal or tribal law in order to determine whether the amendment proposed by the Constitutional Initiative could have the effect on gaming in tribal casinos that the Secretary asserts. Such analysis is beyond the scope of preelection single subject review. It is not a subject set forth by the text of the initiative. To the extent the repercussions are as the Secretary asserts, that is a matter for opponents to present to voters who may decide the likelihood and desirability of such repercussions. Having rejected the arguments of the Secretary and also those of intervenors, we conclude that the Secretary has not shown cause why the Constitutional Initiative should not be placed on the ballot. We therefore will issue a peremptory writ of mandamus requiring the Secretary to place the Constitutional Initiative on the ballot.

*Regulatory Initiative Does Not
Violate Single Subject Rule.*

The Secretary argues that the Regulatory Initiative violates the single subject rule for the same reason that the Constitutional Initiative does and for the additional reason that provisions addressing taxation have no natural and necessary connection to the regulatory scheme set forth in the initiative. We conclude that the Regulatory Initiative does not violate the single subject rule and that the Secretary has not shown cause why the Regulatory Initiative should not be placed on the ballot.

Below we consider various provisions of the Regulatory Initiative, but we initially quote section 4(2). Section 4(2) provides:

No more than one authorized gaming operator license shall be granted for each licensed racetrack enclosure within the state; provided that, it shall not be a requirement that the person or entity applying for or be granted such authorized gaming operator license hold a racing license or be the same person or entity who operates the

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licensed racetrack enclosure at which such authorized gaming operator license shall be granted.

This language in the Regulatory Initiative indicates that although games of chance are to be located within a racetrack enclosure, the entity who operates such enclosure will not necessarily be the operator of games of chance.

The Secretary first argues that the Regulatory Initiative violates the single subject rule for the same reason he asserted in connection with the Constitutional Initiative, that is, it violates the single subject rule—because it both (1) authorizes games of chance and (2) limits operation of such games of chance to racetrack enclosures. However, the Regulatory Initiative does not in itself “authorize games of chance.” Instead, it states in part that “to the full extent permitted by the Constitution of Nebraska, including amendments to the Constitution of Nebraska adopted contemporaneously . . . , the operation of games of chance is permitted only by authorized gaming operators within licensed racetrack enclosures.” The Regulatory Initiative does not itself authorize games of chance and instead it recognizes that such authorization comes from the constitution and that the operation of the regulatory scheme it sets forth is effective only to the extent it is authorized by the constitution.

The subject of the Regulatory Initiative is a regulatory scheme for operation of games of chance that may at some time be authorized by the constitution, and among the features of that regulatory scheme is limiting operation of such games to racetrack enclosures. Because authorization of games of chance is not a subject of the Regulatory Initiative, the limitation to racetracks is not a second subject and instead is to be considered as one of the components of the regulatory scheme.

The Secretary does not argue, and we do not find, that the limitation to racetrack enclosures does not have a natural and necessary connection to regulation of games of chance. The Regulatory Initiative includes various other provisions related to regulation of games of chance, and in other cases, we have found that an initiative that purports to regulate a

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specific subject may include diverse components related to that single subject.

We recently made this observation in *Christensen v. Gale*, 301 Neb. 19, 33, 917 N.W.2d 145, 157 (2018), where we said: [I]n *City of Fremont v. Kotas*, [279 Neb. 720, 781 N.W.2d 456 (2010), *abrogated on other grounds*, *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011),] we held that an initiative petition did not violate the single subject rule. Despite several components of the proposed measure dealing with the subjects of occupancy, licensing, electronic verification, government uses, resources, and penalties, and the application to both landlords and employers, we held that these subjects had a natural and necessary connection with each other and were part of the general subject of regulating illegal immigration.

In his letter, the Secretary rejected the objectors' arguments that certain of the components of the Regulatory Initiative were not related to regulation of games of chance, and he does not assert in his response to our alternative writ that those components or other components of the Regulatory Initiative, other than those discussed below, caused the initiative to violate the single subject rule.

The Secretary does argue that the Regulatory Initiative violates the single subject rule because it contains provisions which (1) exempt licensees of the Nebraska Gaming Commission from sales and use tax and (2) exclude gaming devices from the Mechanical Amusement Device Tax Act. He argues that these "tax breaks" do not have a natural and necessary connection to regulation of games of chance and that the sponsors recognized that taxation issues are not related to regulation because they included other tax-related issues in the separate Tax Initiative.

We disagree. Both tax-related provisions within the Regulatory Initiative have a natural and necessary connection to the regulation of games of chance. Whether operators and licensees are subject to sales and use tax and whether gaming devices authorized in the regulatory scheme are subject to the

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mechanical amusement device tax are both issues relevant to regulation of games of chance. In the Regulatory Initiative, the sales and use tax exemption for licensees of the gaming commission is accomplished by amending a statute that already exempts licensees of the racing commission to include licensees of the gaming commission. See § 77-2704.20. The exclusion of gaming devices from the Mechanical Amusement Device Tax Act is accomplished by adding “gaming devices” defined in the gaming act to a list of items that are not subject to the tax and that list already includes “pickle card dispensing devices.” See § 77-3001. We think this indicates that these provisions are related to the regulation of games of chance in the same sense that the statutes proposed to be amended are part of the regulatory schemes for other forms of gambling—horseracing and pickle cards, respectively.

We also reject the argument that including these tax-related provisions in the Regulatory Initiative rather than the Tax Initiative implicates the single subject rule. The mere fact that the provisions might also have some connection to the general subject of taxation does not mean that they do not also have a natural and necessary connection to the regulation of games of chance. In fact, if these provisions were included in the Tax Initiative, it would be arguable that they have even less connection to the purpose of that initiative than they do the Regulatory Initiative. Whether licensees are exempted from sales and use tax and whether gaming devices are subject to the Mechanical Amusement Device Tax Act are issues that seem to have only tangential connection to a tax initiative whose purpose is to impose a tax on the revenue of games of chance and provide for allocation for the revenue. Furthermore, the fact that a provision may have some connection to another subject, such as “taxation,” does not mean it does not have a natural and necessary connection to the subject of a specific initiative, such as “regulation.” Our analysis is not whether the provisions could better have been included elsewhere; we only consider whether they have a natural and necessary connection

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to the regulatory purpose of the initiative, and we conclude that they do.

We reject the Secretary's argument that the Regulatory Initiative violates the single subject rule, and we conclude that the Secretary has failed to show cause why the Regulatory Initiative should not be placed on the ballot. We will therefore issue a peremptory writ requiring the Secretary to include the Regulatory Initiative on the ballot.

*Tax Initiative Does Not Violate
Single Subject Rule.*

The Secretary argues that the Tax Initiative violates the single subject rule. He generally argues that the Tax Initiative is "interwoven with—and entirely dependent on—the Regulatory Initiative." We reject this argument and conclude that the Secretary has not shown cause why the Tax Initiative should not be placed on the ballot.

The Secretary argues that the Tax Initiative and the Regulatory Initiative are so "tightly intertwined" that they must be considered together for single subject analysis. However, as we discussed above, the purpose of the single subject rule is to allow voters to vote separately on different subjects. Because the voters can vote individually and differently on each initiative presented, a single subject review focuses on the specific initiative at issue.

Viewed in that manner, as we discussed in connection with the Regulatory Initiative, the fact that the tax-related provisions of the Regulatory Initiative and the Tax Initiative both have a connection to the general subject of taxation does not mean that by necessity they must, or even can, be included in a single initiative. Single subject analysis focuses on the subjects and provisions actually included in an initiative and not on provisions that might have been included or that are included in a separate initiative. Therefore, the fact that some tax-related provisions are included in the Regulatory Initiative is not relevant to our review of the Tax Initiative.

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The Tax Initiative imposes a tax on revenues from games of chance and sets forth how the tax collections will be distributed. The imposition of a tax and the distribution of that tax have an obvious natural and necessary connection to one another. If a voter is asked to approve a new tax, it is natural and necessary that the voter would want to know and control how the taxes so collected will be used. A voter is unlikely to support a tax if he or she does not know how the proceeds will be used. Therefore, viewing the Tax Initiative alone, it does not violate the single subject rule.

The Secretary argues that certain distributions provided in the Tax Initiative, particularly that 70 percent of the collected tax be distributed for property tax relief, constitute what single subject precedent has characterized as impermissible “logrolling.” For example, in *State ex rel. Loontjer v. Gale*, 288 Neb. 973, 853 N.W.2d 494 (2014), we held that a proposed ballot measure violated the separate-vote provision of article XVI, § 1, of the Nebraska Constitution, which governs proposals by the Legislature to amend the Constitution and which *Christensen v. Gale*, 301 Neb. 19, 32, 917 N.W.2d 145, 156 (2018), concluded “imposes the same requirements as the single subject provision under article III, § 2.” The measure at issue in *State ex rel. Loontjer* would have amended the Constitution by way of one proposal to permit slot-machine-type gambling on replayed horseraces and would direct tax revenue from that activity, as well as from live horseracing which was already allowed by the Constitution, to property tax relief and education funding. We determined in *State ex rel. Loontjer* that constitutional authorization of a new form of wagering lacked a natural and necessary connection to the measure’s proposal to the use tax revenues for property tax relief and education and that the only purpose of including such property tax relief in the same measure “was to enhance the odds that voters would approve the new form of wagering,” which effect we described as “logrolling.” 288 Neb. at 1004, 853 N.W.2d at 515.

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As noted above in this opinion, we have described logrolling as “the practice of combining dissimilar propositions into one proposed amendment so that voters must vote for or against the whole package even though they would have voted differently had the propositions been submitted separately.” *Christensen v. Gale*, 301 Neb. at 31, 917 N.W.2d at 156. The Secretary’s logrolling argument requires that we look at all three initiatives, or at least both the Regulatory Initiative and the Tax Initiative, together and determine that inclusion of property tax relief in the Tax Initiative serves as an incentive for voters to approve the other initiatives in order to achieve such relief. We reject the Secretary’s argument.

As described above, logrolling means a situation in which voters are required to vote for or against the whole package even though they would have voted differently had the propositions been submitted separately. This concern is not present when, as here, the initiatives are submitted separately and voters may vote on each individually and can choose to vote for all three or only for those of which they approve. For example, a voter might not want to authorize expanded gambling and therefore vote against authorization and/or regulation, but vote for the tax initiative on the thought that if games of chance are authorized by the general electorate, the voter wants those activities taxed and the proceeds used for, among other things, property tax relief. The voter is not forced to vote for authorization in order to achieve property tax relief unless the voter believes authorizing games of chance is an acceptable way to achieve property tax relief.

The distribution of a tax has an obvious natural and necessary connection to the imposition of that tax and therefore both features are part of a single subject. Clearly, a voter would be highly unlikely to vote for a tax unless he or she knew and supported the purpose to which tax proceeds would be directed. We do not believe that including an attractive disposition of proceeds of the tax authorized by the initiative which imposes the tax can be viewed as a ploy to trick a voter into voting for imposition of the tax.

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We conclude that the Tax Initiative does not violate the single subject rule and that therefore, the Secretary has not shown cause why it should not be placed on the ballot. We will therefore issue a peremptory writ of mandamus requiring the Secretary to place the Tax Initiative on the ballot.

CONCLUSION

The people have the power to amend the Nebraska Constitution and enact statutes by the initiative process pursuant to Neb. Const. art. III, § 2, which provides in part: “The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature.” We have repeatedly said that the right of initiative is precious to the people and one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter. We conclude that in response to our alternative writ, the Secretary has not shown cause why either the Constitutional Initiative, the Regulatory Initiative, or the Tax Initiative should not be placed on the ballot. We therefore vacate our alternative writ and by separate order issue a peremptory writ of mandamus ordering the Secretary to place the Constitutional Initiative, the Regulatory Initiative, and the Tax Initiative on the November 2020 ballot.

WRIT OF MANDAMUS GRANTED.

FUNKE, J., and WELCH, Judge, join in this opinion.
PAPIK, J., not participating.

CASSEL, J., concurring.

In the lead opinion, I join the sections entitled “Nature of Case” and “Statement of Facts,” and the judgment of the court.

The court’s decision today is dictated by the seven words of article III, § 2, of the Nebraska Constitution stating, “Initiative measures shall contain only one subject.” That same section of the state Constitution reserves the power of initiative to the people. While this court has stated that the

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power of initiative must be liberally construed to promote the democratic process,¹ it has also recognized that a procedural requirement found in the same section of the state Constitution in which the people reserved to themselves the power of initiative serves to define the scope of the initiative power.² This court must give “meaningful effect” to the self-imposed limitation on that power.³

The words in a constitutional provision must be interpreted and understood in their most natural and obvious meaning unless the subject indicates or the text suggests that they are used in a technical sense.⁴ It is also appropriate and helpful to consider the evil and mischief attempted to be remedied, the objects sought to be accomplished, and the scope of the remedy its terms imply.⁵

A purpose of these seven words is to avoid voter confusion and logrolling, which is the practice of combining dissimilar propositions into one proposed amendment so that voters must vote for or against the whole package even though they would have voted differently had the propositions been submitted separately.⁶ I believe all members of the court agree with this purpose.

Where the limits of a proposed law, having natural and necessary connection with each other, and, together, are a part of one general subject, the proposal is a single and not a dual proposition.⁷ The controlling consideration in determining the singleness of a proposed amendment is its singleness of

¹ See *Stewart v. Advanced Gaming Tech.*, 272 Neb. 471, 723 N.W.2d 65 (2006).

² See *State ex rel. Lemon v. Gale*, 272 Neb. 295, 721 N.W.2d 347 (2006).

³ See *id.*

⁴ *Id.*

⁵ See *id.*

⁶ *Christensen v. Gale*, 301 Neb. 19, 917 N.W.2d 145 (2018).

⁷ *Id.*

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purpose and the relationship of the details to the general subject.⁸ The general subject is defined by its primary purpose.⁹

The proposed amendment to article III, § 24, of the Nebraska Constitution states in relevant part, “This section shall not apply to any law . . . which provides for . . . all forms of games of chance when such games of chance are conducted by authorized gaming operators within a licensed racetrack enclosure.” Fundamentally, a majority of this court concludes that this language prescribes “what” (gaming) and “where” (racetracks), while our dissenting colleagues view the words as dictating “what” (gaming) and “who” (racetrack hosts). But I do not read “authorized gaming operators within a licensed racetrack enclosure” synonymously with either existing licensees or existing racetracks. Further, I do not read any of my dissenting colleagues to agree with the reasoning of the Secretary of State analyzing the Constitutional Initiative, the Regulatory Initiative, and the Tax Initiative as a single proposal. Nor do I view any member of this court as thinking it proper to consider, for purposes of article III, § 2, the effect of adoption of the initiative upon tribal gaming.

The primary purpose of the proposal is to provide another exception to the basic prohibition of games of chance, lotteries, and gift enterprises under article III, § 24(1). The detail of “where” is naturally and necessarily related to the “what.” Expansion of gaming presumes some location. The racetrack limitation merely specifies the place. This dictates that the proposal contains only one “subject” within the meaning of article III, § 2.

That is all the Secretary of State was required to determine, and our scope goes no further. The arguments for and against the wisdom and desirability of the proposal are for the people of this state to decide. Because only one subject was

⁸ *Id.*

⁹ *Id.*

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specified in the Constitutional Initiative, that proposal must go to the voters.

I join the reasoning of my colleagues in the lead opinion regarding application of the single subject rule to the Regulatory Initiative and the Tax Initiative.

HEAVICAN, C.J., STACY, and FREUDENBERG, JJ., dissenting.

To the extent the plurality concludes there is just one subject presented in the Constitutional Initiative, we respectfully disagree. Because we discern two separate subjects with separate purposes, we conclude the initiative violates the single subject requirement of Neb. Const. art. III, § 2. We would deny the writ and allow the Secretary of State to withhold the Constitutional Initiative from the November 2020 ballot.

A constitution represents the supreme written will of the people regarding the framework for their government, and the people may amend their Constitution in any way they see fit, provided the amendments do not violate the federal Constitution or conflict with federal statutes or treaties.¹ In 1998, the people of Nebraska amended art. III, § 2, to add the requirement that “[i]nitiative measures shall contain only one subject.”² The peoples’ power of initiative, and the self-imposed single subject limitation on that power, are of equal constitutional significance.³ Just as courts must respect and give effect to the power the people have reserved to themselves to amend the constitution or enact legislation through initiative measures, courts must also give meaningful effect to the single subject requirement in art. III, § 2.

When analyzing the single subject requirement for voter initiatives under art. III, § 2, we apply the natural and

¹ *State ex rel. Johnson v. Gale*, 273 Neb. 889, 734 N.W.2d 290 (2007).

² See 1997 Neb. Laws, L.R. 32CA.

³ See, e.g., *State ex rel. Lemon v. Gale*, 272 Neb. 295, 721 N.W.2d 347 (2006) (right to initiative and resubmission clause limiting that right have equal constitutional significance).

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necessary connection test.⁴ Under that test, the inquiry is whether all of the provisions of an initiative have a ““natural and necessary connection with each other, and, together, are a part of one general subject.””⁵ When there are separate provisions in a proposed constitutional amendment, they “must be closely related in purpose to be presented to the electorate for a single vote.”⁶ This is so because “[w]ithout a unifying purpose, separate proposals in a ballot measure necessarily present independent and distinct proposals that require a separate vote.”⁷

When analyzing the single subject requirement, we are mindful that its purpose is to “avoid voter confusion and logrolling.”⁸ We have described logrolling as “the practice of combining dissimilar propositions into one proposed amendment so that voters must vote for or against the whole package even though they would have voted differently had the propositions been submitted separately.”⁹ We also have described logrolling as “including favored but unrelated propositions in a proposed amendment to ensure passage of a provision that might otherwise fail.”¹⁰ Generally speaking, logrolling is criticized because it leads to the adoption of measures which, when considered separately, do not enjoy true majority support, and it presents voters with the “Hobson’s choice” of either choosing to vote for a measure they dislike in order to secure passage of a measure they favor or, conversely, being

⁴ See *Christensen v. Gale*, 301 Neb. 19, 917 N.W.2d 145 (2018).

⁵ *Id.* at 32, 917 N.W.2d at 156.

⁶ *State ex rel. Loontjer v. Gale*, 288 Neb. 973, 1000-01, 853 N.W.2d 494, 513 (2014).

⁷ *Id.* at 1003, 853 N.W.2d at 515.

⁸ *Christensen v. Gale*, *supra* note 4, 301 Neb. at 31, 917 N.W.2d at 156.

⁹ *State ex rel. Loontjer v. Gale*, *supra* note 6, 288 Neb. at 995, 853 N.W.2d at 510.

¹⁰ *Id.*

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forced to vote against a measure they favor because it has been joined with a measure they disfavor.¹¹

The plurality and dissenting opinions do not reach separate results because they disagree on any of these fundamental principles of our constitutional single subject jurisprudence. Instead, we reach different results because we have different views regarding the “subject” of the initiative.

We have observed that “whether a proposed amendment’s provisions deal with a single subject matter depends on how narrowly or broadly the subject matter is defined.”¹² Consequently, the judicial exercise of defining the subject of a ballot initiative is a critical first step. To do so, a court must discern the “primary purpose”¹³ of the initiative.

As it regards the Constitutional Initiative, the plurality appears to have accepted the sponsors’ framing of the initiative’s primary purpose. The sponsors describe their objective as amending the constitution to authorize “all forms of games of chance . . . within licensed racetrack enclosures in the state.” Similarly, the plurality defines the subject of the Constitutional Initiative as “ask[ing] voters if they want games of chance to be permitted within racetrack enclosures.”

We reject the notion that a sponsor’s articulation of an initiative’s purpose must control the court’s definition of the initiative’s subject. To give meaningful effect to the single subject requirement under art. III, § 2, courts cannot allow the general subject of a voter initiative measure to be defined at such a high level of abstraction that the primary purpose of the single subject requirement—to prevent logrolling—is frustrated.

¹¹ See Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 82 Alb. L. Rev. 1629 (2019).

¹² *State ex rel. Loontjer v. Gale*, *supra* note 6, 288 Neb. at 1001, 853 N.W.2d at 514.

¹³ *Christensen v. Gale*, *supra* note 4, 301 Neb. at 32, 917 N.W.2d at 156.

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Courts and commentators alike have acknowledged the difficulty inherent in defining the subject of voter initiatives,¹⁴ and we do not intend to suggest there is a simple mathematical or linguistic formula to correctly identify the subject of every initiative. Indeed, it has been suggested that when applying single subject rules, neither judges nor scholars have been able to define a “subject” with precision.¹⁵

We do not write separately to propose any new test for discerning the subject of an initiative. Rather, we faithfully apply our precedent which states that “the general subject of a proposed ballot measure is defined by its primary purpose.”¹⁶ When we review the Constitutional Initiative through this lens, we discern more than one purpose, and thus more than one subject.

The primary purpose of the ballot initiative is to amend the constitution to authorize “all games of chance” in Nebraska. This necessarily means it would authorize casino-style gaming. A secondary purpose of the amendment is to restrict that expanded gaming to only “licensed racetracks.” The plurality does not appear to disagree there are multiple proposals inherent in the text of the initiative, but it concludes there is a natural and necessary connection between authorizing expanded casino-style gaming on the one hand, and deciding where such expanded gaming should be located on the other hand. If the purpose of the provision to restrict expanded casino-style gaming to racetracks was only to identify a geographic location for such gaming, we would agree with our colleagues.

But the purpose of the provision restricting expanded casino-style gaming to “within licensed racetracks” is not about geography. It is about money. This initiative does more than just

¹⁴ See, e.g., Briffault, *supra* note 11.

¹⁵ Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 Colum. L. Rev. 687 (2010).

¹⁶ *State ex rel. Loontjer v. Gale*, *supra* note 6, 288 Neb. at 1002, 853 Neb. at 514. Accord *Christensen v. Gale*, *supra* note 4.

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identify the location where expanded gaming will occur; it also limits the type of businesses that can profit from hosting such gaming in Nebraska, and thus creates in licensed racetracks a constitutionally protected monopoly on hosting expanded gaming. Hidden in the folds of the question whether to authorize expanded casino-style gaming in Nebraska is the separate question whether only racetracks should be given an exclusive constitutional right to host such gaming. That separate question has neither a natural nor a necessary connection to whether expanded casino-style gaming should be authorized in the first instance. It presents a separate subject which, under art. III, § 2, must be put to the voters separately.

Combining the proposal to authorize expanded gaming with the proposal to limit such gaming to only licensed racetracks is a classic example of logrolling. Voters who may favor expanded casino-style gaming but oppose allowing only licensed racetracks to host and thus profit from such gaming are faced with an all or nothing proposition. Either they are forced to vote for something they oppose in order to obtain passage of what they support or, conversely, they are forced to vote against something they support in order to prevent passage of something they oppose.

The plurality finds a natural and necessary connection between expanded gaming and racetracks, because one form of gaming (horseracing) is already authorized at racetracks. Reasonable people can debate whether there is a natural connection between casino-style gaming and horseracing. But we can conceive of no natural and necessary connection between the proposal to authorize expanded casino-style gaming in Nebraska and the proposal to grant racetracks the exclusive constitutional right to host and thus profit from that gaming. Just as the favorable tax proposal in *State ex rel. Loontjer v. Gale*¹⁷ was found to be a separate subject with no natural and necessary connection to expanded horse wagering, the

¹⁷ *State ex rel. Loontjer v. Gale*, *supra* note 6.

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favorable racetrack proposal here has no natural and necessary connection to expanded casino-style gaming. Simply put, the Constitutional Initiative here violates the single subject requirement because it fails the natural and necessary test, and is quintessential logrolling.

We would hold that the Constitutional Initiative violates the single subject rule and would find the Secretary of State has shown cause why the Constitutional Initiative should not be placed on the November 2020 ballot.

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

STATE OF NEBRASKA EX REL. TERRY WAGNER, RELATOR,
v. ROBERT B. EVNEN, SECRETARY OF STATE OF THE
STATE OF NEBRASKA, RESPONDENT, AND NEBRASKANS
FOR SENSIBLE MARIJUANA LAWS, ALSO KNOWN AS
NEBRASKANS FOR MEDICAL MARIJUANA,
ET AL., INTERVENORS.

948 N.W.2d 244

Filed September 10, 2020. No. S-20-623.

1. **Constitutional Law: Justiciable Issues: Appeal and Error.** Questions of justiciability and of constitutional interpretation that do not involve factual dispute are questions of law.
2. **Appeal and Error.** An appellate court reviews questions of law de novo, drawing independent conclusions irrespective of any decision made below.
3. **Mandamus: Words and Phrases.** Mandamus is a law action and represents an extraordinary remedy, not a writ of right.
4. **Mandamus.** Whether to grant a writ of mandamus is within a court's discretion.
5. **Courts: Justiciable Issues.** Before reaching the legal issues presented for review, courts must determine whether the issues presented are justiciable.
6. ____: _____. Ripeness is a justiciability doctrine that courts consider in determining whether they may properly decide a controversy.
7. **Courts.** The fundamental principle of ripeness is that courts should avoid entangling themselves, through premature adjudication, in abstract disagreements based on contingent future events that may not occur at all or may not occur as anticipated.
8. **Initiative and Referendum: Justiciable Issues.** A challenge to a voter ballot initiative based on substantive provisions of law is not ripe before an election because an opinion on the substantive challenge based on the contingent future event of the measure's passage would be merely advisory.

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9. ____: _____. A preelection challenge based on the procedural requirements to a voter ballot initiative's placement on the ballot is ripe for resolution.
10. **Initiative and Referendum.** A challenge to the legal sufficiency of a ballot initiative is a claim based on procedural requirements.
11. **Constitutional Law: Statutes: Initiative and Referendum: Appeal and Error.** Because the voter ballot initiative power is precious to the people, an appellate court construes statutory and constitutional provisions dealing with voters' power of initiative liberally to promote the democratic process.
12. **Constitutional Law: Statutes: Initiative and Referendum.** By petition, the initiative power may be invoked and, if the appropriate procedures are followed, used to propose statutory or constitutional amendments to the state's voters without resorting to the Nebraska Legislature.
13. **Constitutional Law: Initiative and Referendum.** The people's reserved power of the initiative and their self-imposed requirements of procedure in exercising that power are of equal constitutional significance.
14. ____: _____. The single subject rule under Neb. Const. art. III, § 2, was adopted by voter ballot initiative to avoid, among other things, logrolling.
15. **Initiative and Referendum: Words and Phrases.** Logrolling is the practice of combining dissimilar propositions into one voter initiative so that voters must vote for or against the whole package even though they only support certain of the initiative's propositions.
16. **Courts: Initiative and Referendum.** Courts in Nebraska follow the natural and necessary connection test for determining whether a voter ballot initiative violates the single subject rule.
17. **Initiative and Referendum.** Under the natural and necessary connection test, where the limits of a proposed law, having natural and necessary connection with each other, and, together, are a part of one general subject, the proposal is a single and not a dual proposition.
18. _____. The controlling factors in an inquiry under the natural and necessary connection test are the initiative's singleness of purpose and the relationship of other details to its general subject.
19. _____. An initiative's general subject is defined by its primary purpose.
20. **Courts: Initiative and Referendum.** A court's analysis under the single subject rule begins by characterizing the general subject.
21. **Constitutional Law: Initiative and Referendum.** A general subject must not be characterized too broadly when considering an amendment to the constitution.

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22. **Initiative and Referendum.** A general subject must be characterized at a level of specificity that allows for meaningful review of the natural and necessary connection between it and the initiative's other purposes.
23. **Constitutional Law: Initiative and Referendum.** The single subject requirement may not be circumvented by selecting a general subject so broad that the rule is evaded as a meaningful constitutional check on the initiative process.
24. **Words and Phrases.** Necessary means something on which another thing is dependent or contingent.
25. **Declaratory Judgments: Justiciable Issues.** The function of declaratory relief is to determine a justiciable controversy that is either not yet ripe by conventional remedy or, for other reasons, is not conveniently amenable to usual remedies.
26. **Declaratory Judgments.** Although declaratory judgment actions are permitted by statute, in certain circumstances under the Uniform Declaratory Judgments Act, a declaratory judgment will generally not lie where another equally serviceable remedy is available.
27. **Mandamus: Declaratory Judgments.** If a writ of mandamus would be adequate and equally serviceable, then a declaratory judgment will not lie.
28. **Mandamus: Proof.** Mandamus relief is available if the movant can show (1) a clear right to the relief sought, (2) a corresponding clear duty to perform the act requested, and (3) no other plain and adequate remedy is available in the ordinary course of law.
29. **Public Officers and Employees: Initiative and Referendum.** Nebraska law imposes on the Secretary of State a nondiscretionary duty to determine the legal sufficiency of ballot measures and withhold any legally insufficient measure from the ballot.
30. **Initiative and Referendum.** The single subject rule was adopted by voters to protect against voter ballot initiatives that failed to give voters an option to clearly express their policy preference.
31. **Constitutional Law: Courts: Initiative and Referendum.** Just as courts must respect and give effect to the power the people have reserved to themselves to amend the constitution through initiative measures, courts are obliged to give meaningful effect to the people's self-imposed limitations on that power.

Original action. Writ of mandamus granted.

Mark A. Fahleson, of Rembolt Ludtke, L.L.P., for relator.

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Jason W. Grams and Michael L. Storey, of Lamson, Dugan & Murray, L.L.P., and Teri L. Vukonich-Mikkelsen, of Reisinger Booth & Associates, P.C., L.L.O., for intervenors.

HEAVICAN, C.J., MILLER-LEMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

PER CURIAM.

I. INTRODUCTION

The Nebraska Secretary of State certified a voter ballot initiative to create a constitutional right for persons with serious medical conditions to produce and medicinally use cannabis, subject to a recommendation by a licensed physician or nurse practitioner. A Nebraska resident challenged the decision, claiming the initiative violated the single subject rule under Neb. Const. art. III, § 2, and should be withheld from the November 2020 general election ballot. We reverse the Secretary of State’s decision and issue a writ of mandamus directing him to withhold the initiative from the November 2020 general election ballot.

II. FACTUAL BACKGROUND

A voter ballot initiative petition to create a constitutional right for persons with serious medical conditions to produce and medicinally use cannabis, subject to a recommendation by a licensed physician or nurse practitioner, was filed with the Secretary of State, Robert B. Evnen, on February 5, 2019, to certify it for inclusion on the November 2020 general election ballot. Nebraskans for Sensible Marijuana Laws, a ballot question committee, as well as two state senators, Adam Morfeld and Anna Wishart, sponsored the petition. The objective of the petition was “to amend the Nebraska Constitution to provide the right to use, possess, access, and safely produce cannabis, and cannabis products and materials, for serious medical conditions as recommended by a physician or nurse practitioner.”

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To accomplish this objective, the sponsors proposed the “Nebraska Medical Cannabis Constitutional Amendment” (NMCCA), an addition of Neb. Const. art. XIX, § 1. If approved, the NMCCA would, in nine subsections, (1) establish a constitutional right for adults 18 years or older with serious health conditions “to use, possess, access, purchase, and safely and discreetly produce” medicinal cannabis as recommended by a licensed physician or nurse practitioner; (2) establish the same right for minors younger than 18 years of age, provided they obtain the consent of a parent or legal guardian; (3) provide that private entities “may grow, cultivate, process, possess, transport, sell, test, or transfer possession of cannabis, cannabis products, and cannabis-related equipment for sale or delivery to an individual authorized” under the first two subsections; (4) decriminalize the medicinal use of cannabis for persons who qualify under the first two subsections; (5) subject persons’ rights to use cannabis under the first two subsections to reasonable laws, rules, and regulations; (6) set forth certain limitations on the expansion of medicinal cannabis; (7) provide that employers are not required to allow employees to work while impaired by cannabis; (8) provide that insurance providers are not required to provide coverage for the use of cannabis; and (9) define cannabis.

Evenen transmitted the NMCCA to the Nebraska Attorney General, Douglas J. Peterson, to prepare a statement explaining the NMCCA and the effect of a vote for or against it. Peterson then provided the NMCCA’s sponsors with a proposed ballot title and explanatory statement. According to Peterson, the NMCCA, if included on the November 2020 general election ballot, should be presented to voters by the following text:

[EXPLANATORY STATEMENT]

A vote “FOR” will amend the Nebraska Constitution to: (1) Provide individuals the right to use, possess, access, purchase, and produce cannabis, cannabis products, and cannabis-related equipment for serious medical conditions if recommended by a licensed physician

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or nurse practitioner, subject to certain exceptions and reasonable laws, rules, and regulations; and (2) Allow private entities and their agents operating in Nebraska to grow, cultivate, process, possess, transport, sell, test, or transfer possession of cannabis, cannabis products, or cannabis-related equipment for sale or delivery to authorized individual users, subject to reasonable laws, rules, and regulations, including licensing.

A vote “AGAINST” will not cause the Nebraska Constitution to be amended in such a manner. [(Emphasis in original.)]

[BALLOT TITLE]

Shall the Nebraska Constitution be amended to: (1) Provide individuals the right to use, possess, access, purchase, and produce cannabis, cannabis products, and cannabis-related equipment for serious medical conditions if recommended by a licensed physician or nurse practitioner, subject to certain exceptions and reasonable laws, rules, and regulations; and (2) Allow private entities and their agents operating in Nebraska to grow, cultivate, process, possess, transport, sell, test, or transfer possession of cannabis, cannabis products, or cannabis-related equipment for sale or delivery to authorized individual users, subject to reasonable laws, rules, and regulations, including licensing?

Peterson also transmitted a copy of his proposed explanatory statement and ballot title to Evnen to determine whether to certify the NMCCA for inclusion on the November 2020 general election ballot.

On August 26, 2020, Terry Wagner, a Nebraska resident, filed an objection with Evnen, claiming the NMCCA was legally insufficient. The NMCCA’s sponsors filed letters disputing Wagner’s claim. Both parties also submitted additional briefing to Evnen in the form of emails.

On August 27, 2020, Evnen issued a written determination that the NMCCA was legally sufficient. He found that the

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NMCCA had only one general subject—“to legalize the use of cannabis in this state for persons with serious medical conditions”—and that any other purposes were naturally and necessarily connected to that primary purpose. Accordingly, Evnen wrote that the NMCCA did not violate the single subject rule under Neb. Const. art. III, § 2, and that he would “not withhold it from the ballot unless otherwise ordered by a court of competent jurisdiction.”

On August 28, 2020, Wagner filed with this court an application for leave to commence an original action. According to Wagner, this court’s review of Evnen’s decision was necessary because only 14 days remained until the deadline set by Neb. Rev. Stat. § 32-801 (Reissue 2016) for Evnen to certify the issues appearing on the November 2020 general election ballot.

We granted Wagner leave to commence an original action. Based on Wagner’s verified petition for writ of mandamus, we issued an alternative writ of mandamus directing Evnen to show cause why the NMCCA should not be withheld from the November 2020 general election ballot. The NMCCA’s sponsors intervened and essentially aligned their arguments with Evnen’s decision in defense of the NMCCA’s legal sufficiency under the single subject rule.

We note at the outset that the parties do not dispute that the NMCCA petition garnered sufficient signatures and complied with all procedural requirements, except the single subject rule. We therefore presume such other requirements were met and would not prevent placement of the NMCCA on the general election ballot.

III. ASSIGNMENTS OF ERROR

Wagner (1) contends that Evnen erred in failing to find the NMCCA legally insufficient for violating the single subject rule under Neb. Const. art. III, § 2, and (2) prays that this court enter a declaratory judgment finding the NMCCA legally insufficient and issue a writ of mandamus directing Evnen to withhold it from the November 2020 general election ballot.

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IV. STANDARD OF REVIEW

[1,2] Questions of justiciability and of constitutional interpretation that do not involve factual dispute are questions of law.¹ An appellate court reviews questions of law de novo, drawing independent conclusions irrespective of any decision made below.²

[3,4] Mandamus is a law action and represents an extraordinary remedy, not a writ of right.³ Whether to grant a writ of mandamus is within a court's discretion.⁴

V. ANALYSIS

1. JUSTICIABILITY

[5-7] Before reaching the legal issues presented for review, courts must determine whether the issues presented are justiciable.⁵ Ripeness is a justiciability doctrine that courts consider in determining whether they may properly decide a controversy.⁶ The fundamental principle of ripeness is that courts should avoid entangling themselves, through premature adjudication, in abstract disagreements based on contingent future events that may not occur at all or may not occur as anticipated.⁷

[8,9] A challenge to a voter ballot initiative based on substantive provisions of law is not ripe before an election because “[a]n opinion on the substantive challenge based on the contingent future event of the measure’s passage would be

¹ See, *State v. Said*, 306 Neb. 314, 945 N.W.2d 152 (2020) (constitutional interpretation); *State ex rel. Peterson v. Ebke*, 303 Neb. 637, 930 N.W.2d 551 (2019) (justiciability).

² See *State v. Said*, *supra* note 1.

³ See *State ex rel. BH Media Group v. Frakes*, 305 Neb. 780, 943 N.W.2d 231 (2020).

⁴ See *id.*

⁵ See *In re Interest of Giavonni P.*, 304 Neb. 580, 935 N.W.2d 631 (2019).

⁶ *Christensen v. Gale*, 301 Neb. 19, 917 N.W.2d 145 (2018).

⁷ *Id.*

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merely advisory.”⁸ In contrast, a preelection challenge based on “the procedural requirements to [a voter ballot initiative’s] placement on the ballot” is ripe for resolution.⁹

[10] Here, Wagner challenges only the legal sufficiency of the NMCCA. We have held that a challenge to the legal sufficiency of a ballot initiative is a claim based on procedural requirements.¹⁰ Hence, Wagner’s claim is ripe for our review before the election.

2. LEGAL SUFFICIENCY

Wagner’s claim is that Evnen erred in finding the NMCCA legally sufficient. According to Wagner, the NMCCA violates the single subject rule under Neb. Const. art. III, § 2, because its general subject and various other provisions lack any natural and necessary connection with each other. We agree.

(a) Single Subject Rule

[11-13] Under the Nebraska Constitution, the voter ballot initiative is “[t]he first power reserved by the people”¹¹ Because the voter ballot initiative power is precious to the people, we construe statutory and constitutional provisions dealing with voters’ power of initiative liberally to promote the democratic process.¹² By petition, the initiative power may be invoked and, if the appropriate procedures are followed, used to propose statutory or constitutional amendments to the state’s voters without resorting to the Nebraska Legislature.¹³ “The people’s reserved power of the initiative and their

⁸ *Id.* at 35, 917 N.W.2d at 158.

⁹ *Id.*

¹⁰ See *State ex rel. Loontjer v. Gale*, 288 Neb. 973, 853 N.W.2d 494 (2014).

¹¹ Neb. Const. art. III, § 2.

¹² See *State v. Jenkins*, 303 Neb. 676, 931 N.W.2d 851 (2019), *cert. denied* ___, 140 S. Ct. 2704, 206 L. Ed. 2d 844 (2020).

¹³ See *id.*

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self-imposed [requirements of procedure in exercising that power] are of equal constitutional significance.”¹⁴

[14,15] One constitutional requirement of the voter ballot initiative procedure is the single subject rule. Under the Nebraska Constitution, “[i]nitiative measures shall contain only one subject.”¹⁵ This requirement was adopted by voter ballot initiative in 1998 to avoid, among other things, logrolling.¹⁶ Logrolling is the practice of combining dissimilar propositions into one voter initiative so that voters must vote for or against the whole package even though they only support certain of the initiative’s propositions.¹⁷

[16-19] We follow the natural and necessary connection test for determining whether a voter ballot initiative violates the single subject rule.¹⁸ Under the test, “““[W]here the limits of a proposed law, having natural and necessary connection with each other, and, together, are a part of one general subject, the proposal is a single and not a dual proposition.”””¹⁹ The controlling factors in this inquiry are the initiative’s singleness of purpose and the relationship of other details to its general subject.²⁰ An initiative’s general subject is defined by its primary purpose.²¹

Although we have applied similar natural and necessary connection tests based in the common law to municipal voter ballot initiatives and legislatively proposed constitutional

¹⁴ *State ex rel. Lemon v. Gale*, 272 Neb. 295, 304, 721 N.W.2d 347, 356 (2006).

¹⁵ Neb. Const. art. III, § 2.

¹⁶ See 1997 Neb. Laws, L.R. 32CA, § 1; *Christensen v. Gale*, *supra* note 6.

¹⁷ *Christensen v. Gale*, *supra* note 6.

¹⁸ *Id.*

¹⁹ *Id.* at 32, 917 N.W.2d at 156 (quoting *State ex rel. Loontjer v. Gale*, *supra* note 10). See, also, *Munch v. Tusa*, 140 Neb. 457, 300 N.W. 385 (1941).

²⁰ *Christensen v. Gale*, *supra* note 6.

²¹ *Id.*

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amendments,²² we have only applied the test based in the single subject rule, Neb. Const. art. III, § 2, to a voter ballot initiative once before, in *Christensen v. Gale*.²³

At issue in *Christensen* was a voter ballot initiative to amend the Medical Assistance Act²⁴ to (1) expand Medicaid coverage to certain lower income adults in Nebraska and (2) direct the Nebraska Department of Health and Human Services to take actions necessary to maximize federal funding for medical assistance in the State.²⁵ Objectors claimed that these objectives qualified as impermissible dual purposes.²⁶

We upheld the voter ballot initiative.²⁷ First, we determined from the initiative’s text that its general subject was “the expansion of Medicaid.”²⁸ Second, we found that although the initiative’s text indicated a secondary purpose was maximizing federal funding, the secondary purpose did not violate the single subject rule because it “ha[d] a natural and necessary connection” to expansion of Medicaid,²⁹ namely, increased federal funding would enable the State to pay to expand Medicaid coverage.³⁰ Therefore, “maximizing federal funding for that expansion [wa]s a detail related to the singleness of purpose of expanding Medicaid.”³¹ While some voters might

²² See, e.g., *State ex rel. Loontjer v. Gale*, *supra* note 10 (legislatively proposed constitutional amendment to allow certain horse track wagers); *City of Fremont v. Kotas*, 279 Neb. 720, 781 N.W.2d 456 (2010) (municipal voter ballot initiative to regulate undocumented immigrants), *abrogated on other grounds*, *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011).

²³ *Christensen v. Gale*, *supra* note 6.

²⁴ See Neb. Rev. Stat. §§ 68-901 to 68-994 (Reissue 2018 & Supp. 2019).

²⁵ *Christensen v. Gale*, *supra* note 6.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 34, 917 N.W.2d at 157.

²⁹ *Id.*

³⁰ See *id.*

³¹ *Id.*

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have been in favor of Medicaid expansion but not expanding federal funding, the dissimilarity between these purposes was not so great that they “create[d] a risk of confusion and logrolling.”³²

(b) Right to Produce and
Medicinally Use Cannabis

[20-23] Our analysis here under the single subject rule begins by characterizing the NMCCA’s general subject. We have stated before that a general subject must not be characterized too broadly when considering an amendment to the constitution.³³ An overly broad general subject might allow any secondary purpose to arguably be naturally and necessarily connected to it.³⁴ Instead, a general subject must be characterized at a level of specificity that allows for meaningful review of the natural and necessary connection between it and the initiative’s other purposes. As two other jurisdictions have stated in a similar context, “‘the single subject requirement may not be circumvented by selecting a [general subject] so broad that the rule is evaded as a meaningful constitutional check’” on the initiative process.³⁵

At an appropriate level of specificity, then, the NMCCA’s general subject is to create a constitutional right for persons with serious medical conditions to produce and medicinally use an adequate supply of cannabis, subject to a recommendation by a licensed physician or nurse practitioner. This primary

³² *Id.* at 35, 917 N.W.2d at 158.

³³ See *State ex rel. Loontjer v. Gale*, *supra* note 10.

³⁴ *Id.* See, e.g., Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 82 Alb. L. Rev. 1629, 1637 (2019) (noting, with disapproval, that “some state courts have approved as constitutionally permissible subjects such broad topics as ‘land,’ ‘education,’ ‘transportation,’ ‘utilities,’ ‘state taxation,’ ‘public safety,’ ‘capital projects,’ and ‘operations of state government’”).

³⁵ *Gregory v. Shurtleff*, 299 P.3d 1098, 1112 (Utah 2013) (quoting *Wirtz v. Quinn*, 2011 IL 111903, 953 N.E.2d 899, 352 Ill. Dec. 218 (2011)).

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purpose is evident from the text of subsections (1) and (2) of the NMCCA:

(1) An individual who is eighteen years of age or older, if recommended by a licensed physician or nurse practitioner, has the right to use, possess, access, purchase, and safely and discreetly produce an adequate supply of cannabis, cannabis products, and cannabis-related equipment to alleviate a serious medical condition. Such individual may be assisted by a caregiver in exercising these rights.

(2) An individual who is under eighteen years of age, if recommended by a licensed physician or nurse practitioner and with the permission of a parent or legal guardian with responsibility for health care decisions of such individual, has the right to use cannabis, cannabis products, and cannabis-related equipment to alleviate a serious medical condition. Such individual may be assisted by a parent, legal guardian, or caregiver, who may possess, access, purchase, and safely and discreetly produce an adequate supply of cannabis, cannabis products, and cannabis-related equipment on behalf of the individual.

Also in support of this primary purpose, subsection (5) delegates authority to the Legislature and administrative agencies to promulgate laws, rules, and regulations. Subsection (9) defines the term “cannabis.”

Further evidence that this is the NMCCA’s general subject is found in the object statement submitted by the NMCCA’s sponsors: “The object of this petition is to: Amend the Nebraska Constitution to provide the right to use, possess, access, and safely produce cannabis, and cannabis products and materials, for serious medical conditions as recommended by a physician or nurse practitioner.” Peterson also identified this as the NMCCA’s primary purpose when he stated in his ballot title and explanatory statement that the NMCCA would “[p]rovide individuals the right to use, possess, access, purchase, and produce cannabis, cannabis products, and cannabis-related equipment for serious medical conditions if recommended by a

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licensed physician or nurse practitioner, subject to certain exceptions and reasonable laws, rules, and regulations” (Emphasis omitted.)

These statements characterize the NMCCA’s general subject accurately and at an adequate level of specificity to provide for meaningful review. A constitutional right to produce and medicinally use cannabis is not so broad as to evade the single subject rule as a constitutional check on voter ballot initiatives. Rather, it can be tested against other provisions without risk that every secondary purpose could reasonably be argued as naturally and necessarily connected to it.

Accordingly, we find the general subject of the NMCCA is to create a constitutional right for persons with serious medical conditions to produce and medicinally use cannabis, subject to a recommendation by a licensed physician or nurse practitioner.

(c) Right to Grow and
Sell Cannabis

As Evnen found, the NMCCA also states a secondary purpose. Subsections (3) and (4) state:

(3) The rights protected in subsections (1) and (2) of this section include the right to access or purchase cannabis, cannabis products, and cannabis-related equipment from private entities. Private entities and agents operating on the entities’ behalf in the State of Nebraska may grow, cultivate, process, possess, transport, sell, test, or transfer possession of cannabis, cannabis products, and cannabis-related equipment for sale or delivery to an individual authorized to use cannabis under subsection (1) or (2) of this section.

(4) Individuals or entities engaged in actions allowed by, or exercising rights protected by this section shall not be subject to arrest, prosecution, or civil or criminal penalties under state or local law, except that reasonable

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penalties may be imposed for any violation of reasonable laws, rules, and regulations enacted pursuant to subsection (5) of this section.

By this text, subsections (3) and (4) express a different primary purpose than subsections (1) and (2). Instead of affording certain persons a constitutional right to produce and medicinally use cannabis, subsection (3) would afford private entities in Nebraska a constitutional property right to legally grow and sell the substance to persons who qualify under subsections (1) and (2). And subsection (4) would civilly and criminally immunize any private entity engaging in actions allowed or protected by subsection (3).

Though he found the “difficulty” posed by subsections (3) and (4) under the single subject rule “substantial,” Evnen decided the secondary purpose was sufficiently in support of the general subject to be naturally and necessarily connected. Similar to *Christensen*³⁶ and *City of Fremont v. Kotas*,³⁷ where the secondary purpose was upheld because it would significantly support the initiative’s general subject, Evnen reasoned, the constitutional right to grow and sell cannabis here, too, was in support of the constitutional right to produce and medicinally use the substance. We disagree.

This case is distinguishable from both *Christensen* and *Kotas*. *Kotas* is distinguishable because it was decided under our common-law single subject rule. We have applied the common-law rule to municipal voter ballot initiatives since at least 1939.³⁸ Under that rule, we have stated that

a proposed municipal ballot measure is invalid if it would
(1) compel voters to vote for or against distinct propositions in a single vote—when they might not do so if presented separately; (2) confuse voters on the issues they

³⁶ See *Christensen v. Gale*, *supra* note 6.

³⁷ See *City of Fremont v. Kotas*, *supra* note 22.

³⁸ See *Drummond v. City of Columbus*, 136 Neb. 87, 285 N.W. 109 (1939).

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are asked to decide; or (3) create doubt as to what action they have authorized after the election.³⁹

But the single subject rule as applied to voter ballot initiatives has a much shorter and simpler history. Voters adopted the single subject rule for voter ballot initiatives in 1998.⁴⁰ And they placed, in Neb. Const. art. III, § 2, only a seven-word requirement: “Initiative measures shall contain only one subject.” Accordingly, this case is controlled by those seven words and not by the three-part test applied in *Kotas*.

We have only applied the single subject rule under Neb. Const. art. III, § 2, once before, in *Christensen*, but that case is factually distinguishable here.⁴¹ In *Christensen*, the initiative’s secondary purpose (maximizing federal funding for Medicaid) was naturally and necessarily connected to its general subject (expanding Medicaid coverage in the State). The nature of expanding Medicaid coverage was clearly connected to its funding source, and federal funding was necessary for the State to expand Medicaid coverage.⁴² The similarity between these two purposes demonstrated a singleness of purpose and a lack of logrolling concerns.⁴³

Although not explicitly stated in *Christensen*, an implied further reason that logrolling was not a concern was that it was the federal government, and not the initiative’s sponsors, that tied federal funding to state programs of Medicaid expansion. This indicated that the secondary purpose was not one borne purely of tactical convenience—that is, to persuade voters “to vote for the primary purpose of expanding Medicaid in order to obtain, more generally, federal funds.”⁴⁴

³⁹ *City of North Platte v. Tilgner*, *supra* note 22, 282 Neb. at 349, 803 N.W.2d at 487.

⁴⁰ See 1997 Neb. Laws, L.R. 32CA, § 1.

⁴¹ *Christensen v. Gale*, *supra* note 6.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 35, 917 N.W.2d at 158.

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In contrast, here, the NMCCA’s secondary purpose is not naturally and necessarily connected to its general subject. First, subsection (3) lacks any natural connection to subsections (1) and (2). While subsections (1) and (2) concern a personal constitutional right of patients with serious medical conditions to produce and use cannabis for themselves, subsection (3) concerns a constitutional right of private entities to grow and sell cannabis to others. This constitutional right to sell cannabis, and its accompanying expectation of profit, is a property right.

We have long distinguished between the nature of use and property rights in other contexts.⁴⁵ We have also distinguished between the nature of rights held by an individual and by a business or other legal entity.⁴⁶ The personal, individual rights that would be conferred by subsections (1) and (2) are fundamentally distinct from the property rights conferred by subsection (3). Meanwhile, subsection (4) would enforce those property rights by conferring civil and criminal immunity to persons exercising them. Accordingly, neither subsection (3) nor subsection (4) is naturally connected to the NMCCA’s general subject.

[24] Second, the NMCCA’s secondary purpose is not necessarily connected to its general subject. The term “necessary” means something “on which another thing is dependent or

⁴⁵ See, e.g., *Cappel v. State*, 298 Neb. 445, 456, 905 N.W.2d 38, 48 (2017) (“[t]he right to appropriate surface water is not an ownership of property”); *Strode v. City of Ashland*, 295 Neb. 44, 62-63, 886 N.W.2d 293, 307 (2016) (noting, in an inverse condemnation action, that “‘[t]he right to full and free use and enjoyment of one’s property in a manner and for such purposes as the owner may choose . . . is a privilege [of owning property rights] protected by law’”)).

⁴⁶ See, e.g., *State v. Stanko*, 304 Neb. 675, 685, 936 N.W.2d 353, 361 (2019) (business that “holds a portion of its property open to the public” impliedly gives right to others to enter it under a limited privilege). See, also, Neb. Rev. Stat. § 21-145 (Reissue 2012) (providing limited liability company right, which no individual has, to legally dissolve).

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contingent.”⁴⁷ In no sense is authorization in subsection (3) for private entities to grow and sell cannabis necessary for patients with serious medical conditions to use the substance medicinally. Subsections (1) and (2) provide for patients to obtain cannabis by producing it themselves or with the help of a caregiver. If patients could legally produce their own medicinal cannabis, their legal use of the substance would not depend or be contingent upon it being grown and sold by private entities. Subsections (3) and (4) would create a market to unnecessarily bolster the supply of medicinal cannabis, despite subsections (1) and (2) already providing an adequate means of meeting any demand. In this way, subsection (3) would go far beyond any necessary connection, and subsection (4) would broaden this already unnecessarily connected purpose still further by conferring any private entity acting under the color of constitutional right under subsection (3) with immunity from any civil or criminal liability, even arrest.

Suppose that a voter were in favor of there being in this state a constitutional right to produce and medicinally use cannabis, but not a constitutional right to grow and sell the substance; he or she could not express that preference with a vote for or against the NMCCA in November. Instead, in its first and second pairs of subsections, the NMCCA combines dissimilar propositions into one proposed amendment “so that voters must vote for or against the whole package even though they would have voted differently had the propositions been submitted

⁴⁷ “Necessary,” Oxford English Dictionary Online, <http://oed.com/view/Entry/125629> (last visited Sept. 8, 2020). See, also, “Necessary,” Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/necessary> (last visited Sept. 8, 2020) (“absolutely needed” or “logically unavoidable”); “Necessary,” Cambridge English Dictionary Online, <http://dictionary.cambridge.org/us/dictionary/english/necessary> (last visited Sept. 8, 2020) (“needed in order to achieve a particular result”); Black’s Law Dictionary 1192 (10th ed. 2014) (“[t]hat is needed for some purpose or reason; essential”).

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separately.”⁴⁸ This demonstrates precisely the logrolling scenario that Nebraska’s voters sought to avoid by adopting the single subject rule in Neb. Const. art. III, § 2.

We hold that subsections (3) and (4) of the NMCCA exhibit an impermissible secondary purpose because they are not naturally and necessarily connected to subsections (1) and (2).

(d) Limitations on Right to Produce
and Medicinally Use Cannabis

At oral arguments, Wagner also maintained that some six other purposes of the NMCCA render it in violation of the single subject rule. Specifically, Wagner points to the following language in subsections (6), (7), and (8):

- (6) This section shall not be construed to:
 - (a) Allow the smoking of cannabis in public;
 - (b) Require detention or correctional facilities to allow the possession or use of cannabis in such facilities;
 - (c) Allow the operation of a motor vehicle while impaired by cannabis; or
 - (d) Otherwise allow engaging in conduct that would be negligent to undertake while impaired by cannabis.
- (7) This section does not require an employer to allow an employee to work while impaired by cannabis.
- (8) This section does not require any insurance provider to provide insurance coverage for the use of cannabis.

We agree with Wagner that the clauses in these subsections represent distinct constitutional rights and policies not naturally and necessarily connected to the general subject of the NMCCA. The NMCCA’s general subject bears no natural relation to the four objects expressed in subsection (6) that would amend, with respect to medicinal cannabis use, the law of public space, correctional facilities, motor vehicles, and negligence. Nor does the production and medicinal use of cannabis naturally relate to the objects in subsections (7) and (8) that would amend the law of employment decisions

⁴⁸ *Christensen v. Gale*, *supra* note 6, 301 Neb. at 31, 917 N.W.2d at 156.

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and insurance coverage. These objects of limitation are not in any way necessary for a constitutional right to produce and medicinally use cannabis. There is nothing about the makeup or constitution of the production and medicinal use of cannabis that naturally relates to these objects, nor would the constitutional right of producing and medicinally using cannabis be dependent or contingent on its exclusion from certain locations or situations.

Rather, by our existing law, there is strong evidence that each of these objects of limitation needed to be included in separate voter ballot initiatives to amend the Nebraska Constitution. Nebraska's Constitution and statutes are separated by many of the objects of limitation the NMCCA would impose on existing law. For example, the use of public spaces, operation of motor vehicles, regulation of correctional facilities, and law of negligence are regulated by numerous other statutes.⁴⁹ The same is true of employment and insurance law.⁵⁰ That our laws have naturally separated these limitations provides strong evidence that they are their own general subjects and not naturally or necessarily connected to the production and medicinal use of cannabis. Indeed, a constitutional right to produce and medicinally use cannabis, if properly put to and approved by voters, would likely also result in the promulgation of new sections and chapters of laws regulating the production and medicinal use of cannabis.

But the issue with respect to subsections (6), (7), and (8) is the same as it is with respect to subsections (3) and (4). In voting on the NMCCA, a voter who approved or disapproved of a constitutional right to produce and medicinally use

⁴⁹ See, e.g., Neb. Rev. Stat. ch. 25, art. 21(o) (Reissue 2016) ("Certain Cases Involving Negligence"); Neb. Rev. Stat. ch. 37 (Reissue 2016) ("Game and Parks"); Neb. Rev. Stat. ch. 51 (Reissue 2010) ("Libraries and Museums"); Neb. Rev. Stat. ch. 60 (Reissue 2010) ("Motor Vehicles"); Neb. Rev. Stat. ch. 83, art. 4 (Reissue 2014) ("Penal and Correctional Institutions").

⁵⁰ See, e.g., Neb. Rev. Stat. ch. 44 (Reissue 2010) ("Insurance"); Neb. Rev. Stat. ch. 48 (Reissue 2010) ("Labor").

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cannabis cannot express a contrary view as to the additional subjects presented in subsections (6), (7), and (8) on the law of public space, correctional facilities, motor vehicles, negligence, employment decisions, and insurance coverage. On its face, the NMCCA indicates that these subjects of constitutional amendment were included only for tactical convenience, not any natural and necessary connection. This is again an example of logrolling.

We hold that subsections (6), (7), and (8) of the NMCCA also exhibit an impermissible secondary purpose because they are not naturally and necessarily connected to subsections (1) and (2).

3. WRIT OF MANDAMUS

Based on the legal insufficiency of the NMCCA, Wagner prays for this court to issue two forms of relief: first, a declaratory judgment finding that the NMCCA is legally insufficient, and second, a writ of mandamus requiring Evnen to withhold it from the November 2020 general election ballot.

[25,26] The function of declaratory relief is to determine a justiciable controversy that is either not yet ripe by conventional remedy or, for other reasons, is not conveniently amenable to usual remedies.⁵¹ Thus, although declaratory judgment actions are permitted by statute in certain circumstances under the Uniform Declaratory Judgments Act,⁵² we have held that a declaratory judgment will generally not lie where another equally serviceable remedy is available.⁵³ An application for a writ of mandamus is another such equally serviceable remedy.⁵⁴

[27] Under this rule, then, Wagner cannot have relief in the form of both a declaratory judgment and a writ of mandamus.

⁵¹ *Cain v. Lymber*, 306 Neb. 820, 947 N.W.2d 541 (2020).

⁵² Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 2016).

⁵³ *Cain v. Lymber*, *supra* note 51.

⁵⁴ See *id.*

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If a writ of mandamus would be adequate and equally serviceable, then a declaratory judgment will not lie.

[28] Mandamus relief is available if Wagner can show (1) that there exists a clear right to the relief sought, (2) that Evnen has a corresponding clear duty to perform the act requested, and (3) that no other plain and adequate remedy is available in the ordinary course of law.⁵⁵

[29] Here, because Wagner's legal insufficiency argument has merit, his prayer for a writ of mandamus also has merit. Nebraska law imposes on the Secretary of State a nondiscretionary duty to determine the legal sufficiency of ballot measures and withhold any legally insufficient measure from the ballot.⁵⁶ Noting that this was "a close case," Evnen wrongly determined to certify the NMCCA, a legally insufficient voter ballot initiative, for the November 2020 general election ballot. Thus, Wagner's right is clear and mandamus relief is his only adequate remedy. Accordingly, we deny Wagner's prayer for a declaratory judgment, but grant his prayer for a writ of mandamus.

VI. CONCLUSION

[30,31] The single subject rule was adopted by voters to protect against voter ballot initiatives that failed to give voters an option to clearly express their policy preference.⁵⁷ "Just as we must 'respect and . . . give effect to the power the people have reserved to themselves' to amend the constitution . . . through initiative measures, we are obliged to give meaningful effect to their 'self-imposed limitations' on that power"⁵⁸ Here, that means giving meaningful effect to the single subject rule in Neb. Const. art. III, § 2.

⁵⁵ See *State ex rel. Wieland v. Beermann*, 246 Neb. 808, 523 N.W.2d 518 (1994).

⁵⁶ See *id.*

⁵⁷ See *State ex rel. Loontjer v. Gale*, *supra* note 10.

⁵⁸ *State ex rel. Lemon v. Gale*, *supra* note 14, 272 Neb. at 304, 721 N.W.2d at 356.

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As proposed, the NMCCA contains more than one subject—by our count, it contains at least eight subjects. In addition to enshrining in our constitution a right of certain persons to produce and medicinally use cannabis under subsections (1) and (2), in subsections (3) and (4), the NMCCA would enshrine a right and immunity for entities to grow and sell cannabis; and in subsections (6), (7), and (8), it would regulate the role of cannabis in at least six areas of public life. These secondary purposes are not naturally and necessarily connected to the NMCCA’s primary purpose. As such, they constitute logrolling.

If voters are to intelligently adopt a State policy with regard to medicinal cannabis use, they must first be allowed to decide that issue alone, unencumbered by other subjects.

The decision of the Secretary of State is reversed. We issue a writ of mandamus directing him to withhold the NMCCA from the November 2020 general election ballot.

WRIT OF MANDAMUS GRANTED.

PAPIK, J., dissenting.

I respectfully dissent from the opinion of the court to the extent it concludes that the Nebraska Medical Cannabis Constitutional Amendment (NMCCA) should not be placed on the ballot and voted upon by the people. I agree with the Secretary of State that the NMCCA does not violate the single subject requirement of Neb. Const. art. III, § 2.

Under Neb. Const. art. III, § 2, “[t]he first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature.” We have long recognized that “[t]he right of initiative is precious to the people and one which courts are zealous to preserve to the fullest tenable measure of spirit as well as letter.” *Christensen v. Gale*, 301 Neb. 19, 27, 917 N.W.2d 145, 153 (2018). See, also, *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 602 N.W.2d 465 (1999). We have also said that the power of initiative must be liberally construed to promote the democratic process and

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that provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is effectual. *Stewart v. Advanced Gaming Tech.*, 272 Neb. 471, 723 N.W.2d 65 (2006).

The people's power to amend the constitution or enact legislation through initiative is not unlimited. The single subject rule at issue in this case is one such limitation. The single subject requirement arises out of the following seven words in art. III, § 2: "Initiative measures shall contain only one subject." As the majority opinion describes, we have traditionally followed what we have dubbed the natural and necessary connection test for determining whether a ballot initiative violates the single subject rule. See *Christensen, supra*. Under that test, "[w]here the limits of a proposed law, having natural and necessary connection with each other, and, together, are a part of one general subject, the proposal is a single and not a dual proposition." *Id.* at 32, 917 N.W.2d at 156 (quoting *State ex rel. Loontjer v. Gale*, 288 Neb. 973, 853 N.W.2d 494 (2014)). See, also, *Munch v. Tusa*, 140 Neb. 457, 300 N.W. 385 (1941). The controlling factors in this inquiry are the initiative's singleness of purpose and the relationship of the details to its general subject. *Christensen, supra*. An initiative's general subject is defined by its primary purpose. *Id.*

Under the foregoing test, the first step in any single subject rule inquiry is to determine the general subject or primary purpose of the initiative measure. And, as it turns out, everyone involved in this case—the initiative's sponsors, the relator, the Secretary, and the majority of this court—more or less agrees as to the NMCCA's primary purpose. As the majority puts it, the NMCCA's purpose is "to create a constitutional right for persons with serious medical conditions to produce and medicinally use cannabis, subject to a recommendation by a licensed physician or nurse practitioner." I agree that is a fair statement of the NMCCA's primary purpose.

With the general subject or primary purpose of the NMCCA established, the question is whether the various provisions

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thereof have a natural and necessary connection to that primary purpose. It is on this question that I part company with the majority. For reasons I will explain, I find that when the natural and necessary connection test is applied to the NMCCA in the manner in which we have done so in previous cases, no single subject rule violation emerges. All the details of the NMCCA relate to the same general subject—providing a right to individuals with serious medical conditions to use cannabis to alleviate those conditions.

*Right to Produce Cannabis and Sell
It to Those Given Right to Use.*

The majority finds that the NMCCA first violates the single subject rule by providing private entities a right to produce cannabis for and sell cannabis to those authorized to use cannabis to alleviate a serious medical condition, as well as conferring certain legal immunities on those private entities when they do so. I disagree that this right to produce and sell cannabis to those authorized to use it and related immunities constitute additional subjects under the natural and necessary relationship test. Instead, I agree with the analysis of the Secretary on this point.

The Secretary found there was a natural and necessary connection between the legalized production and sale of medical cannabis and the primary purpose of the NMCCA—individual use of cannabis by those with serious medical conditions. As he explained, “[i]t is inherent in the legalization of medical cannabis that someone or some category of persons must be granted the right or authority to produce, sell and distribute the medical cannabis.” I agree with this assessment. A right of individuals to use cannabis for medicinal purposes is meaningful only if individuals can access cannabis. Some means of access is naturally and necessarily related to use. The NMCCA proposes to provide that access through both allowing individuals to grow their own cannabis and allowing production and sale by third parties.

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The majority finds otherwise, reasoning that the right to sell cannabis is a property right and that individuals given the right to use cannabis could access it by means other than allowing third parties to produce and sell it. I am not convinced. First, it is not clear to me what property right has been created or bestowed by giving unspecified entities the right to produce and sell cannabis to authorized users, but, in any event, I also do not see what relevance that has to the natural and necessary connection test.

As for the notion that there is a single subject problem because authorized users could get access to cannabis in some other way, that runs counter to our precedent applying the natural and necessary connection test. Last election cycle in *Christensen v. Gale*, 301 Neb. 19, 917 N.W.2d 145 (2018), we rejected an argument that an initiative measure to expand Medicaid in Nebraska violated the single subject rule because it could have been proposed without also proposing that federal funding be maximized. We said that the single subject inquiry was not whether the measure could have been proposed without federal funding or “the *strict necessity* of any given detail to carry out the general subject,” but, rather, the controlling consideration was the measure’s “singleness of purpose and relationship of the details to the general subject.” *Id.* at 34, 917 N.W.2d at 157 (emphasis supplied).

Neither did we inquire in *City of Fremont v. Kotas*, 279 Neb. 720, 781 N.W.2d 456 (2010), whether each of the individual elements of a proposed municipal ordinance to regulate illegal immigration were indispensable to achieve the measure’s general purpose. There, we concluded that a proposed ordinance imposing different requirements on a variety of different entities—landlords, tenants, the city police department, and local businesses—constituted a single subject because the various components “had a natural and necessary connection with each other and were part of the general subject of regulating illegal aliens” in the city. *Id.* at 728, 781 N.W.2d at 463. The majority suggests that *Kotas* has no bearing on this case because

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municipal initiatives are not governed by the art. III, § 2, single subject rule, but *Kotas* is not so easily cast to the side. Although *Kotas* did involve a municipal initiative, we cited and applied the same natural and necessary connection test that governs here. In fact, this court subsequently abrogated *Kotas* precisely for applying a state constitutional provision to a municipal ordinance. See *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011). Furthermore, we relied on the reasoning of *Kotas* in *Christensen*, which involved the single subject rule at hand here.

Not only is the majority's application of the natural and necessary test in tension with our prior cases, it is difficult to see how it would ever allow an initiative measure to include the means by which an initiative measure seeks to accomplish its general purpose. In almost any case, a challenger will be able to point to *some* alternative way in which the general purpose could be pursued and thereby argue that the means proposed by the initiative's sponsors are not "necessary" and thus introduce a prohibited second subject. And yet our articulation of the natural and necessary connection test expressly contemplates that a measure may contain both a primary purpose and the details by which that purpose will be achieved. See, e.g., *Christensen*, *supra*.

So what work does the word "necessary" do in the natural and necessary connection test? I read *Christensen* to say that rather than asking whether a particular detail is strictly necessary or whether other details could have been provided, we are to ask whether the *purpose* of the included details are naturally and necessarily connected to the general purpose. In *Christensen*, the provision regarding maximizing federal funding passed the natural and necessary connection test because funding of some kind is a natural and necessary part of the expansion of a government program. In a similar way, as the Secretary reasoned here, providing individuals authorized to use cannabis medicinally a means of access is a natural and necessary part of granting a right to use.

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Finally, I disagree with the majority's assertion that the NMCCA's inclusion of both a right to use cannabis medicinally and a right of others to produce and sell it to authorized users is a single subject violation because it amounts to logrolling. We have said that the prevention of logrolling is a purpose of the single subject rule, but we have defined logrolling as "the practice of combining *dissimilar propositions* into one proposed amendment so that voters must vote for or against the whole package even though they would have voted differently had the propositions been submitted separately." *State ex rel. Loontjer v. Gale*, 288 Neb. 973, 995, 853 N.W.2d 494, 510 (2014) (emphasis supplied). Logrolling is not a separate test apart from our familiar natural and necessary inquiry; and if the features are naturally and necessarily related, it is not appropriate to examine the proposal for logrolling. Because I believe the provisions at issue are related, rather than dissimilar, logrolling has no application here.

Limitations on Rights Conferred.

I also disagree with the majority's conclusion that the limitations contained within subsections (6), (7), and (8) of the NMCCA are not naturally and necessarily connected to the general subject. According to the majority, these limitations on the scope of the amendment represent "distinct constitutional rights and policies" that would change the existing law of public space, motor vehicles, correctional facilities, negligence, employment, and insurance coverage. However, rather than introducing a second subject, the limitations define the rights conferred by the NMCCA by stating what the amendment does not require. They make clear that the areas of law identified by the majority would, in fact, not change if the NMCCA were to become law. These provisions bear a natural and necessary connection to giving individuals a constitutional right to use medical cannabis because they define the parameters of that right.

In analyzing these limitations, the majority finds more logrolling. Again, I do not believe this fits our definition of

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logrolling because the rights granted and the exceptions to those rights are related, rather than dissimilar. In addition, while presenting the provisions together is not logrolling, the alternative of requiring these related provisions to be presented separately could result in other problems for voters. There are some measures containing multiple, related policy details where voters' support for one policy detail might depend on whether another detail becomes law. Suppose, for example, that citizens of a municipality that has previously banned dog ownership propose an initiative to allow for dog ownership with the exception of pit bulls. If the general authorization of dog ownership and the pit bull exception must be presented separately, a voter favorably inclined to dogs generally but opposed to pit bulls cannot reliably express his or her preferences.

Similarly, here, there may be voters whose support for legalizing medical cannabis depends on whether the right will be limited as in the NMCCA. Requiring the limitations to be submitted as separate ballot propositions will not prevent logrolling; it would only prevent those voters from being able to cast an informed vote.

Conclusion.

Courts and commentators have observed that the term “subject” as used in a single subject rule and any verbal tests that attempt to define it are malleable. See, e.g., *Advisory Opinion to the Atty. Gen.*, 592 So. 2d 225 (Fla. 1991) (Kogan, J., concurring in part, and in part dissenting); *Oregon Educ. Ass'n v. Phillips*, 302 Or. 87, 727 P.2d 602 (1986) (Linde, J., concurring); Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 Colum. L. Rev. 687 (2010). This presents courts with a challenge. As one court described the quandary, if the rule is applied too loosely, it “would render the safeguards of [a single subject rule] inert. Conversely, the requirements of [a single subject rule] must not become a license for the judiciary to ‘exercise a pedantic tyranny’” over efforts to change the law. *PA Against Gambling Expansion Fund v. Com.*, 583 Pa. 275, 296, 877 A.2d 383,

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395-96 (2005) (quoting *City of Philadelphia v. Com.*, 575 Pa. 542, 838 A.2d 566 (2003)). To be clear, I do not believe anyone on this court wishes to exercise a tyranny of any kind over the initiative process. But, for the reasons I have discussed, I am concerned that today's decision has squeezed the concept of single subject in art. III, § 2, such that the people's right to initiative has been diminished.

Obviously, nothing I have said should be taken as commentary on the policy merits of legalizing cannabis for medicinal use or whether the NMCCA is a sound means of doing so. It would not be consistent with the role of the judiciary to express a view on such matters. See *State ex rel. Johnson v. Gale*, 273 Neb. 889, 896, 734 N.W.2d 290, 298 (2007) (“[t]his court makes no attempt to judge the wisdom or the desirability of enacting initiative amendments”). When legally sufficient, however, it is the right of the people to express their views on initiative measures by voting. Because I believe the Secretary correctly rejected the relator's arguments that the NMCCA was legally insufficient, I would not keep it from the ballot.

MILLER-LERMAN, J., joins in this dissent.

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

OMAHA EXPOSITION AND RACING, INC., APPELLEE,
v. NEBRASKA STATE RACING COMMISSION ET AL.,
APPELLEES, AND HALL COUNTY LIVESTOCK
IMPROVEMENT ASSOCIATION AND
NEBRASKA THOROUGHBRED BREEDERS
ASSOCIATION, APPELLANTS.

949 N.W.2d 183

Filed September 18, 2020. No. S-19-020.

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. **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. **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.
5. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
6. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
7. ____: _____. A court action taken without subject matter jurisdiction is void.

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8. **Administrative Law: Jurisdiction: Appeal and Error.** Where a district court has statutory authority to review an action of an administrative agency, the district court may acquire jurisdiction only if the review is sought in the mode and manner and within the time provided by statute.
9. **Appeal and Error.** The right of appeal in Nebraska is purely statutory.
10. **Jurisdiction: Statutes: Appeal and Error.** The requirements of a statute underlying a right to appeal are mandatory and must be complied with before the appellate court acquires jurisdiction of the subject matter of the action.
11. **Statutes: Legislature: Intent.** In construing 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.
12. **Administrative Law: Jurisdiction: Appeal and Error.** In analyzing the requirements to initiate judicial review under the Administrative Procedure Act, for a district court to acquire jurisdiction to review a final decision of an administrative agency, the appellant must file the petition and serve summons.
13. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.
14. **Administrative Law: Parties: Appeal and Error.** Determining whether an agency acted beyond its role as a neutral fact finder to qualify as one of the “parties of record” under Neb. Rev. Stat. § 84-917 (Reissue 2014) requires looking at the nature of the administrative proceeding under review.
15. **Administrative Law: Words and Phrases.** An administrative agency is a neutral factfinding body when it is neither an adversary nor an advocate of a party.
16. **Administrative Law: Parties.** When an administrative agency acts as the primary civil enforcement agency, as distinguished from determining the rights of two or more individuals in a dispute before such agency, it is more than a neutral factfinding body.
17. ____; _____. An agency that is charged with the responsibility of protecting the public interest, and not merely determining the rights of two or more individuals in a dispute, is more than a neutral factfinding body.
18. **Administrative Law: Parties: Appeal and Error.** When evaluating whether an agency is a neutral fact finder under Neb. Rev. Stat. § 84-917(2)(a) (Reissue 2014), courts look to the agency’s actions as to the dispute at issue, the statutory basis upon which the agency was

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acting, and the participation of the agency in the matters surrounding the dispute.

19. **Administrative Law.** Where an agency acts beyond the role of a neutral fact finder due to its responsibility to the public interest, its role as the primary civil enforcement entity, or its licensing and credentialing function, the agency takes some action or is required to make some consideration beyond merely resolving a dispute between outside parties.

Appeal from the District Court for Lancaster County: SUSAN I. STRONG, Judge. Vacated and dismissed.

Cathy S. Trent-Vilim, John M. Walker, and Daniel J. Waters, of Lamson, Dugan & Murray, L.L.P., for appellant Hall County Livestock Improvement Association.

O. William VonSeggern for appellant Nebraska Thoroughbred Breeders Association.

Christopher D. Jerram, Raymond E. Walden, and Michael T. Gibbons, of Woodke & Gibbons, P.C., L.L.O., for appellee Omaha Exposition and Racing, Inc.

Tara Tesmer Paulson, of Rembolt Ludtke, L.L.P., for appellee Nebraska Horsemen's Benevolent and Protective Association, Inc.

HEAVICAN, C.J., MILLER-LEMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

FUNKE, J.

This case concerns moneys accumulated from deductions of horseracing wagers under Neb. Rev. Stat. §§ 2-1207(2) (Cum. Supp. 2018) and 2-1207.01 (Reissue 2012) for the promotion, support, and preservation of agriculture and horse breeding in Nebraska. Pursuant to a request from the Nebraska Thoroughbred Breeders Association (NTBA), the Nebraska State Racing Commission (Commission) directed § 2-1207(2) funds collected by the Nebraska Horsemen's Benevolent & Protective Association, Inc. (HBPA), from Nebraska horseracing tracks be transferred to NTBA. The district court reversed

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and vacated the order, finding the Commission exceeded its statutory authority in ordering that the funds be paid over to NTBA for distribution. Because the district court lacked subject matter jurisdiction to consider the petition, its order reversing and vacating the Commission's order is void and must be vacated, and we must dismiss this appeal.

BACKGROUND

Appellant NTBA is a nonprofit corporation formed to promote breeding of thoroughbred horses in Nebraska. Appellant Hall County Livestock Improvement Association, doing business as Fonner Park, is a nonprofit corporation for the promotion of agriculture, fairs, and horseracing. Fonner Park is licensed and authorized to operate as a horseracing track and participate in the simulcasting of horseraces in Grand Island, Nebraska. Fonner Park and Agricultural Park, a Nebraska race-track located in Columbus, Nebraska, account for 90 percent of all live horseracing in Nebraska.

Omaha Exposition and Racing, Inc. (OER), is a nonprofit corporation and is licensed and authorized for horseracing and simulcasting services. OER operates and does business as Horsemen's Park in Omaha, Nebraska, and Lincoln Race Course in Lincoln, Nebraska. Horsemen's Park and Lincoln Race Course hold live races each year, but most of their revenues are derived from simulcasting. The facilities at Horsemen's Park and Lincoln Race Course are owned by HBPA, which is a member of OER and holds two of the four OER governing board seats. HBPA is a nonprofit corporation representing a majority of all licensed owners and trainers that race thoroughbred horses at Nebraska licensed racetracks.

Nebraska horseracing tracks are statutorily required to deduct a percentage of all wagers made at their tracks to promote and preserve agriculture, horse breeding, and horseracing in Nebraska.¹ These deducted amounts are to be distributed

¹ §§ 2-1207(2) and 2-1207.01.

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as purse supplements and breeder and stallion awards for Nebraska-bred horses.² Distribution is to be made at the racetrack where the funds are generated unless the racetrack does not conduct live race meets, in which case the deducted funds may be distributed to those racetracks which do conduct live race meets for the promotion of horseracing or as purse supplements.³

Prior to the 1990's, each horseracing track in Nebraska had individual bookkeepers, including HBPA who used its bookkeeper to distribute purse awards at the tracks. In 1996, Ak-Sar-Ben, an Omaha racetrack, closed and the remaining tracks determined it would be economically beneficial to transfer their bookkeeping duties to a single bookkeeper, the one used by HBPA. NTBA alleges this system was approved by the Commission and worked without issue until the current dispute arose in 2017.

In 1998, because the majority of live horseracing occurred at only a few of the parks, the presidents of HBPA and NTBA entered into an agreement for the redistribution of a portion of the funds collected from the statutorily required deductions from wagers on simulcast races. That year, the amount deducted from simulcast races totaled approximately \$175,000. The parties agreed to distribute \$80,000 to Fonner Park, \$25,000 to Agricultural Park, and \$70,000 to a now-relocated Lincoln racetrack. Appellants allege that until 2017, the parties continued to allocate a portion of funds deducted from simulcast races to individual racetracks by determining what an equitable amount of breeder purses were to be and HBPA's bookkeeper paying out those amounts.

By a letter in June 2017, HBPA advised NTBA that the bookkeeper, at HBPA's direction, was suspending distribution of the deducted funds because Fonner Park failed to contribute its share. According to Fonner Park, this alleged deficit was

² § 2-1207.01.

³ *Id.*

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created by the addition to Fonner Park's earnings of simulcast funds allocated by NTBA. Fonner Park asserts such deficits have historically been satisfied by HBPA's bookkeeper using surplus deducted simulcast funds from other Nebraska race-tracks. In the June 2017 letter, HBPA claimed this use of deducted simulcast funds from other Nebraska racetracks to satisfy Fonner Park's contribution requirements appeared to be contrary to a statutory directive that all contributions of the deducted funds must come from the individual track and cannot come from another.

On July 7, 2017, NTBA submitted an emailed request to be on the agenda for the upcoming Commission meeting. In the email, NTBA asked the Commission to order "the HBPA[']s Purse Bookkeeper to pay all NTBA accumulated funds in the Purse Bookkeeper[']s possession to the [NTBA]." In a subsequent email, NTBA modeled the statutory language for the deducted funds and described "NTBA accumulated funds" as "funds generated for our breeders' awards, purse supplements, and purses." NTBA also asked the Commission to order that all future deducted funds by Nebraska racetracks be paid over to NTBA and its bookkeeper for allocation and disbursement.

The Commission held hearings on NTBA's request at its meetings on July 20, October 25, and December 19, 2017. On February 21, 2018, the Commission issued an order granting NTBA's request. The order stated that the Commission's statutory authority to enforce all state laws covering horseracing extended to enforcement of the deduction statutes and determination of a proper custodian of the funds generated. The Commission found that the current structure wherein the HBPA bookkeeper collected and distributed the funds allowed for the potential of future conflicts such as underpayment or misappropriation. Finding NTBA is the proper entity to serve as custodian of the funds, the Commission directed that all current deducted funds held by HBPA and its bookkeeper be transferred to NTBA and that all future funds deducted by any Nebraska racetracks be paid to NTBA.

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OER submitted a petition for judicial review of the Commission's order to the district court on February 28, 2018. On March 1, OER filed a copy of a summons for the Commission that was addressed to the Attorney General through certified mail, although no return receipt was filed. OER also sent a summons with a copy of the petition by certified mail directly to the Commission, of which a return receipt was signed March 19, and the Commission filed a transcript of its proceedings in this matter on March 28. The Attorney General filed an answer to OER's petition on March 27. OER sent another notice for the Commission through certified mail to the Attorney General's office on March 28, which return receipt was signed April 3.

Additionally on March 1, 2018, OER filed a copy of a summons for NTBA addressed to "Linda F. Hoffman & Zack Mader." However, no return receipt was filed. On March 22, NTBA filed an answer.

After a hearing on the matter, the district court reversed and vacated the Commission's order. The court found the Commission lacked statutory authority to appoint a custodian of the funds and require payment of the funds by Nebraska racetracks to that appointed entity. The court explained that the statutes governing the deduction of the funds are unambiguous and that the Legislature did not empower any entity other than the licensed racetracks with responsibility to collect the funds or delegate custody of the funds to anyone other than the licensed racetracks. The court additionally determined that the past practice of subsidizing other racetracks by allowing NTBA to allocate a portion of the generated funds based on its determination of what was equitable was contrary to the statutory directive that the funds be distributed at the racetrack where they were generated. Accordingly, the court concluded that the Commission erred in appointing NTBA as custodian and granting NTBA the authority to collect and determine distribution of the deducted funds.

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ASSIGNMENTS OF ERROR

Appellants assign, consolidated and restated, that the district court erred by (1) considering the petition for further review while lacking subject matter jurisdiction due to OER's failure to sufficiently serve NTBA and the Commission, (2) determining the Commission did not have authority to appoint a custodian of the deducted funds, (3) reaching the issue of where the deducted funds may be used when the issue was not brought before the Commission, and (4) determining all deducted funds must be used at the racetrack where the funds are generated.

STANDARD OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act (APA) may be reversed, vacated, or modified by an appellate court for errors appearing on the record.⁴ 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.⁵

[3] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.⁶

[4] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.⁷

ANALYSIS

Before we can consider whether the Commission was authorized to appoint NTBA as the custodian of the funds and

⁴ *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 899 N.W.2d 893 (2017).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

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the merits of the appeal, we must first determine whether the district court had subject matter jurisdiction to consider OER's petition for further review and whether we, in turn, have jurisdiction to consider an appeal of the district court's order.

Neb. Rev. Stat. § 84-917 (Reissue 2014) provides the procedure for judicial review of an agency's final decision in a contested case. Under this statute, an aggrieved party may seek review of a final decision by filing a petition in district court within 30 days after service of the decision.⁸ All parties of record to the agency action must be made parties to the proceedings for judicial review.⁹

Appellants claim that the district court lacked subject matter jurisdiction due to insufficiencies in OER's service of NTBA and the Commission under § 84-917(2)(a)(i). Appellees, in turn, claim service of a petition for judicial review under the APA is not an issue of subject matter jurisdiction, that NTBA entered a voluntary appearance which is the equivalent of process, and that OER properly served the Commission.

SUBJECT MATTER JURISDICTION

Contrary to appellees' arguments, under the APA, service of necessary parties in a petition for further review is an issue of subject matter jurisdiction.¹⁰

[5-7] Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.¹¹ Lack of subject matter jurisdiction may be raised at any time by any party or by the

⁸ § 84-917(2)(a)(i).

⁹ *Id.*

¹⁰ See, *Candyland, LLC v. Nebraska Liquor Control Comm.*, 306 Neb. 169, 944 N.W.2d 740 (2020); *J.S.*, *supra* note 4; *Concordia Teachers College v. Neb. Dept. of Labor*, 252 Neb. 504, 563 N.W.2d 345 (1997).

¹¹ *J.S.*, *supra* note 4.

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court sua sponte.¹² A court action taken without subject matter jurisdiction is void.¹³

[8] Where a district court has statutory authority to review an action of an administrative agency, the district court may acquire jurisdiction only if the review is sought in the mode and manner and within the time provided by statute.¹⁴

[9-11] The right of appeal in Nebraska is purely statutory.¹⁵ The requirements of a statute underlying a right to appeal are mandatory and must be complied with before the appellate court acquires jurisdiction of the subject matter of the action.¹⁶ In construing 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.¹⁷

[12] In analyzing the requirements to initiate judicial review under the APA, we have held that for a district court to acquire jurisdiction to review a final decision of an administrative agency, the appellant must file the petition and serve summons.¹⁸ Section 84-917(2)(a)(i) states that judicial review “*shall be instituted* by filing a petition in the district court . . . within thirty days after the service of the final decision by the agency”; “[a]ll parties of record *shall be made parties* to the proceedings for review”; and, if the agency is a party of record, “[s]ummons *shall be served* within thirty days of the filing of the petition in the manner provided for service of a summons in section 25-510.02.” (Emphasis supplied.) When Neb.

¹² *Id.*

¹³ *Id.*

¹⁴ *Kozal v. Nebraska Liquor Control Comm.*, 297 Neb. 938, 902 N.W.2d 147 (2017). See *J.S.*, *supra* note 4.

¹⁵ *J.S.*, *supra* note 4.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See *Candyland, LLC*, *supra* note 10. See, also, *J.S.*, *supra* note 4; *Concordia Teachers College*, *supra* note 10.

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Rev. Stat. § 25-510.02 (Reissue 2016) applies, a summons must be served on the Attorney General in order to institute judicial review.¹⁹ Additionally, while § 84-917(2)(a)(i) states service shall be provided “in the manner provided for service of a summons in section 25-210.02” and the required means of service under § 25-510.02 only addresses the means of service of the agency, we have held that “service on nongovernmental entities under § 84-917(2)(a)(i) is required ‘within thirty days of the filing of the petition’” and have applied such requirement as an issue of subject matter jurisdiction when there is insufficient service of nongovernmental entities.²⁰

Because § 84-917(2)(a)(i) requires service within 30 days of necessary parties to an agency action—including nongovernmental parties of record and, if the agency is a party of record, the agency through the Attorney General—in order to initiate a judicial review, such service is an issue of subject matter jurisdiction.

SUFFICIENCY OF OER’S
SERVICE OF NTBA

Appellees do not contest that OER failed to serve NTBA within 30 days of the filing of the petition. Instead, appellees claim NTBA voluntarily appeared by filing its answer and submitted itself to the district court’s authority.

Appellees’ argument is premised on the proposition that service of nongovernmental parties of record is an issue of only personal and not subject matter jurisdiction. As discussed, this proposition is incorrect and the service of nongovernmental parties of record under § 84-917(2) is necessary to provide the reviewing court with subject matter jurisdiction.²¹

[13] Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may

¹⁹ See *Concordia Teachers College*, *supra* note 10.

²⁰ *Candyland, LLC*, *supra* note 10.

²¹ See *id.*

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subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.²² Accordingly, NTBA was unable to voluntarily submit itself to the district court's authority and NTBA's filing its answer did not overcome OER's failure to serve NTBA as required by § 84-917(2).

Because NTBA was a party of record to the agency action and it is undisputed that OER did not serve NTBA within 30 days of filing the petition, the district court lacked subject matter jurisdiction to consider the petition.

SUFFICIENCY OF OER'S
SERVICE OF COMMISSION

Similarly, OER's service of the Commission was insufficient and also deprived the district court of subject matter jurisdiction.

The required means and manner of service of an agency under the APA depends on whether the agency was a party of record to the proceedings. When determining whether the agency is a party of record, § 84-917(2)(a)(i) clarifies that the agency is not a party of record "[i]f an agency's only role in a contested case is to act as a neutral factfinding body" If the agency is not a party of record, the petitioner is required to serve only a copy of the petition and a request for preparation of the official record upon the agency within 30 days of filing the petition.²³ However, when the agency functions beyond a neutral factfinding body, the agency is a party of record and summons shall be served within 30 days of the filing of the petition as provided by § 25-510.02.²⁴ Section 25-510.02 requires that service upon a state agency be executed by leaving the summons at the office of the Attorney General or by certified mail or designated delivery service addressed to the office of the Attorney General. The purpose of § 25-510.02 is

²² *J.S.*, *supra* note 4.

²³ § 84-917(2)(a)(i).

²⁴ *Id.*

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to give the State, its agencies, and its employees “adequate notice of the case against it” and to “eliminate ineffectual service.”²⁵

Appellants argue that OER’s service on the Commission was insufficient because the Commission acted beyond a neutral factfinding body, making it a necessary party of record and requiring service of the Attorney General within 30 days of the filing of the petition. Because OER failed to serve the Attorney General in accordance with § 25-510.02 until after the running of the 30 days, appellants claim service was insufficient and the district court lacked subject matter jurisdiction over the review.

[14-17] Determining whether an agency acted beyond its role as a neutral fact finder to qualify as one of the “parties of record” under § 84-917 requires looking at the nature of the administrative proceeding under review.²⁶ An administrative agency is a neutral factfinding body when it is neither an adversary nor an advocate of a party.²⁷ In contrast, when an administrative agency acts as the primary civil enforcement agency, as distinguished from determining the rights of two or more individuals in a dispute before such agency, it is more than a neutral factfinding body.²⁸ Also, an agency that is charged with the responsibility of protecting the public interest, and not merely determining the rights of two or more individuals in a dispute, is more than a neutral factfinding body.²⁹

[18,19] When evaluating whether an agency is a neutral fact finder under § 84-917(2)(a), we have repeatedly looked to the agency’s actions as to the dispute at issue, the statutory basis upon which the agency was acting, and the participation of the agency in the matters surrounding the dispute. In cases

²⁵ *Anthony K. v. State*, 289 Neb. 523, 532, 855 N.W.2d 802, 810 (2014).

²⁶ See *Kozal*, *supra* note 14.

²⁷ *McDougle v. State ex rel. Bruning*, 289 Neb. 19, 853 N.W.2d 159 (2014).

²⁸ See *id.*

²⁹ See *id.*

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where an agency acts beyond the role of a neutral fact finder due to its responsibility to the public interest, its role as the primary civil enforcement entity, or its licensing and credentialing function, the agency takes some action or is required to make some consideration beyond merely resolving a dispute between outside parties.³⁰

For instance, in *McDougle v. State ex rel. Bruning*,³¹ the Division of Public Health of the Department of Health and Human Services revoked a practitioner's licenses to practice as a mental health practitioner and as a provisional alcohol and drug counselor after previously adopting regulations on statutorily impermissible unprofessional conduct of a licensee, conducting an investigation as to the practitioner's possible violations of the regulation, recommending the Attorney General file a petition for disciplinary action, and holding a hearing before the department's chief medical officer and director. In *re 2007 Appropriations of Niobrara River Waters*³² involved a challenge to the Department of Natural Resources' issuance of closing notices for the purpose of administering water, and the department sought to advocate for the validity of its administration. In *In re Application of Metropolitan Util. Dist.*,³³ a utilities district applied to the Nebraska Public Service Commission (PSC) for certification as a competitive natural gas provider, the PSC had authority to approve or

³⁰ See, *Shaffer v. Nebraska Dept. of Health & Human Servs.*, 289 Neb. 740, 857 N.W.2d 313 (2014); *McDougle*, *supra* note 27; *In re 2007 Appropriations of Niobrara River Waters*, 283 Neb. 629, 820 N.W.2d 44 (2012); *Metropolitan Util. Dist. v. Aquila, Inc.*, 271 Neb. 454, 712 N.W.2d 280 (2006); *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005); *Becker v. Nebraska Acct. & Disclosure Comm.*, 249 Neb. 28, 541 N.W.2d 36 (1995); *Leach v. Dept. of Motor Vehicles*, 213 Neb. 103, 327 N.W.2d 615 (1982) (superseded by statute as stated in *Candyland, LLC*, *supra* note 10).

³¹ *McDougle*, *supra* note 27.

³² *In re 2007 Appropriations of Niobrara River Waters*, *supra* note 30.

³³ *In re Application of Metropolitan Util. Dist.*, *supra* note 30.

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deny and set conditions on a certification, the PSC had the authority to enforce any order on the certification, and the PSC denied the utilities district's application. In *Becker v. Nebraska Acct. & Disclosure Comm.*,³⁴ following a taxpayer's complaint against the Board of Regents of the University of Nebraska, the Nebraska Accountability and Disclosure Commission investigated, found probable cause of violations, and entered into a settlement wherein the disclosure commission agreed to certain prosecutorial concessions in exchange for the board's making certain disclosures and refraining from the alleged violations in the future. Finally, in *Leach v. Dept. of Motor Vehicles*,³⁵ the Department of Motor Vehicles had revoked a driver's license pursuant to the implied consent law in execution of the department's given responsibility of protecting the public interest, as opposed to determining the rights of two or more people in a dispute, and the driver attempted to challenge the revocation by the department.

In the current action, the Commission was not merely determining the rights of two or more individuals in a dispute. It was also acting pursuant to its claimed licensing and credentialing authority to approve a custodian of the funds based upon the public interest.

NTBA requested that funds deducted under §§ 2-1207(2) and 2-1207.01 be transferred to NTBA and that NTBA be appointed custodian of the funds to be collected and distributed by an independent bookkeeper hired by NTBA. NTBA did this because it alleged the current structure utilizing HBPA's bookkeeper resulted in delayed distribution of the funds due to an external dispute among multiple horseracing organizations.

The Commission's statutory purpose is to provide statewide regulation of horseracing in order to prevent and eliminate corrupt practices and fraudulent behavior, and thereby maintain a high level of integrity and honesty in the horseracing

³⁴ *Becker*, *supra* note 30.

³⁵ *Leach*, *supra* note 30.

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industry of Nebraska and to ensure that all funds received by the Commission are properly distributed.³⁶ As to the oversight of racetracks' compliance with §§ 2-1207(2) and 2-1207.01, the Commission has the statutory authority to review accounting of the racetracks,³⁷ license racetracks and racing industry participants,³⁸ revoke any license issued at any time for good cause,³⁹ and enforce horseracing statutes and regulations.⁴⁰ The Commission also has the authority to adopt rules and regulations governing horseracing and the licensing of horseracing associations.⁴¹

Under this authority, the Commission adopted an administrative regulation, which states:

Each Association shall have a bookkeeper, approved by the Commission, whose duty it is to keep and preserve books which will reflect the deposits or other credits and withdrawals or other charges that may be made by an owner or other licensee. Said bookkeeper shall have an office at the track and said office shall be open on each racing day during the hours specified by the Commission. Said bookkeeper must also furnish such reports and information as may be required by the Commission or its representatives.⁴²

In reviewing NTBA's request, the Commission considered whether to approve NTBA and its appointed bookkeeper for the management of the deducted funds or to maintain its alleged approval of HBPA's bookkeeper for such management. The Commission based its ruling on consideration of either

³⁶ Neb. Rev. Stat. § 2-1201.01 (Reissue 2012).

³⁷ § 2-1207.01; Neb. Rev. Stat. §§ 2-1205 and 2-1211 (Reissue 2012).

³⁸ Neb. Rev. Stat. § 2-1203.01 (Cum. Supp. 2018).

³⁹ § 2-1205.

⁴⁰ Neb. Rev. Stat. § 2-1203 (Cum. Supp. 2018); § 2-1203.01.

⁴¹ § 2-1203.

⁴² 294 Neb. Admin. Code ch. 3, § 001.08 (2006).

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option's potential for corrupt practices and fraudulent behavior such as underpayment or misappropriation. The designation of the bookkeeper was not merely resolving an independent dispute between the parties, but was the Commission's exercising compliance assurance authority grounded in its role as the racetrack licensor and certifying agency. In approving the bookkeeper, the Commission indicated that it was attempting to prevent the exposure of possible future corruption and fraud.

In arguing the Commission was acting as a neutral fact finder, appellees note the Commission held evidentiary hearings where interested parties made appearances, exhibits were received, and the parties briefed their arguments. However, such procedures and similarities to the judicial process do not necessitate that the Commission was acting as a neutral fact finder.

In *Shaffer v. Nebraska Dept. of Health & Human Servs.*,⁴³ a Medicaid recipient was denied the continuation of coverage for private duty nursing services by a managed care organization because the managed care organization deemed the services were not medically necessary. The recipient appealed to the Department of Health and Human Services (DHHS), which held a hearing where the parties appeared before a DHHS hearing officer, presented testimony and evidence, and submitted arguments.⁴⁴ Based upon the record made at the hearing, DHHS' director of the Division of Medicaid & Long-Term Care concluded that the services were not medically necessary and agreed with the managed care organization's denial of coverage.⁴⁵ While DHHS' order involved a dispute between two or more parties and was the result of an evidentiary hearing, we determined DHHS' involvement

⁴³ *Shaffer*, *supra* note 30.

⁴⁴ *Id.*

⁴⁵ *Id.*

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went beyond that of a neutral fact finder because DHHS was charged with the administration of the Medicaid program and had broad regulatory and oversight powers, adopted and promulgated the rules and regulations to determine eligibility, and was authorized to and did contract with the managed care organization for the provision of medical assistance for eligible recipients.⁴⁶

The Commission's actions in the instant case are similar to DHHS' actions in *Shaffer*. The Commission was acting under broad regulatory, enforcement, and licensing authority. The Commission adopted and promulgated rules that require racetracks to have bookkeepers and which require the Commission's approval of those bookkeepers. In approving NTBA as the custodian of the funds and the use of its bookkeeper while revoking the approval of HBPA's bookkeeper, the Commission considered the potential effect its decision would have on the horseracing industry and its exposure to potential mistake, corrupt practices, and fraud.

This case is distinguishable from *Metropolitan Util. Dist. v. Aquila, Inc.*⁴⁷ There, a dispute between a utilities district and Aquila, Inc., two distributors of natural gas which both had contracts with the same natural gas supplier, arose over the utilities district's proposed construction of a gas main extension.⁴⁸ Aquila argued in a complaint before the PSC that the utilities district's extension violated Neb. Rev. Stat. §§ 57-1301 to 57-1307 (Reissue 2004), because it was not in the public interest.⁴⁹ Following a hearing, the PSC agreed and granted Aquila's request to order a cease and desist of the construction.⁵⁰

⁴⁶ *Id.*

⁴⁷ *Aquila, Inc.*, *supra* note 30.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

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In determining the PSC was not a party of record under § 84-917, we concentrated our review on the PSC's actions in considering the dispute then at issue.⁵¹ The statute authorizing the PSC to consider such a complaint, § 57-1306, expressly stated that the PSC "'shall have no jurisdiction over a metropolitan utilities district or natural gas utility beyond the determination of disputes'" brought under the relevant statutes.⁵² These statutes specified that no utility could extend or enlarge its natural gas mains or services unless it was in the public interest and that, if a complaint was brought alleging an action was not in the public interest, the PSC was instructed to consider the question of public interest by weighing statutorily prescribed factors.⁵³

There are no such limiting statutes that restrained the Commission's consideration in approving a bookkeeper and custodian of the deducted funds. The Commission was generally charged with overseeing the horseracing industry to ensure all funds received by the Commission are properly distributed, licensing and credentialing horseracing entities, enforcing horseracing statutes and regulations, and establishing rules and regulations governing horseracing and the licensing of horseracing associations.⁵⁴ Additionally, in the requirement of the Commission's approval of racetracks' bookkeepers, the Commission was not limited in its evaluation to specific statutorily prescribed factors.

For the reasons stated above, we find that the Commission was acting beyond its neutral factfinding role when it considered NTBA's request to approve NTBA and its bookkeeper as the custodian of the deducted funds and revoke the previous approval of HBPA. Therefore, the Commission was a party of record and appellees were required to serve summons on the

⁵¹ *Id.*

⁵² *Id.* at 458, 712 N.W.2d at 285.

⁵³ *Id.*

⁵⁴ §§ 2-1203, 2-1203.01, 2-1205, 2-1207.01, and 2-1211.

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Commission through the Attorney General's office within 30 days of filing the petition for further review.⁵⁵

Appellees contend that OER complied with § 84-917(2) because OER filed its petition for judicial review on February 28, 2018, and a summons was issued for the Commission on March 1, which alleged it would be sent to the Attorney General's office through certified mail, and that it can be implied such summons was sent by certified mail because the Attorney General filed an answer on March 27. Appellees claim this proof of service was sufficient because §§ 84-917(2) and 25-510.02 do not require a return receipt.

In analyzing the service of an agency under § 25-510.02, as when analyzing the option to serve an individual through certified mail under Neb. Rev. Stat. § 25-508.01 (Reissue 2016), we look to Neb. Rev. Stat. § 25-505.01(1)(c) (Reissue 2016) for the requirements of service by certified mail.⁵⁶ Section 25-505.01(1) requires the servicing party request a return receipt and states:

[A] plaintiff may elect to have service made by . . . :

. . . .

(c) Certified mail service which shall be made by (i) within ten days of issuance, sending the summons to the defendant by certified mail with a return receipt requested showing to whom and where delivered and the date of delivery, and (ii) filing with the court proof of service with the signed receipt attached[.]

In order for the district court to obtain subject matter jurisdiction, OER was required to serve the Commission within 30 days of filing the petition as provided by § 25-510.02; one option for service under § 25-510.02 is through certified mail, and § 25-505.01(1)(c) explains the process of service by certified mail to include requesting and filing a return

⁵⁵ § 84-917(2)(a)(i); § 25-510.02.

⁵⁶ See *Anthony K.*, *supra* note 25. See, also, *Mendoza v. Osterberg*, No. 8:13CV65, 2014 WL 3784122 (D. Neb. July 31, 2014).

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receipt as proof of service. As such, OER was required to request a return receipt on any service of the Commission it sent through certified mail. Without the return receipt, it is unknown whether OER sent the summons or whether service upon the Attorney General occurred. There is no affidavit of service or other evidence to establish service, and the fact that the Attorney General filed an answer is insufficient to establish service was executed. Accordingly, the issued summons listing the Attorney General's address is insufficient to prove proper service under § 84-917(2).

Though perhaps not the only method available to challenge the Commission's order, a petition for judicial review was the method chosen by OER. As a result, OER was obligated to bring the action in compliance with § 84-917(2). Because the Commission acted beyond the role of a neutral fact finder and was a party of record and because OER failed to execute service on the Attorney General in compliance with § 84-917(2)(a)(i), the district court lacked subject matter jurisdiction to review the Commission's order and its order reversing and vacating the Commission's order is void.⁵⁷

Because the district court lacked subject matter jurisdiction to consider OER's petition for judicial review, we, in turn, lack jurisdiction to consider the district court's review.⁵⁸ Even when appellate jurisdiction is lacking, however, we have the power to vacate a void order and, if necessary, to remand the cause with appropriate directions.⁵⁹ As a result, we must vacate the order of the district court.

In vacating the order of the district court, we make no determination as to the merits of the Commission's order, whether the Commission had authority to consider NTBA's request, whether the Commission had authority to appoint

⁵⁷ See *J.S.*, *supra* note 4.

⁵⁸ See *In re Estate of Evertson*, 295 Neb. 301, 889 N.W.2d 73 (2016).

⁵⁹ See *Francisco v. Gonzalez*, 301 Neb. 1045, 921 N.W.2d 350 (2019).

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a custodian, or the extent of the Commission's authority to approve a bookkeeper.

CONCLUSION

OER failed to seek district court review of the Commission's order in the mode and manner provided by § 84-197(2) by failing to timely serve the summons and a copy of the petition upon NTBA and the Commission through the Attorney General's office. The district court, therefore, lacked subject matter jurisdiction under the APA to consider the petition for judicial review and its order is void. We likewise lack subject matter jurisdiction over this appeal. We vacate the order of the district court and dismiss this appeal.

VACATED AND DISMISSED.

PAPIK, J., concurring.

Nebraska's Administrative Procedure Act (APA) allows those aggrieved by decisions of state agencies to seek review of those decisions in district court. See Neb. Rev. Stat. § 84-917(1) (Reissue 2014). In *Concordia Teachers College v. Neb. Dept. of Labor*, 252 Neb. 504, 563 N.W.2d 345 (1997), this court interpreted the APA to require that all parties of record before the agency be timely served with a summons in order for the district court to have *subject matter jurisdiction* of such a judicial review proceeding. We have followed that principle in subsequent APA cases, see, e.g., *Candyland, LLC v. Nebraska Liquor Control Comm.*, 306 Neb. 169, 944 N.W.2d 740 (2020), and in a case brought pursuant to similar statutes, see *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 899 N.W.2d 893 (2017), and the court applies it today to find that the district court lacked subject matter jurisdiction in this case. While I believe the court's decision faithfully applies the cases cited above, I write separately to observe that the interpretation of the APA we adopted in *Concordia Teachers College* resulted in a rule that is legally anomalous and, in my view, can lead to peculiar results.

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The interpretation we first adopted in *Concordia Teachers College* is a legal anomaly because in most cases, properly serving a party with a summons is necessary to confer *personal* rather than subject matter jurisdiction. See, e.g., *Henderson v. Department of Corr. Servs.*, 256 Neb. 314, 589 N.W.2d 520 (1999) (holding that district court lacked personal jurisdiction over named parties because they were not served with summons and did not enter voluntary appearance); *Rudd v. Debora*, 20 Neb. App. 850, 855, 835 N.W.2d 765, 770 (2013) (“[t]he father was properly served with a valid summons, and the court thereby obtained personal jurisdiction over him”). See, also, *Omni Capital Int’l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104, 108 S. Ct. 404, 98 L. Ed. 2d 415 (1987) (“[b]efore a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied”); *York Group, Inc. v. Wuxi Taihu Tractor Co., Ltd.*, 632 F.3d 399, 403 (7th Cir. 2011) (“[t]he effectiveness of service concerns *personal* jurisdiction, not subject matter jurisdiction” (emphasis in original)). Treating service of a summons as an issue of personal rather than subject matter jurisdiction is consistent with how those concepts have been traditionally understood by this court. As we have often stated, personal jurisdiction is the power of a tribunal to subject and bind a particular person or entity to its decisions while subject matter jurisdiction refers to the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved. See, e.g., *Young v. Govier & Milone*, 286 Neb. 224, 835 N.W.2d 684 (2013).

But the interpretation of the APA we embraced in *Concordia Teachers College* affects more than just those concerned with consistent use of legal terminology. As this case illustrates, application of the *Concordia Teachers College* rule can preclude judicial review in cases in which judicial review would be available if service of summons were, as in other contexts, a matter of personal jurisdiction. Here, NTBA and the

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Commission filed answers in the judicial review proceeding less than 30 days after OER filed its petition. Their answers did not assert that the district court lacked jurisdiction, but asked that the district court affirm the decision of the Commission on its merits. If proper service of summons were a matter of personal jurisdiction, there would be no jurisdictional problem under these circumstances. The answers of NTBA and the Commission amounted to a general appearance and authorized the exercise of personal jurisdiction over them. See *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001). But because subject matter jurisdiction cannot be waived or conferred by the consent or conduct of the parties, see *id.*, under the rule of *Concordia Teachers College*, the district court lacked subject matter jurisdiction over OER's petition for judicial review.

While dictated by *Concordia Teachers College* and its progeny, this strikes me as a strange outcome. One would expect the purpose of a requirement that parties be served with a summons to be to ensure that parties involved have notice of the proceedings and an opportunity to participate before the court takes action that potentially affects the outcome of the agency proceedings in which they had an interest. But when parties make a general appearance within the time before which summons must be served, as the NTBA and the Commission did here, there is no need to worry about whether those parties received adequate notice. And I cannot conceive of any other reason why a district court should be precluded from exercising judicial review when a party who was not served with a summons nonetheless willingly engages on the merits in a judicial review proceeding. As far as I can tell, our interpretation of the APA in *Concordia Teachers College* has established, at best, a counterintuitive exception to the general rule that effective service is a requirement of personal rather than subject matter jurisdiction, and, at worst, a jurisdictional trap. See, e.g., *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 899 N.W.2d 893 (2017) (citing *Concordia Teachers College v.*

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Neb. Dept. of Labor, 252 Neb. 504, 563 N.W.2d 345 (1997), and holding that district court lacked subject matter jurisdiction because there was no evidence school board that filed voluntary appearance in which it purported to waive service of summons was served with summons).

Given the important role of judicial review of administrative agency actions, this strikes me as a particularly unfortunate area for counterintuitive rules or jurisdictional traps. While usually belonging to the executive branch, administrative agencies that promulgate rules and regulations and adjudicate violations of those rules and regulations also exercise functions that appear to be more legislative or judicial in character. See *Arlington v. FCC*, 569 U.S. 290, 304 n.4, 133 S. Ct. 1863, 185 L. Ed. 2d 941 (2013) (explaining that administrative agency actions can take “‘legislative’ and ‘judicial’ forms”). So how is the exercise of all these powers by the same entity not, as James Madison famously wrote, “the very definition of tyranny”? See *The Federalist* No. 47 at 298 (James Madison) (Clinton Rossiter ed., 2003) (“accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny”). While different jurists would surely offer different answers to that question, one that is commonly offered is that courts, through judicial review provisions, can hold agencies in check. See, e.g., Brietta R. Clark, *APA Deference After Independent Living Center: Why Informal Adjudicatory Action Needs a Hard Look*, 102 Ky. L.J. 211, 229 (2014) (“judicial review helps guard against abuse of power and arbitrariness”); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 Cornell L. Rev. 393, 471 (1996) (“[i]n fact, the huge growth of executive agencies has not resulted in tyranny primarily because of congressional oversight and judicial review”). At the risk of stating the obvious, courts cannot perform this important function if they do not acquire subject matter jurisdiction.

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None of these observations should be taken as criticism of the court's decision in this case. OER did not ask that we overrule *Concordia Teachers College*, and, even if it had, it would have to overcome the doctrine of legislative acquiescence. But even if the Legislature has, up to this point, acquiesced in our interpretation of the APA in *Concordia Teachers College*, the outcome in this case may provide reason for the Legislature to consider anew whether the APA should be amended to allow courts to exercise subject matter jurisdiction when parties are not served with a summons but nonetheless make a timely general appearance in a judicial review proceeding.

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

FIRST STATE BANK NEBRASKA, APPELLANT,
v. MP NEXLEVEL, LLC, APPELLEE.

948 N.W.2d 708

Filed September 18, 2020. No. S-19-543.

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. **Uniform Commercial Code: Secured Transactions: Security Interests.** Article 9 of the Uniform Commercial Code, as adopted by Nebraska, provides a comprehensive scheme for the regulation of security interests.
5. **Uniform Commercial Code: Secured Transactions.** Article 9 of the Uniform Commercial Code, in part, applies to both a sale of certain payment rights—accounts, chattel paper, intangibles, and promissory notes—and the grant of an interest in specified payment rights to secure an obligation.
6. **Uniform Commercial Code: Secured Transactions: Debtors and Creditors.** In the case of a debtor granting a party payment rights to secure an obligation, part 6 of article 9 of the Uniform Commercial Code provides enforcement rights of the secured party in the event of a default by the debtor, as well as certain limitations on the exercise of those rights for the protection of the defaulting debtors, other creditors, and other affected persons.

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7. ____: ____: _____. Part 4 of article 9 of the Uniform Commercial Code primarily addresses the rights and duties of account debtors and other persons obligated on collateral who are not, themselves, parties to a secured transaction.
8. **Statutes: Appeal and Error.** In construing a statute, statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
9. **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.
10. **Uniform Commercial Code: Statutes.** While official comments to the Uniform Commercial Code, as adopted by Nebraska, are not binding, they are persuasive in matters of statutory interpretation.
11. **Uniform Commercial Code: Secured Transactions: Assignments: Words and Phrases.** Unless there is a good reason for the definition of “assignment” to apply more narrowly in a given context, “assignment” under article 9 of the Uniform Commercial Code includes both an outright transfer of ownership and a contingent transfer for security.
12. ____: ____: ____: _____. The determination of whether a sale or grant of an interest amounts to an “assignment” as used in a given statute under article 9 of the Uniform Commercial Code depends upon the context of the statute and the interest given.
13. **Uniform Commercial Code: Secured Transactions: Security Interests: Assignments: Words and Phrases.** “Assignment” and its derivatives under Neb. U.C.C. § 9-406(a) (Reissue 2001 & Cum. Supp. 2018) apply to presently exercisable security interests.
14. **Uniform Commercial Code: Secured Transactions: Notice.** Whether a notice is sufficient under Neb. U.C.C. § 9-406(a) (Reissue 2001 & Cum. Supp. 2018) depends upon the facts of each case.
15. **Uniform Commercial Code: Secured Transactions: Assignments: Notice.** In order to be sufficient under Neb. U.C.C. § 9-406(a) and (b)(1) (Reissue 2001 & Cum. Supp. 2018), a notice has to reasonably identify the rights assigned and demand payment to the assignee.
16. **Uniform Commercial Code: Secured Transactions: Notice.** A reasonable identification need not identify the right to payment with specificity, and “magic words” are not required for a notice under Neb. U.C.C. § 9-406(a) (Reissue 2001 & Cum. Supp. 2018) to be effective.
17. **Uniform Commercial Code: Secured Transactions: Debtors and Creditors.** Neb. U.C.C. § 9-406(a) (Reissue 2001 & Cum. Supp. 2018) can modify an account debtor’s obligations under its agreement with

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the debtor if certain criteria are met, and Neb. U.C.C. § 9-607(a)(3) (Reissue 2001 & Cum. Supp. 2018) permits the secured party to enforce the account debtor's obligations.

18. **Uniform Commercial Code: Secured Transactions.** Default under article 9 of the Uniform Commercial Code is not contingent on an adjudication or agreement.
19. ____: _____. Article 9 of the Uniform Commercial Code leaves to the agreement of the parties the circumstances giving rise to a default; default is whatever the security agreement says it is.
20. ____: _____. Under Neb. U.C.C. § 9-607(a)(3) (Reissue 2001 & Cum. Supp. 2018), it is unnecessary for a secured party to first become the owner of the collateral pursuant to a disposition or acceptance.
21. ____: _____. Under Neb. U.C.C. § 9-607(a)(3) (Reissue 2001 & Cum. Supp. 2018), a secured party may collect and enforce obligations included in collateral in its capacity as a secured party.
22. **Standing: Jurisdiction: Parties.** Standing refers to whether a party had, at the commencement of the litigation, a personal stake in the outcome of the litigation that would warrant a court's or tribunal's exercising its jurisdiction and remedial powers on the party's behalf.
23. **Standing: Words and Phrases.** Standing involves a real interest in the cause of action, meaning some legal or equitable right, title, or interest in the subject matter of the controversy.
24. **Standing: Claims: Parties.** To have standing, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties.

Appeal from the District Court for Lancaster County:
SUSAN I. STRONG, Judge. Reversed and remanded for further proceedings.

Brandon R. Tomjack and Nicholas A. Buda, of Baird Holm, L.L.P., for appellant.

Michael S. Degan, of Kutak Rock, L.L.P., for appellee.

Anthony Schutz for amicus curiae Commercial Law Amicus Initiative.

Robert J. Hallstrom and Gerald M. Stilmock, of Brandt, Horan, Hallstrom & Stilmock, for amicus curiae Nebraska Bankers Association, Inc.

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HEAVICAN, C.J., CASSEL, FUNKE, PAPIK, and FREUDENBERG, JJ.

FUNKE, J.

First State Bank Nebraska (First State) challenges the district court's order dismissing its claims against MP Nexlevel, LLC. MP Nexlevel contracted to pay Husker Underground Utilities & Construction, LLC (Husker Underground), for certain construction services. First State held a security interest in Husker Underground's accounts due to separate loan agreements. When Husker Underground failed to meet its loan obligations, First State sought direct payment of MP Nexlevel's obligations under the contract by sending MP Nexlevel notices of Husker Underground's default. Despite the notices, MP Nexlevel continued to submit its payments to Husker Underground, and First State brought suit against MP Nexlevel for performance under the contract.

First State challenges the district court's finding that it lacked standing because it was not a party to the contract, Neb. U.C.C. § 9-607(a) (Reissue 2001 & Cum. Supp. 2018) did not authorize it to enforce MP Nexlevel's obligations under the contract, and Neb. U.C.C. § 9-406(a) (Reissue 2001 & Cum. Supp. 2018) did not apply, because First State held a security interest rather than an assignment of Husker Underground's rights to payment under the contract. For the reasons set forth herein, we reverse the judgment of the district court and remand this matter for further proceedings consistent with this opinion.

BACKGROUND

First State is a domestic bank chartered by and registered in the State of Nebraska. MP Nexlevel is a Minnesota limited liability company performing excavation, trenching, and other services for Nebraska customers as well as customers in other states.

In January 2018, MP Nexlevel and Husker Underground entered into a subcontract agreement whereby Husker Underground promised to perform certain construction services.

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As Husker Underground performed these services, it would submit invoices to MP Nexlevel for payment. MP Nexlevel was generally required to pay these amounts within 45 days of approval. Husker Underground performed these services throughout 2018. First State was not a party to the subcontract or any other agreement between MP Nexlevel and Husker Underground.

Between May and June 2016, First State loaned money to Husker Underground pursuant to various promissory notes and agreements. These agreements included a May promissory note executed in the original principal amount of \$50,000, a June promissory note in the original principal amount of \$635,500, and a May business manager agreement with business and professionals in which First State agreed, in part, to purchase certain accounts receivable from Husker Underground. Husker Underground secured these agreements by granting First State a security interest in virtually all of its assets, including its accounts and accounts receivable. First State filed three financing statements with the Nebraska Secretary of State to perfect these security interests. MP Nexlevel was not a party to any agreement between First State and Husker Underground and had no actual knowledge of the two parties' relationship.

Husker Underground failed to make payments to First State when due, including failing to pay the May note in full upon maturity. As such, in August 2018, First State filed a lawsuit against Husker Underground, alleging Husker Underground was in default under the agreements and seeking a judgment for the payment of the remaining obligations. On January 23, 2019, the district court entered a stipulated order, signed by Husker Underground representatives, granting summary judgment in favor of First State.

Prior to filing suit against Husker Underground, First State sent three notices to MP Nexlevel in May, July, and August 2018. These notices alleged that Husker Underground had defaulted on loans from First State, that Husker Underground had granted First State a security interest in its accounts, and that Husker Underground assigned First State its rights to

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receive payments from MP Nexlevel as a result of its default. The notices directed MP Nexlevel to pay all amounts owed on Husker Underground's accounts to First State directly and warned that failure to do so could result in adverse consequences for MP Nexlevel. Attached was a copy of a Uniform Commercial Code (UCC) financing statement identifying the security interest in Husker Underground's accounts.

Once MP Nexlevel received the May 2018 notice, it contacted representatives at First State and Husker Underground. As to the communication with First State, affidavits offered by the parties alleged slightly varying facts as to MP Nexlevel's representations on whether it would comply with the notice's directions. Pat Carlson, an MP Nexlevel accounting supervisor, stated that he telephoned Miranda Hobelman, of First State,

in order to gather additional information, including the amount [First State] claimed it was owed by Husker Underground. I informed [Hobelman] that [MP Nexlevel] would review and decide the matter after due consideration of [MP Nexlevel's] legal rights and responsibilities, if any, to [First State] and Husker Underground.

Hobelman, First State's general counsel and a senior vice president, stated:

. . . I received a telephone call from . . . Carlson with MP Nex[l]evel who[] acknowledged receipt of [First State's] May Notice and otherwise stated that MP Nex[l]evel would be cooperating with the Notice and sending payments on the Accounts directly to [First State]. After our call, I sent . . . Carlson two emails . . . following-up our conversation confirming that [MP Nexlevel] would send [First State] all funds owed to Husker Underground on the Accounts.

The first email Hobelman referenced in her affidavit apologized for missing Carlson's initial call and stated, "Please make the checks payable to First State . . . as requested in the letter." The second email thanked Carlson for calling back, explaining, "As we discussed, please send funds owed to Husker Underground to First State . . . until the total of funds

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sent equals \$1,033,242.30. The funds will be credited to Husker Underground's loans at First State."

As to MP Nexlevel's communication with Husker Underground, Carlson asserted that Husker Underground disputed the claim that it assigned its rights to receive MP Nexlevel payments to First State. Husker Underground, instead, demanded MP Nexlevel continue to make the payments to it under terms of the subcontract agreement. Carlson claimed that Husker Underground never directed MP Nexlevel to make payments to First State, that MP Nexlevel was never provided an assignment of Husker Underground's rights to payment under the subcontract, that MP Nexlevel was not notified of a judgment in favor of First State against Husker Underground, and that MP Nexlevel was not provided copies of the notes or agreement between First State and Husker Underground. As such, MP Nexlevel continued making its payments directly to Husker Underground. MP Nexlevel's discovery responses show MP Nexlevel made payments totaling \$412,302.59 to Husker Underground after receiving the May 2018 notice. There are no outstanding invoices of Husker Underground for MP Nexlevel to pay.

In August 2018, 6 days after bringing suit against Husker Underground, First State filed a complaint against MP Nexlevel and, thereafter, filed a motion for summary judgment. First State alleged that because Husker Underground was in default of the notes and agreement and First State had a security interest in Husker Underground's accounts receivable, it had a right to enforce this security interest and foreclose upon the same pursuant to §§ 9-406(a) and 9-607(a). First State further alleged that once First State sent its May 2018 notice to MP Nexlevel, MP Nexlevel could discharge its obligations under the subcontract only by paying the invoiced amounts directly to First State. First State claimed that because MP Nexlevel continued paying the invoiced amounts to Husker Underground, MP Nexlevel breached its obligations under the subcontract, and that First State is entitled to payment of the delinquent amounts.

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MP Nexlevel resisted First State's motion and filed a cross-motion for summary judgment. MP Nexlevel argued First State lacked standing to enforce the subcontract agreement, because there was no contractual relationship between First State and MP Nexlevel. Although MP Nexlevel received the notices, MP Nexlevel argued it properly continued to pay Husker Underground, because Husker Underground contested First State's assertions and there was insufficient documentation that Husker Underground's rights to payment under the subcontract were assigned to First State.

The district court overruled First State's motion for summary judgment and granted MP Nexlevel's cross-motion, dismissing the case with prejudice. First, the court held that § 9-607 does not give rise to a claim by a secured creditor against an account debtor where the debtor is not in default and has not otherwise agreed. As such, because the record demonstrated that Husker Underground denied being in default at the time of First State's notices and First State did not obtain its judgment against Husker Underground until January 23, 2019, First State did not have a cognizable claim against MP Nexlevel under § 9-607 for MP Nexlevel's performance under the subcontract. Additionally, the court determined that § 9-406(a) required receipt of notification of assignment in order to obligate the account debtor to pay the assignee and that an assignment is not the same as a secured interest. Because First State failed to adduce any evidence establishing Husker Underground made an assignment to First State, First State did not have authority under § 9-406(a) to demand MP Nexlevel to make the subcontract payments directly to it. As such, the court found First State lacked standing to pursue its claims for breach of the subcontract.

ASSIGNMENTS OF ERROR

First State assigns, restated, that the district court erred by (1) failing to find genuine issues of material fact existed, (2) finding Husker Underground was not in default at the time MP Nexlevel received the notices, (3) failing to find

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MP Nexlevel’s motion was deficient by not filing an annotated statement of disputed facts, (4) admitting Carlson’s affidavit, (5) holding an “assignment” under § 9-406 does not include a “security interest,” and (6) granting MP Nexlevel’s motion for summary judgment.

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.¹

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.²

[3] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.³

ANALYSIS
EVIDENCE AND FINDING OF HUSKER
UNDERGROUND’S DEFAULT

As an initial matter, several of First State’s assignments claim MP Nexlevel presented evidence that Husker Underground was not in default at the time of First State’s notices. First State claims this evidence and the court’s finding that default had not occurred contradicted First State’s allegations and evidence of Husker Underground’s earlier default. On this basis, First

¹ *JB & Assocs. v. Nebraska Cancer Coalition*, 303 Neb. 855, 932 N.W.2d 71 (2019).

² *Id.*

³ *Id.*

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State contends that it was reversible error for MP Nexlevel to fail to file an annotated statement of disputed facts. Further, First State contends that the court erred in admitting Carlson's affidavit, finding Husker Underground was not in default at the time of the notice, and finding there were no genuine issues of material fact.

First State misstates MP Nexlevel's allegations and the court's findings. Contrary to First State's contention, MP Nexlevel did not contest that Husker Underground was in default of its loan obligations at the time of the notices. Instead, MP Nexlevel explained that at the time of the notices, Husker Underground disputed First State's claim that it was in default. MP Nexlevel, and Carlson's affidavit, made no allegation that the default had not actually occurred.

Additionally, the court made no findings that Husker Underground was not in default at the time of the notices. To the contrary, the court specifically found that "Husker Underground defaulted on its obligations owed to [First State] under the Businessmanager[] Agreement and Notes by failing to make payments to [First State] when due and failing to pay the May Note in full upon maturity." The court's basis for granting MP Nexlevel's motion for summary judgment was that the default was disputed at the time of the notices and not on the basis that the default did not occur.

Accordingly, First State's assignments premised on this proposition are without merit, and we turn to First State's assignments regarding its authority to seek and enforce payment of Husker Underground's account against MP Nexlevel after Husker Underground failed in its loan obligations to First State.

ARTICLE 9 OF UCC

Husker Underground's agreements with First State imposed various financial obligations which Husker Underground secured by granting First State a security interest in virtually all of its assets, including its accounts and accounts receivable. These accounts included an agreement between Husker

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Underground and MP Nexlevel where Husker Underground would provide certain services in exchange for payment from MP Nexlevel. As discussed above, it is undisputed that Husker Underground failed to meet its obligations to First State. This case arises from First State's attempt to enforce the security agreement after Husker Underground's failure to meet its obligations and hinges on whether First State could demand MP Nexlevel comply with the terms of the security agreements when Husker Underground had disputed it was in default.

[4,5] Article 9 of the UCC, as adopted by Nebraska, provides a comprehensive scheme for the regulation of security interests.⁴ Article 9, in part, applies to both a sale of certain payment rights—accounts, chattel paper, intangibles, and promissory notes—and the grant of an interest in specified payment rights to secure an obligation.⁵ Under article 9, a “secured party” includes, among others, either a person in whose favor a security interest is created or provided for under a security agreement or a person to which payment rights have been sold; a “debtor” includes a person having an interest in the collateral other than a security interest or other lien and a seller of payment rights; and an “account debtor” is a person obligated on an account, chattel paper, or general intangible subject to the payment rights sold or granted.⁶

[6] In the case of a debtor granting a party payment rights to secure an obligation, part 6 of article 9 provides enforcement rights of the secured party in the event of a default by the debtor, as well as certain limitations on the exercise of those rights for the protection of the defaulting debtors, other creditors, and other affected persons.⁷ Section 9-607(a) states, in relevant part:

⁴ See Neb. U.C.C. § 9-101, comment 1 (Reissue 2001 & Cum. Supp. 2018).

⁵ Neb. U.C.C. § 9-109 (Reissue 2001).

⁶ Neb. U.C.C. § 9-102(3), (28), (73) (Reissue 2001 & Cum. Supp. 2018).

⁷ See Neb. U.C.C. § 9-601, comment 2 (Reissue 2001 & Cum. Supp. 2018).

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If so agreed, and in any event after default, a secured party:

(1) may notify an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party; [and]

. . . .

(3) may enforce the obligations of an account debtor or other person obligated on collateral and exercise the rights of the debtor with respect to the obligation of the account debtor or other person obligated on collateral to make payment or otherwise render performance to the debtor, and with respect to any property that secures the obligations of the account debtor or other person obligated on the collateral.

Section 9-607 addresses a secured party's rights in relation to the debtor to collect a specified payment right. However, this section "does not determine whether an account debtor . . . owes a duty to a secured party."⁸

[7] Part 4 of article 9 primarily addresses the rights and duties of account debtors and other persons obligated on collateral who are not, themselves, parties to a secured transaction.⁹ As part of these duties, § 9-406(a) provides:

. . . [A]n account debtor on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor.

⁸ § 9-607(e).

⁹ See Neb. U.C.C. § 9-401, comment 2 (Reissue 2001).

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In other words, prior to receiving notice otherwise, account debtors may discharge their obligations by paying the “assignor.” However, once an account debtor receives notification of a transfer authenticated from the “assignor” or the “assignee” and receives instruction to pay the “assignee,” § 9-406(a) mandates that an account debtor must comply and may only discharge their account obligations by paying the “assignee.”

ASSIGNMENT UNDER § 9-406(a)

The district court interpreted the use of “assignor” and “assignee” in § 9-406(a) to impose no duty upon an account debtor in those instances where there has been a granting of a security interest. We disagree.

[8-10] In construing a statute, statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.¹⁰ Components of a series or collection of statutes pertaining to a certain subject matter are in *pari materia* and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.¹¹ While official comments to the UCC, as adopted by Nebraska, are not binding, they are persuasive in matters of statutory interpretation.¹²

[11] Unless there is a good reason for the definition of “assignment” to apply more narrowly in a given context, “assignment” under article 9 includes both an outright transfer of ownership and a contingent transfer for security.¹³ Comment

¹⁰ *State v. Galvan*, 305 Neb. 513, 941 N.W.2d 183 (2020).

¹¹ *Id.*

¹² *Blue Valley Co-op v. National Farmers Org.*, 257 Neb. 751, 600 N.W.2d 786 (1999), *disapproved on other grounds*, *Weyh v. Gottsch*, 303 Neb. 280, 929 N.W.2d 40 (2019). See, also, *Fjellin ex rel. Leonard Van Liew v. Penning*, 41 F. Supp. 3d 775 (D. Neb. 2014).

¹³ See §§ 9-102, comment 26, and 9-109.

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26 of § 9-102 explains that article 9 uses “assignment” in numerous provisions but that it and its derivatives are not defined by the UCC. Comment 26 of § 9-102 states that “[t]his article generally follows common usage by using the terms ‘assignment’ and ‘assign’ to refer to transfers of rights to payment, claims, and liens and other security interests” and that “[d]epending on the context, [‘assignment’] may refer to the assignment or transfer of an outright ownership interest or to the assignment or transfer of a limited interest, such as a security interest.” We find no convincing justification for limiting the use of “assignment” in the context of § 9-406(a) when there is a presently exercisable security interest.

Indeed, comment 5 of § 9-406 indicates that the drafters intended “assignment” to include contingent transfers for security. In discussing certain types of assignments, comment 5 identifies “assignment of an account (whether outright *or to secure an obligation*)” and “*assignments of rights to payment as security* and other assignments of rights to payment such as accounts and chattel paper.”¹⁴ Comment 5 additionally includes an example hypothetical involving a security interest which applies § 9-406.

Other sections of article 9 support a reading of “assignments” to include both outright transfers of ownership and contingent transfers for security. For instance, Neb. U.C.C. § 9-209 (Reissue 2001) imposes a duty on an account debtor to free up collateral when there is no longer any outstanding “secured obligation” or commitment to give value in the future. In establishing that a “secured party” has a duty upon demand from the “debtor” to release the account debtor from any further obligation to the secured party, § 9-209 identifies the account debtor as one that “has received notification of *an assignment to the secured party as assignee* under section 9-406(a).”¹⁵ Section 9-209(c) specifies that this section does

¹⁴ § 9-406, comment 5 (emphasis supplied).

¹⁵ § 9-209(b) (emphasis supplied).

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not apply to assignments from the sale of accounts, chattel paper, or payment intangibles. Accordingly, by the language of § 9-209, that section supports the conclusion that “assignment” under § 9-406 includes those transfers which provide interests in specified payment rights to secure obligations.

Utilizing the current language of article 9, the U.S. District Court for the District of Arizona analyzed Arizona’s version of § 9-406(a).¹⁶ The court noted holdings by previous courts that notification of a security interest in the amount due is the same as notification that the amount due has been assigned and concluded that under Arizona’s statute, there is “‘no meaningful difference between a security interest and an assignment.’”¹⁷

Similarly, Colorado’s Arapahoe County District Court in *Garber v. TouchStar Software Corp*¹⁸ found that the UCC makes “‘no distinction between a party with a security interest in a debtor’s accounts receivable and a party who is an assignee of a debtor’s accounts receivable.’” Several additional courts have also analyzed security agreements as assignments under the current article 9 version.¹⁹

In applying previous versions of article 9, other jurisdictions have determined there is no meaningful difference between an “assignment” and a “security interest” under the UCC. The Eighth Circuit in *In re Apex Oil Co.*²⁰ held that “notice of a security interest constitutes notice of an assignment for purposes of security under Article 9,” explaining that “[w]e see no meaningful difference between a security interest and an

¹⁶ *ARA Inc. v. City of Glendale*, 360 F. Supp. 3d 957 (D. Ariz. 2019).

¹⁷ *Id.* at 967.

¹⁸ *Garber v. TouchStar Software Corp*, No. 2009 CV1189, 2011 WL 12526062 at *4 (Colo. Dist. Nov. 10, 2011).

¹⁹ See, *Lake City Bank v. R.T. Milord Co.*, No. 18 C 7159, 2019 WL 1897068 (N.D. Ill. Apr. 29, 2019); *Magnolia Financial Group v. Antos*, 310 F. Supp. 3d 764 (E.D. La. 2018); *ImagePoint, Inc. v. JPMorgan Chase Bank, Nat.*, 27 F. Supp. 3d 494 (S.D.N.Y. 2014); *Swift Energy Operating v. Plemco-South*, 157 So. 3d 1154 (La. App. 2015).

²⁰ *In re Apex Oil Co.*, 975 F.2d 1365, 1369, 1370 (8th Cir. 1992).

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assignment for purposes of security[and i]n fact, they appear to be the same thing under Article 9.” Similarly, the Supreme Court of Maine held that “[e]ven though Article 9 usually refers to a creditor with a security interest as a ‘secured party,’ a secured party with a security interest in accounts is the ‘assignee’ under [Maine’s secured transactions statute].”²¹ The U.S. Bankruptcy Court for the Eastern District of Tennessee also held that “‘assignee’ under [the Tennessee UCC] includes a secured party with a security interest in accounts or general intangibles.”²²

MP Nexlevel cites *IIG Capital LLC v. Archipelago, L.L.C.*²³ for the proposition that the use of the assignment derivatives in § 9-406 apply only to transfers of ownership and not contingent transfers for security. Specifically, MP Nexlevel quotes:

Plaintiff also argues that a secured party with a security interest is the equivalent of an assignee for purposes of UCC 9-406. However, the cases plaintiff cites for this proposition do not support it. The cited cases deal with a distinct section of the UCC (former UCC 9-318 [1]), which provided that unless otherwise agreed, the rights of an assignee are subject to the terms of the original contract between the account debtor and assignor, including any defenses authorized therein While these cases treat assignees and holders of security interests similarly for purposes of holding them subject to defenses available to the original account debtors, they provide no authority to treat plaintiff’s security interest as an assignment for collection purposes under UCC 9-406.²⁴

²¹ *Maine Farmers Exch. v. Farm Credit of Maine*, 789 A.2d 85, 88 n.7 (Me. 2002).

²² *In re Otha C. Jean & Associates, Inc.*, 152 B.R. 219, 223 (E.D. Tenn. 1993).

²³ *IIG Capital LLC v. Archipelago, L.L.C.*, 36 A.D.3d 401, 829 N.Y.S.2d 10 (2007).

²⁴ *Id.* at 404, 829 N.Y.S.2d at 3.

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In *IIG Capital LLC*, the secured party's interest was contingent upon an event of default but none was alleged.²⁵ The court dismissed the secured party's claim, stating that "plaintiff's right to collect on the collateral is expressly conditioned on an event of default, and no such default is alleged in the complaint."²⁶ Its statement evaluating whether a security interest was an assignment was dicta.

[12] Also, the security interest in *IIG Capital LLC* is distinguishable from the one in our review. Contrary to the security interest held by First State, the security interest in *IIG Capital LLC* was not alleged to be presently exercisable at the time of the notice, because it was contingent on the occurrence of an event that had not been alleged.²⁷ As stated above, the determination of whether a sale or grant of an interest amounts to an assignment as used in a given statute depends upon the context of the statute and the interest given.²⁸ Here, First State's security interest was presently exercisable due to Husker Underground's breach. Such context is distinct from a presently nonexercisable security interest which is contingent on the occurrence of a given event and which contingent event is not alleged to have occurred.

[13] In consideration of all of the above, we hold that "assignment" and its derivatives under § 9-406(a) apply to presently exercisable security interests.

SUFFICIENCY OF § 9-406(a) NOTICE

We next address whether First State's notification and authentication was sufficient to impose the § 9-406(a) duty upon MP Nexlevel to discharge its obligations on its Husker Underground agreement by paying First State.

²⁵ See *id.*

²⁶ *Id.*

²⁷ See *id.*

²⁸ See § 9-102, comment 26.

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[14-16] Whether a notice is sufficient depends upon the facts of each case.²⁹ In order to be sufficient, the notice has to reasonably identify the rights assigned and demand payment to the assignee.³⁰ A reasonable identification need not identify the right to payment with specificity, and “magic words” are not required for a notice to be effective.³¹

Here, First State provided sufficient notice of its currently exercisable security interest in Husker Underground’s account with MP Nexlevel. In its notices, First State identified itself, disclosed its agreements with Husker Underground which showed that Husker Underground had granted it a security interest in its accounts, and alleged Husker Underground had breached its loan obligations under those agreements. The notices directed MP Nexlevel to pay all amounts owed on Husker Underground’s accounts directly to First State and warned that failure to do so could result in adverse consequences for MP Nexlevel. First State authenticated the security interest by attaching a copy of a UCC financing statement identifying the security interest.

The allegation that Husker Underground contested its breach at the time of First State’s notices does not change the facts that Husker Underground had breached its obligations to First State, that First State notified MP Nexlevel of Husker Underground’s breach and of its security interest, that First State provided documentation of that security interest, and that First State directed MP Nexlevel to pay all amounts owed on Husker Underground’s accounts to First State, directly warning that failure to do so could result in adverse consequences for MP Nexlevel.

If MP Nexlevel was uncertain whether the breach occurred due to Husker Underground’s representations, § 9-406(c) provides a means for MP Nexlevel to obtain additional proof

²⁹ See *ARA Inc.*, *supra* note 16.

³⁰ § 9-406(a) and (b)(1).

³¹ See § 9-406, comment 3. See, also, *ARA Inc.*, *supra* note 16.

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of First State's present authority to collect on the collateral. Section 9-406(c) states: "[I]f requested by the account debtor, an assignee shall seasonably furnish reasonable proof that the assignment has been made," and "[u]nless the assignee complies, the account debtor may discharge its obligation by paying the assignor, even if the account debtor has received a notification under [§ 9-406(a)]." As discussed above, an "assignment" and its derivatives under § 9-406 include presently exercisable security interests. Accordingly, if MP Nexlevel had reason to doubt that First State held a presently exercisable security interest to MP Nexlevel's accounts with Husker Underground, § 9-406(c) allows MP Nexlevel to request additional "reasonable proof" of such assignment, which First State would be required to "seasonably furnish."

We find First State's notices were sufficient to reasonably identify that First State had a presently exercisable security interest on Husker Underground's account with MP Nexlevel, provide authentication of that security interest, and demand MP Nexlevel perform its obligations on its agreement with Husker Underground by paying First State. As such, § 9-406(a) required that MP Nexlevel could discharge its obligations only by paying First State and not by paying Husker Underground. This is contrary to MP Nexlevel's assertion that it was entitled to the defense of discharge in that it fully performed and paid Husker Underground the obligated money because, as described in § 9-406(a), after receiving the notice, MP Nexlevel could discharge its obligation only by paying First State. Because MP Nexlevel continued paying Husker Underground and failed to pay First State, it breached its contractual obligations.

DEFAULT UNDER § 9-607(a)

In order to exercise its authority under § 9-607(a)(3) to enforce MP Nexlevel's obligations, § 9-607(a) conditions this authority by stating that "[i]f so agreed, and in any event after default." The district court seemingly interpreted this language as requiring that should a default be contested, the

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default occurs when it is adjudicated or the parties agree. The district court based its holding on § 9-607(e)'s statement that "[t]his section does not determine whether an account debtor . . . owes a duty to a secured party" and its finding that requiring an account debtor to determine whether a breach actually occurred imposes an additional duty upon the account debtor to the secured party.³²

[17] As acknowledged above, § 9-607 does not impose a duty upon an account debtor. However, § 9-406(a) modifies an account debtor's obligations under its agreement with the debtor if certain criteria are met and § 9-607(a)(3) permits the secured party to enforce the account debtor's obligations.³³ A secured party's exercise of its § 9-607(a)(3) authority against the account debtor is not the imposition of a duty upon the account debtor but the enforcement of existing duties.

[18,19] Additionally, § 9-607(a) limits its application only to "after default" and default is not contingent on an adjudication or agreement. Article 9 leaves to the agreement of the parties the circumstances giving rise to a default; default is whatever the security agreement says it is.³⁴

Here, the agreements between Husker Underground and First State all provide that default includes failure to make payments to First State when due. It is presently uncontested that Husker Underground had failed to make these payments when First State sent MP Nexlevel the notices. Although Husker Underground initially disputed its default and the matter had to be adjudicated, the date of default does not

³² See *ImagePoint, Inc.*, *supra* note 19.

³³ See, e.g., *Agri-Best Holdings v. Atlanta Cattle Exchange*, 812 F. Supp. 2d 898 (N.D. Ill. 2011); *Reading Co-Op. Bank v. Suffolk Const. Co.*, 464 Mass. 543, 984 N.E.2d 776 (2013); *Greenfield Commercial Credit, L.L.C. v. Catlettsburg Refining, L.L.C.*, No. Civ. A. 03-3391, 2007 WL 97068 (E.D. La. Jan. 9, 2007); *Garber*, *supra* note 18.

³⁴ See § 9-607, comment 3. See, also, *First Nat. Bank of Black Hills v. Beug*, 400 N.W.2d 893 (S.D. 1987).

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change simply because Husker Underground had previously challenged it.

If MP Nexlevel did not have sufficient information to determine whether the default occurred and First State was presently authorized to collect on the collateral, it could have requested additional proof from First State pursuant to § 9-406(c) as discussed above. And, if First State did not comply, § 9-406(a) would not have imposed an additional duty, MP Nexlevel would be able to continue discharging its obligations by paying Husker Underground, and § 9-607(a) would not grant First State the authority to bring an action to enforce an obligation to pay it directly. Because MP Nexlevel did not request such additional proof and the notice under § 9-406(a) was sufficient, MP Nexlevel had a duty under § 9-406(a) to pay First State directly to discharge its contractual obligations and § 9-607(a)(3) provided First State the authority to step into Husker Underground's place and enforce MP Nexlevel's obligations as adjusted by operation of § 9-406(a).

We conclude that the district court erred in its requirement that should a debtor contest that a default occurred at the time of the § 9-406(a) notice, the default under § 9-607(a) to allow the secured party to enforce an account debtor's obligation to pay it directly does not occur until the default is adjudicated or the parties otherwise agree. Instead, the default occurs when determined by the security agreement—in this case, when Husker Underground failed to make timely payments. If the debtor contests the default, the account debtor is authorized to exercise its authority under § 9-406(e) to acquire more proof of the secured party's presently exercisable security interest. If the account debtor does not seek additional proof or if the secured party provides adequate proof, § 9-406(a) imposes a duty upon the account debtor to discharge its obligations by paying the secured party and the secured party can enforce those obligations under § 9-607(a)(3). The date of default relevant to § 9-607(a) remains as determined by the security agreement.

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STANDING

[20,21] For completeness, MP Nexlevel claims that First State lacked standing to bring this action, because First State was not in privity of contract and §§ 9-406 and 9-607 do not provide private rights of action. However, First State did not bring claims for violations of §§ 9-406 and 9-607, but instead brought claims for breach of contract and account stated. First State's reliance on §§ 9-406 and 9-607 was merely for the purpose of placing itself in the position to enforce Husker Underground's agreement with MP Nexlevel as adjusted by operation of § 9-406(a) so as to require payment be sent to First State. Under § 9-607(a)(3), it is unnecessary for a secured party to first become the owner of the collateral pursuant to a disposition or acceptance.³⁵ A secured party may collect and enforce obligations included in collateral in its capacity as a secured party.³⁶

[22-24] Standing refers to whether a party had, at the commencement of the litigation, a personal stake in the outcome of the litigation that would warrant a court's or tribunal's exercising its jurisdiction and remedial powers on the party's behalf.³⁷ Standing involves a real interest in the cause of action, meaning some legal or equitable right, title, or interest in the subject matter of the controversy.³⁸ To have standing, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties.³⁹

First State was authorized by its security agreements with Husker Underground and § 9-607(a)(3) to step into Husker Underground's place to enforce MP Nexlevel's contractual obligations. Further, § 9-406(a) imposes a duty upon MP

³⁵ See § 9-607, comment 6.

³⁶ See *id.* See, also, *Agri-Best Holdings*, *supra* note 33.

³⁷ *Applied Underwriters v. S.E.B. Servs. of New York*, 297 Neb. 246, 898 N.W.2d 366 (2017).

³⁸ *Id.*

³⁹ *Id.*

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Nexlevel to discharge its obligation by paying First State and prevents MP Nexlevel from claiming it satisfied its contractual obligations by paying Husker Underground. As a result, First State had standing to bring its claims against MP Nexlevel.

CONCLUSION

The district court erred in granting MP Nexlevel summary judgment and dismissing First State's complaint. First State was authorized by § 9-607(a)(1) to notify Husker Underground, as the account debtor obligated under the collateral, to make payment for its benefit due to Husker Underground's default. Section 9-406(a) applies to presently exercisable security interests, and because First State's notice and authentication were sufficient, § 9-406(a) imposed a duty on MP Nexlevel to discharge its obligations under its agreement with Husker Underground by paying directly to First State. When MP Nexlevel continued paying to Husker Underground and failed to pay directly to First State, MP Nexlevel breached its obligations and First State was authorized by § 9-607(a)(3) to step into Husker Underground's place and enforce MP Nexlevel's contractual obligations as adjusted by operation of § 9-406(a). After having received notice of First State's claim, MP Nexlevel could have protected itself from liability by the very simple expedient of either demanding further proof (if it doubted the truth of First State's claims) or making the payments jointly to Husker Underground and First State. Because MP Nexlevel failed to do so, we must reverse the district court's order granting summary judgment in favor of MP Nexlevel and dismissing First State's complaint. We remand this matter to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

MILLER-LERMAN and STACY, JJ., not participating.

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

BRIAN LASSALLE, AND ALL OTHERS SIMILARLY SITUATED,
APPELLANT, v. STATE OF NEBRASKA AND STATE OF
NEBRASKA, ACTING THROUGH THE NEBRASKA
DEPARTMENT OF HEALTH AND HUMAN
SERVICES, ET AL., APPELLEES.

948 N.W.2d 725

Filed September 18, 2020. No. S-19-810.

1. **Summary Judgment: Appeal and Error.** An appellate court affirms a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. ____: _____. An appellate court reviews the district court's grant of summary judgment de novo, viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor.
3. **Contracts.** The interpretation of a contract and whether the contract is ambiguous are questions of law.
4. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
5. **Employer and Employee: Employment Contracts: Wages.** A payment will be considered a wage subject to the Nebraska Wage Payment and Collection Act if (1) it is compensation for labor or services, (2) it was previously agreed to, and (3) all the conditions stipulated have been met.
6. **Contracts.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them.
7. _____. A contract must receive a reasonable construction and must be construed as a whole, and if possible, effect must be given to every part of the contract.

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8. _____. A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include.
9. **Contracts: Intent.** A court should avoid interpreting contract provisions in a manner that leads to unreasonable or absurd results that are obviously inconsistent with the parties' intent.
10. **Contracts.** Extrinsic evidence is not permitted to explain the terms of a contract that is unambiguous.
11. **Moot Question.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Kathleen M. Neary and Vincent M. Powers, of Powers Law, and R. Joseph Barton and Vincent Cheng, of Block & Leviton, L.L.P., for appellant.

Douglas J. Peterson, Attorney General, and Stephanie Caldwell for appellees.

HEAVICAN, C.J., MILLER-LEMAN, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

PAPIK, J.

On several occasions between 2016 and 2019, Brian Lassalle, an employee of the Nebraska Department of Health and Human Services (DHHS), sought to take and be paid for leave hours during pay periods in which he also worked his full complement of hours. When DHHS did not allow him to do so, he brought an action against the State alleging various claims, including a violation of the Nebraska Wage Payment and Collection Act (NWPCA), see Neb. Rev. Stat. §§ 48-1228 to 48-1234 (Reissue 2010, Cum. Supp. 2018 & Supp. 2019). He also filed a motion for class certification in which he asked to represent a class of similarly situated DHHS employees. The district court entered summary judgment in favor of the State and denied Lassalle's motion for class certification

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as moot. Finding no error on the part of the district court, we affirm.

BACKGROUND

Lassalle's Allegations.

Since 1993, Lassalle has worked for DHHS as a security specialist and medication aide at the Lincoln Regional Center. Lassalle receives pay every 2 weeks and is paid by the hour. As a term of his employment, Lassalle receives paid vacation, sick, and bereavement leave.

In this case, Lassalle sought to bring an action on behalf of himself and other DHHS employees against the State of Nebraska. He alleged that beginning in July 2016, DHHS refused to pay him and other employees for certain vacation, sick, and bereavement leave hours that were approved by supervisors and recorded by the employees. Lassalle asserted that this happened because in July 2016, DHHS began prohibiting employees from taking and being paid for leave hours to the extent that use would cause the employee to exceed more than 40 hours per week if paid weekly or more than 80 hours every 2 weeks if paid on that basis. According to Lassalle, he had previously been paid for leave time during pay periods in which he recorded more than 80 hours of work and leave time. Lassalle alleged that the refusal to pay him for the leave hours at issue violated the NWPCA; the State Tort Claims Act, see Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2014, Cum. Supp. 2018 & Supp. 2019); and the State Contract Claims Act, Neb. Rev. Stat. §§ 81-8,302 to 81-8,306 (Reissue 2014).

Motions for Class Certification.

Early in the case, Lassalle filed a motion for class certification. Lassalle defined the class as:

All current and former full-time non-exempt employees of [DHHS]

(a) who work at one or more of the following facilities: the Lincoln Regional Center, Norfolk Regional Center, Hastings Regional Center, Whitehall Psychiatric

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Residential Treatment Facility, Kearn[e]y Youth Rehabilitation & Treatment Center, Geneva Youth Rehabilitation & Treatment Center, and Beatrice State Department Center (collectively “the Facilities”); or

(b) who took paid vacation or sick leave on or after June 27, 2016[,] while they worked at any of the Facilities and have not been compensated for all the hours corresponding to such leave.

The district court overruled Lassalle’s motion for class certification. The court reasoned that although the class was sufficiently numerous, a potential conflict of interest existed between class members, because if Lassalle prevailed, certain class members who might prefer to keep rather than use accrued leave would lose the chance to do so. Alternatively, the district court found that class certification should be denied because whether and to what extent any class member would be entitled to recover would be subject to varying proof.

Lassalle filed a second amended complaint in which he attempted to address the potential conflict of interest found by the district court. The second amended complaint asked that the district court order that class members be allowed to elect whether they wished to receive back wages or to retain their accrued leave. Lassalle later filed a renewed motion for class certification.

Summary Judgment.

Prior to the district court’s ruling on Lassalle’s renewed motion for class certification, the State filed a motion for summary judgment. The district court held one hearing in which it received evidence and heard argument on both motions. We summarize certain evidence offered in support of and in opposition to the State’s motion for summary judgment below.

The district court received two labor contracts between the State and the union representing the bargaining unit to which Lassalle belonged. The first labor contract applied between July 1, 2015, and June 30, 2017, and the second applied between July 1, 2017, and June 30, 2019. There was no dispute

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that these contracts set forth the terms and conditions of Lassalle's employment.

The relevant provisions of the labor contracts were substantially the same. Each labor contract stated that it "supersedes and cancels all prior practices and agreements, whether written or oral, unless expressly stated to the contrary," and "constitutes the complete and entire agreement between the parties."

In both labor contracts, the State reserved the right "to operate and direct the employees of the State . . . to the extent that such rights do not violate its legal authority, and to the extent such rights are not modified by [the contracts]." The labor contracts provided that those rights included "[t]he right to adopt, modify, change, enforce, or discontinue any existing rules, regulations, procedures or policies."

The labor contracts also contained provisions concerning employees' right to paid leave. Under the labor contracts, employees earned vacation and sick leave according to the duration of their employment. Another provision stated that employees may be granted up to 5 days of bereavement leave in the event of a death in the employee's immediate family. A provision of the labor contracts pertaining to overtime work provided that, with an exception not relevant to Lassalle, "holidays shall be considered as work hours for overtime purposes," but that "[l]eave time (vacation, sick, etc.) shall not be considered as hours worked."

Under the labor contracts, employees received a lump-sum payment for any unused vacation leave upon separation of employment. The labor contracts also provided, however, that employees forfeit any accumulated vacation time in excess of 35 days at the end of each year. The contracts provided that "[v]acation leave should be applied for in advance by the employee and may be used only when approved by the Agency Head and/or his/her Designee. Vacation leave may not be unreasonably denied or deferred so that the employee is deprived of vacation rights." The labor contract in effect between July 1, 2017, and June 30, 2019, contained an additional provision

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obligating the employing agency “to provide reasonable opportunity for a State employee to use rather than forfeit accumulated vacation leave.” Under that provision, if an employee made a reasonable request to use vacation leave before the leave must be forfeited and that request was denied, the State was obligated to pay the employee the cash equivalent of the forfeited and denied vacation leave.

Both labor contracts provided that all sick leave was forfeited upon separation from employment, except that employees age 55 and older and certain other employees were entitled, upon separation, to a payment equivalent to one-quarter of their accumulated sick leave not to exceed 480 hours. The labor contracts contained no provision regarding payouts for unused bereavement leave, and the parties agree that unused bereavement leave was forfeited at the end of each year. The labor contracts provided that bereavement leave “will not be unreasonably denied.”

In addition to the labor contracts, the district court received evidence regarding a DHHS policy concerning the use of leave. The district court received an affidavit of DHHS’ chief of staff, in which she stated the following:

Since at least 2013, it has been the policy of the DHHS that employees are only allowed to report more than 40 hours of time in a single work period (or more than 80 hours in a two-week work period) when actually working overtime. DHHS hourly employees are not allowed to use leave time to exceed 40 hours in a single work period or 80 hours in a two-week work period. For example, an employee that works a 40 hour work week cannot report 35 hours of work and 8 hours of leave time. Only 5 hours of leave time may be used in this situation.

Other employees of DHHS also testified as to this policy. Additionally, the policy was reflected in a document received by the district court entitled “KRONOS Quick Start Guide for Employees” (KRONOS guide). KRONOS is a time and attendance software used by DHHS to track employees’ worktime

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and leave usage. The KRONOS guide, which indicated it was updated in 2013, provided:

Employees are only allowed to report more than 40 hours of time in a single week when working overtime. Employees are not allowed to use leave time to exceed 40 hours in the week. For example, an employee cannot report 35 hours of work and 8 hours of vacation. Only 5 hours of vacation may be used in this situation.

The district court also received evidence that it came to the attention of DHHS in 2016 that at some DHHS facilities, including the Lincoln Regional Center, some employees were recording and being paid for leave time in excess of the total hours allowed in the employees' pay periods. In response to that information, on June 8, 2016, the deputy human resources director at DHHS emailed a memorandum to all DHHS supervisors. The memorandum stated that "[e]mployees cannot have more than 40 hours in any work week unless they have **physically worked** more than 40 hours." (Emphasis in original.) It went on to provide a similar example to the one noted in the KRONOS guide: "If an employee works 34 hours in a week, and submits a leave request for 8 hours—the supervisor should only approve 6 hours." The district court also received as an exhibit a document indicating that on July 13, Lassalle, along with others, was forwarded an email from human resources staff at the Lincoln Regional Center stating that if a full-time employee actually worked 80 hours, paid leave was unavailable.

The district court also received at the summary judgment hearing interrogatory answers of Lassalle in which he identified 11 different days between September 2016 and January 2019 on which he claimed that his supervisor approved and he took and recorded vacation, sick, or bereavement leave but was denied pay. According to Lassalle, he was denied approximately \$1,300 as a result of DHHS' refusal to allow him to take and be paid for the leave at issue.

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*District Court Order on Summary Judgment
and Class Certification.*

The district court issued an order in which it sustained the State's motion for summary judgment and overruled Lassalle's motion for class certification. The district court addressed the State's summary judgment motion first. In analyzing Lassalle's NWPCA claim, the district court considered the labor contracts and found that they contained no agreement to pay Lassalle for leave time exceeding 80 hours in a pay period. Without evidence of such an agreement, the district court concluded the State was entitled to judgment as a matter of law on his NWPCA claim. The district court also found the State was entitled to summary judgment on Lassalle's claims under the State Tort Claims Act and the State Contract Claims Act.

In light of its finding that the State was entitled to summary judgment, the district court determined that Lassalle's renewed motion for class certification was moot. Even so, the district court, "for the sake of judicial efficiency," went on to explain why it would overrule the motion for class certification even if it had not entered summary judgment against Lassalle. It stated that although Lassalle had attempted to remedy the issues the district court identified when it denied his initial motion for class certification, Lassalle did not explain why the evidence and argument he relied upon were not offered at the time of the first motion. The district court also noted that it believed class certification at that point would result in unacceptable delay.

ASSIGNMENTS OF ERROR

Lassalle assigns 12 errors on appeal, all of which relate to the entry of summary judgment in favor of the State and the denial of his motion for class certification. He assigns, consolidated and restated, that the district court erred in (1) sustaining the State's motion for summary judgment on his NWPCA claim and (2) denying his motions for class certification.

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STANDARD OF REVIEW

[1,2] An appellate court affirms a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Drought v. Marsh*, 304 Neb. 860, 937 N.W.2d 229 (2020). An appellate court reviews the district court's grant of summary judgment de novo, viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. *Pitts v. Genie Indus.*, 302 Neb. 88, 921 N.W.2d 597 (2019).

[3,4] The interpretation of a contract and whether the contract is ambiguous are questions of law. *Timberlake v. Douglas County*, 291 Neb. 387, 865 N.W.2d 788 (2015). An appellate court independently reviews questions of law decided by a lower court. *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 829 N.W.2d 703 (2013).

ANALYSIS

NWPCA Claim.

As mentioned above, Lassalle asserted multiple theories of recovery in the district court. On appeal, however, Lassalle challenges only the entry of summary judgment in favor of the State on his NWPCA claim. We thus limit our analysis to that claim.

Before turning to the NWPCA itself, however, we pause to clarify the basis of Lassalle's claim and to identify the issues that are in dispute. As explained above, Lassalle contends that during several pay periods between 2016 and 2019, he sought to take and be paid for leave time even though the combined total of his work and leave hours exceeded 80. This apparently came about as a result of Lassalle's receiving approval to take time off on days he was scheduled to work, but also agreeing to work additional hours at other times during the same pay period. Lassalle would then record both a full 80 hours of work and the additional leave hours. The State does not

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dispute that it did not pay Lassalle for leave hours to the extent they exceeded 80 hours on those occasions.

Lassalle makes a number of concessions as well. He does not dispute that DHHS never denied him pay for hours he worked and that in each of the instances in which DHHS did not permit him to take or be paid for leave, it did not deduct those hours from his leave balances. Lassalle also admits that he had never lost or forfeited any vacation or sick leave under the labor contracts. The issue in this case is thus whether the State violated the NWPCA when it refused to permit Lassalle to take and be paid for leave hours when doing so would cause him to exceed 80 hours of work and leave during a pay period. With that background established, we turn to the NWPCA.

[5] The NWPCA essentially permits an employee to sue his or her employer if the employer fails to pay the employee's wages as they become due. *Pick v. Norfolk Anesthesia*, 276 Neb. 511, 755 N.W.2d 382 (2008). "Wages" are defined as "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." § 48-1229(6). On the basis of this statutory language, we have held that a payment will be considered a wage subject to the NWPCA if (1) it is compensation for labor or services, (2) it was previously agreed to, and (3) all the conditions stipulated have been met. *Pick v. Norfolk Anesthesia, supra*.

It is clear that sick and vacation leave plans like those provided under the labor contracts qualify as compensation for labor or services. The NWPCA specifically provides that sick and vacation leave plans are "fringe benefits" and thus included within the act's definition of "wages." See § 48-1229(4). See, also, *Timberlake v. Douglas County*, 291 Neb. 387, 865 N.W.2d 788 (2015).

But establishing that the leave benefits qualify as compensation for labor or services proves only the first element of an NWPCA claim. In order to prove the other two elements,

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Lassalle was also required to show that the State previously agreed to pay him for the leave at issue and that all the conditions stipulated to receive that pay were met. It was here that the district court found that Lassalle's NWPCA claim fell short: it found that the State did not agree in the labor contracts that it would pay Lassalle for vacation, sick, or bereavement leave to the extent doing so would allow Lassalle to be paid for more than 80 hours during a pay period. Lassalle offers a number of reasons why he believes this was erroneous, but, as we will explain, we are not persuaded.

Lassalle first argues that the district court erred by giving any consideration to whether there was a prior agreement to pay him for the leave at issue. Lassalle asserts that under the NWPCA, the question of whether there was an agreement to pay compensation is an issue of fact that should not have been resolved at summary judgment. We disagree. Lassalle brought his claim under the NWPCA, but he alleged in his operative complaint that his right to payment arose out of the labor contracts. When, as here, a party's NWPCA claim is premised on a written contract, the meaning of that contract may present a question of law to be decided by the court. As we have previously observed, "[i]n virtually every case brought under the [NWPCA], the employee and the employer dispute whether wages are owed based on an existing contract or agreement of some sort. The court then determines which party's interpretation of the agreement is correct." *Professional Firefighters Assn. v. City of Omaha*, 290 Neb. 300, 307, 860 N.W.2d 137, 142 (2015). A court may make such a determination because the meaning of an unambiguous contract is a question of law. See *Kasel v. Union Pacific RR. Co.*, 291 Neb. 226, 865 N.W.2d 734 (2015). That is what we understand the district court to have done here.

[6-9] Neither do we agree with Lassalle that the district court was incorrect when it determined that the labor contracts did not contain an agreement to pay Lassalle for leave hours in excess of 80 hours in a pay period. In reviewing the district

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court's interpretation of the labor contracts, we are guided by familiar principles. When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. *Coffey v. Planet Group*, 287 Neb. 834, 845 N.W.2d 255 (2014). A contract must receive a reasonable construction and must be construed as a whole, and if possible, effect must be given to every part of the contract. *Kercher v. Board of Regents*, 290 Neb. 428, 860 N.W.2d 398 (2015). A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include. *Ray Anderson, Inc. v. Buck's, Inc.*, 300 Neb. 434, 915 N.W.2d 36 (2018). A court should avoid interpreting contract provisions in a manner that leads to unreasonable or absurd results that are obviously inconsistent with the parties' intent. *Timberlake v. Douglas County*, 291 Neb. 387, 865 N.W.2d 788 (2015).

Lassalle cannot point to any provision in the labor contracts in which the State agreed that employees could take and be paid for leave hours in addition to being compensated for a fully worked pay period. The labor contracts did provide that “[v]acation leave may not be unreasonably denied or deferred so that the employee is deprived of vacation rights.” This provision, however, does not give employees a right to use vacation leave in any manner they choose or a right to be paid for vacation leave during pay periods in which they actually work a full schedule. In any event, we do not see how this provision could be of any assistance to Lassalle, because it refers only to employees who are denied vacation leave *and* are thereby deprived of vacation rights. Lassalle acknowledges that he has never forfeited any vacation leave.

The provision in the contracts stating that “[b]ereavement leave will not be unreasonably denied” is also of no assistance to Lassalle. Like the language regarding vacation leave, this provision does not reflect an agreement that employees will be

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paid for bereavement leave to the extent it would cause them to exceed their normal paid hours during a pay period.

The labor contracts did contain a provision that made clear that leave time was not to be counted as hours worked for overtime purposes. The district court relied on this provision in the course of concluding that there was no agreement to pay Lassalle for the leave time at issue. Lassalle criticizes the district court's reliance on this provision, arguing that it is irrelevant because he did not claim an entitlement to overtime pay. But even if Lassalle is correct that the labor contracts' overtime provisions do not directly address his claim, it remains true that no provision of the labor contracts, outside of those dealing with overtime, refers to employees' right to be paid for more than 40 hours if paid weekly or more than 80 hours if paid every 2 weeks.

Not only did the labor contracts not contain any language suggesting an agreement to pay employees leave time in a pay period in which they worked a full schedule, they contained language giving DHHS the authority to enforce its policy prohibiting employees from using leave time in this fashion. As noted above, in the labor contracts, the State reserved the right to direct employees "to the extent such rights [were] not modified by [the labor contracts]," and that this included the "right to adopt, modify, change, enforce, or discontinue any existing rules, regulations, procedures, or policies."

Because the labor contracts contained no provision guaranteeing employees the right to use leave time to the extent that doing so would cause them to exceed their normal hours during a pay period, the State could, within the terms of the labor contracts, enforce its policy prohibiting employees from doing so. And while Lassalle strives to create a genuine issue of material fact regarding the policy, we do not see one. Lassalle principally points to deposition testimony from a longtime DHHS payroll processor that she had to change the way she processed payroll in response to DHHS' June 2016 memorandum regarding the usage of leave time. This testimony is undoubtedly

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evidence that DHHS did not consistently enforce its policy prior to June 2016, but that point is not in question. We do not believe this evidence creates a genuine dispute of material fact as to whether such a policy existed or that the labor contracts authorized DHHS to enforce it.

Lassalle also argues that the State could not enforce its policy in the instances at issue, because a supervisor approved his taking of leave, he did not work on the days leave was approved, and he recorded that leave on his timesheets. He apparently takes the position that the State agreed to pay leave when those conditions were met. But while those steps may be necessary conditions to an employee's receiving leave pay under the labor contracts, Lassalle points to nothing in the labor contracts that provides those are sufficient conditions to receiving leave pay.

In the instances at issue, Lassalle may have received supervisor approval to miss work on a particular day he was scheduled, but under the policy adopted by DHHS—which, as we have discussed above, the labor contracts authorized it to enforce—he was not permitted to use leave time to the extent it would cause his total hours to exceed 80 in a pay period. Further, there is no dispute that DHHS did not, in fact, deduct any leave hours from Lassalle's accumulated totals in the instances at issue. So while Lassalle may not have received leave pay for some days in which his supervisor approved his absence from work, he did not actually use leave hours on those days either. There is nothing in the labor contracts indicating that employees could, prior to separation from employment and during a pay period in which they were compensated for a full 80 hours, also receive pay for leave hours that were not used.

[10] Lassalle makes other arguments that the district court erred by granting summary judgment on his NWPCA claim, but in light of our conclusion that the district court correctly concluded that the labor contracts contained no agreement to pay him for the leave at issue, they can be dispensed with

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quickly. Lassalle argues, for example, that the district court ignored deposition testimony of certain current and former state employees. He argues that this testimony was favorable to his position there was an agreement to pay him for the leave at issue and that by not addressing it, the district court failed to view the evidence in the light most favorable to him as the nonmoving party. Although we understand much of the testimony Lassalle relies upon to recognize only a general right of state employees to accrue and use leave benefits, it is not necessary for us to parse that testimony in detail, because it is extrinsic to the labor contracts. Extrinsic evidence is not permitted to explain the terms of a contract that is unambiguous. *Ray Anderson, Inc. v. Buck's, Inc.*, 300 Neb. 434, 915 N.W.2d 36 (2018).

Finally, Lassalle argues that the district court erred by focusing exclusively on the labor contracts. In both his briefs and at oral argument, Lassalle emphasized that he brought an NWPCA claim and not a claim for breach of the labor contracts. But as we have discussed, to prevail on an NWPCA claim, the employee must show an agreement to pay the wages at issue, and Lassalle alleged that the labor contracts contained such an agreement. Given this allegation, we cannot fault the district court for analyzing the labor contracts to determine if they contained an agreement that would support Lassalle's NWPCA claim. Further, Lassalle has not identified any other agreement in which the State committed to pay him for leave under the circumstances at issue here.

The district court did not err by concluding as a matter of law that there was no prior agreement to pay Lassalle for the leave at issue and sustaining the State's motion for summary judgment on Lassalle's NWPCA claim.

Class Certification.

Lassalle also argues that the district court erred when it overruled his motion for class certification. The district court concluded that because it sustained the State's motion for

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summary judgment, Lassalle's motion for class certification was moot. We agree.

[11] A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *State v. Dunster*, 278 Neb. 268, 769 N.W.2d 401 (2009). Lassalle sought to represent a class of DHHS employees in an action against the State, but because the State was entitled to summary judgment on those claims, he could no longer do so. The class certification issue was moot. See, e.g., *Spaulding v. United Transp. Union*, 279 F.3d 901 (10th Cir. 2002) (holding that entry of summary judgment in favor of defendants mooted plaintiffs' argument that district court erred in denying motion for class certification); *Jibson v. Michigan Educ. Ass'n-NEA*, 30 F.3d 723, 734 (6th Cir. 1994) ("because we affirm the district court's grant of [the defendant's] motion for summary judgment, we also find that the district court did not err in subsequently refusing to rule on the motion for class certification, and in not granting any relief to the other purported class members"). See, also, *Cowen v. Bank United of Texas, FSB*, 70 F.3d 937 (7th Cir. 1995) (explaining that entry of summary judgment in favor of defendant moots motion for class certification if grounds for summary judgment would apply equally to other members of proposed class).

CONCLUSION

Because the district court did not err by sustaining the State's motion for summary judgment on Lassalle's NWPCA claim or by denying his motion for class certification as moot, we affirm.

AFFIRMED.

CASSEL, J., not participating.

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

STATE OF NEBRASKA, APPELLANT AND
CROSS-APPELLEE, v. JACK E. HARRIS,
APPELLEE AND CROSS-APPELLANT.

948 N.W.2d 736

Filed September 25, 2020. Nos. S-19-130, S-19-133.

1. **Jurisdiction.** A question of jurisdiction is a question of law.
2. **Judgments: Appeal and Error.** Appellate courts independently review questions of law decided by a lower court.
3. ____: _____. The construction of a mandate issued by an appellate court presents a question of law, on which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken.
6. **Final Orders: Appeal and Error.** Among the three types of final orders which may be reviewed on appeal is an order affecting a substantial right made during a special proceeding.
7. **Actions: Words and Phrases.** An action involves prosecuting the alleged rights between the parties and ends in a final judgment, whereas a special proceeding does not.
8. **Final Orders.** Whether an order affects a substantial right depends on whether it affects with finality the rights of the parties in the subject matter.
9. _____. Whether an order affects a substantial right depends on whether the right could otherwise effectively be vindicated.
10. **Final Orders: Appeal and Error.** An order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review.

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11. **Appeal and Error: Words and Phrases.** In appellate procedure, a “remand” is an appellate court’s order returning a proceeding to the court from which the appeal originated for further action in accordance with the remanding order.
12. **Courts: Appeal and Error.** After receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court.
13. **Courts: Judgments: Appeal and Error.** A lower court may not modify a judgment directed by an appellate court; nor may it engraft any provision on it or take any provision from it.
14. **Judgments: Appeal and Error.** No judgment or order different from, or in addition to, the appellate mandate can have any effect.
15. **Courts: Judgments: Jurisdiction: Appeal and Error.** Because a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court, any order attempting to do so is entered without jurisdiction and is void.

Appeals from the District Court for Douglas County: WILLIAM B. ZASTERA and JODI L. NELSON, Judges. Appeal in No. S-19-130 dismissed. Judgment in No. S-19-133 vacated, and cause remanded with directions.

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

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

MILLER-LERMAN, CASSEL, STACY, FUNKE, and PAPIK, JJ., and MOORE and WELCH, Judges.

PAPIK, J.

Two decades ago, following a jury trial, Jack E. Harris was convicted of first degree murder and use of a deadly weapon to commit a felony. His convictions were affirmed on direct appeal. As is often the case in such matters, years of litigation followed, in which Harris filed many motions collaterally attacking his convictions and sentences. After we remanded for further proceedings in an appeal involving such collateral attacks in 2017, the district court granted Harris’ motion

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for new trial and, later, his motion for absolute discharge on speedy trial grounds. On the State's appeal from these orders, we conclude that the district court did not comply with our mandate in an earlier appeal and that its orders granting Harris a new trial and absolute discharge were thus void. Accordingly, we vacate those orders and remand the cause for further proceedings.

I. BACKGROUND

1. CONVICTION, EARLIER PROCEEDINGS,
AND APPEALS BY HARRIS

In 2000, following a jury trial, Harris was convicted of first degree murder and use of a deadly weapon to commit a felony. He was sentenced to life imprisonment on the murder conviction and 10 to 20 years' imprisonment on the weapons conviction, to be served consecutively. We affirmed on direct appeal. See *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002) (*Harris I*).

Several unsuccessful motions and appeals by Harris followed. See *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004) (*Harris II*); *State v. Harris*, 274 Neb. 40, 735 N.W.2d 774 (2007) (*Harris III*); *State v. Harris*, 292 Neb. 186, 871 N.W.2d 762 (2015) (*Harris IV*); and *State v. Harris*, 296 Neb. 317, 893 N.W.2d 440 (2017) (*Harris V*).

In *Harris IV*, we reversed the district court order that dismissed Harris' second postconviction motion, which had been filed simultaneously with a new trial motion and a motion for writ of error coram nobis. Harris' motions rested on allegations (1) that Howard "Homicide" Hicks, Harris' accomplice and a key witness in Harris' trial, disclosed to fellow inmate Terrell McClinton that Hicks had lied during his testimony and that Hicks alone, not Harris, had killed the victim; (2) that another witness, Curtis Allgood, generally corroborated McClinton's account and provided details placing Hicks near the crime scene at the time of the murder; and (3) that Harris was unaware of this information until McClinton's contact with

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Harris' attorney in 2006 and was prevented from discovering the information earlier because of misconduct by the prosecutor and the State's witness.

The district court had earlier granted Harris leave to file a third amended postconviction motion raising claims similar to the second motion's and additional claims concerning the State's plea agreement with Hicks. Although the court, the parties, and the evidence gave indications that the third amended postconviction motion was addressed at the subsequent June 28, 2013, hearing, Harris had not filed it. At the hearing, the district court announced that the matter was before the court on the third amended motion for postconviction relief and took judicial notice of the bill of exceptions for Harris' trial in 1999. The State did not assert that Harris had failed to file the third amended motion, but instead offered a copy of the motion and the court's docket entries showing that Harris had been given leave to file the motion. Harris presented evidence that was relevant only to his third amended motion for postconviction relief. Following the hearing, the district court's order expressly dismissed the *second* postconviction motion, and Harris appealed.

In *Harris IV*, we characterized the 2013 hearing as a hearing on the third amended postconviction motion. We held that "a court presented with a motion for postconviction relief which exists simultaneously with a motion seeking relief under another remedy must dismiss the postconviction motion without prejudice when the allegations, if true, would constitute grounds for relief under the other remedy sought." *Harris IV*, 292 Neb. at 191, 871 N.W.2d at 766. We determined that because the motion for new trial was time barred under the statute then in effect and because there was no possibility of obtaining relief through a writ of coram nobis, the district court erred in dismissing the motion for postconviction relief. See Neb. Rev. Stat. § 29-2103 (Reissue 2008). We remanded for consideration of "the postconviction motion" on the merits. *Harris IV*, 292 Neb. at 194, 871 N.W.2d at 768.

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On remand, the district court did not conduct a new evidentiary hearing but considered the evidence presented at the 2013 evidentiary hearing. It denied postconviction relief, but given the matters addressed at the 2013 hearing, it was unclear whether the district court's order disposed of the second postconviction motion or the third amended postconviction motion involving similar and additional claims. The court's order, signed on March 3, 2016, referred to the "[s]econd" motion for postconviction relief and addressed claims raised only in the second motion. It stated that "[t]he matter came on for full evidentiary hearing on June 28, 2013." The court did not address Harris' claims regarding Hicks' plea agreement raised only in the third amended postconviction motion, but specifically ruled on his claims that the State suppressed information possessed by Allgood before Harris' trial and by McClinton before Harris' trial, direct appeal, or postconviction proceedings. Harris appealed, which led to our decision in *Harris V.*

In *Harris V.*, we examined the record from the 2013 postconviction hearing and took judicial notice of our previous records and decisions in Harris' case. We determined that the district court properly denied relief on Harris' claim that the State suppressed evidence of McClinton's statements in his affidavit, but that it failed to apply the correct standard to Harris' claim that the State suppressed Allgood's statements at Harris' 1999 murder trial and failed to address Harris' claims from the third amended postconviction motion concerning the State's plea agreement with Hicks. We affirmed in part, and in part reversed and remanded for further proceedings to clarify which postconviction motion the court intended to rule on in the March 2016 order and, if necessary, to enter an order to dispense with all of Harris' claims for relief:

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

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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 [Corey] Bass[, an alleged drug dealer for whom McClinton said Hicks killed people]. 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. 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.

. . . .

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[W]e 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.

....

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 [Officer Leland Cass' police] report.

Harris V, 296 Neb. at 342-46, 893 N.W.2d at 458-60. Following the release of our opinion, we issued our mandate ordering the district court to "proceed to enter judgment in conformity with the judgment and opinion of this court."

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2. NEW TRIAL ORDER

On June 15, 2017, after our mandate in *Harris V* issued, Harris filed his third amended motion for postconviction relief, which he had previously been given leave to file, along with a motion for new trial based on newly discovered evidence. See Neb. Rev. Stat. § 29-2101(5) (Reissue 2016). In his motion for new trial, Harris alleged (1) that Hicks disclosed to McClinton that Hicks had lied during his testimony and that Hicks alone, not Harris, had killed the victim; (2) that Allgood corroborated McClinton's account of Hicks' statement; (3) that the prosecutor misrepresented or allowed Hicks to misrepresent Hicks' plea agreement during Harris' trial, documentation of which Harris' counsel obtained in 2010; and (4) that another witness at Harris' trial, Tony Bass, later told another inmate that he had lied during his testimony. Harris referenced supporting affidavits and other documentary evidence attached to the motion. He concluded by requesting a hearing to substantiate his claims by affidavit or testimony.

A hearing was held on Harris' motions on July 24, 2017, Judge William B. Zastera presiding. The parties presented arguments, but no evidence was offered or received.

On September 21, 2017, the district court entered an order granting Harris' motion for new trial and dismissing Harris' third amended motion for postconviction relief.

Relevant to the mandate in *Harris V*, the district court stated:

On March 3, 2016, this Court denied [Harris'] Amended Second Verified Motion for Postconviction Relief. [Harris] timely appealed and the Nebraska Supreme Court affirmed in part and reversed in part this Court's prior decision. . . .

At this juncture, [Harris] has filed a Third Amended Verified Motion for Postconviction Relief and a Motion for New Trial (Newly Discovered Evidence). In light of the Nebraska Supreme Court's findings in [*Harris V*], the Court now considers the current motions filed by [Harris].

Quoting language from *Harris IV*, the district court determined that it had to consider Harris' motion for new trial

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before addressing the third amended motion for postconviction relief. The district court noted our finding in *Harris IV* that Harris' previous motion for new trial was barred by the then-applicable statute of limitations, but found that the current motion was not time barred by the current version of § 29-2103(4) (Reissue 2016). That section requires motions for new trial based on newly discovered evidence to 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." § 29-2103(4). Accord § 29-2101(5).

The district court went on to observe that traditionally, new trial was not granted for issues of impeachment, but that where it appears the defendant has not been afforded a fair trial, it is the court's duty to grant new trial. See *State v. Robinson*, 198 Neb. 785, 255 N.W.2d 835 (1977). Moreover, it noted that in the context of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), impeachment evidence can be of such a weight that depriving the defendant of access to it can change the outcome of trial. The district court stated that it was unclear whether Harris would be procedurally barred from obtaining a new trial under § 29-2103, but that it believed Harris was entitled to a new trial because his constitutional rights had been implicated. The court continued:

First, after reviewing the Bill of Exceptions, it is apparent to this Court that material evidence was suppressed at [Harris'] trial, whether done so intentionally or not. Regardless of intent, it is clear that the entirety of [an officer's] police report was not disclosed which contained the exculpatory statements of . . . Allgood. Further, it is possible, that Allgood's statements to the officer would have corroborated [Harris'] alibi defense and permitted him to impeach . . . Hicks' credibility at [Harris'] trial. Second, the Court finds that a new trial is also warranted because the evidence reflects that the prosecutor misrepresented

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or allowed Hicks to misrepresent the nature of Hicks' plea agreement during [Harris'] trial.

The district court determined the suppression of this evidence to be material and prejudicial.

The district court dismissed Harris' third amended postconviction motion without prejudice pursuant to *Harris IV* and ordered him held without bail pending retrial.

Within 10 days, on September 29, 2017, the State filed a motion "to reconsider, alter and/or amend" pursuant to Neb. Rev. Stat. § 25-1329 (Reissue 2016). The State asserted that the new trial order was made without receiving any evidence or conducting an evidentiary hearing and that it was based on incorrect legal standards. The State requested that the order be amended or vacated.

As publicized and announced to the parties months before, on October 1, 2017, Judge Zastera retired.

3. STATE ATTEMPTS TO APPEAL;
APPEAL DISMISSED

On October 23, 2017, before any ruling on its motion for reconsideration, the State filed a notice of appeal of the September 21 order for new trial. On December 11, this court issued an order to show cause within 10 days why the appeal should not be dismissed for lack of jurisdiction. The State did not respond and later acknowledged in a motion to extend brief date that it could not show cause. Harris moved to dismiss the appeal for lack of jurisdiction, and on March 28, 2018, we did so. On April 20, our mandate was filed in the district court.

4. ORDER RULING MOTION FOR
RECONSIDERATION MOOT AND
GRANTING DISCHARGE

On May 1, 2018, Chief Justice Michael G. Heavican appointed Judge Nathan B. Cox to preside over this matter, replacing Judge Zastera.

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On May 10, 2018, Harris moved for absolute discharge on speedy trial grounds pursuant to Neb. Rev. Stat. § 29-1207 (Reissue 2016). He also moved to dismiss the State's motion for reconsideration as inapplicable to criminal cases and untimely filed.

On June 28, 2018, Judge Cox recused himself upon Harris' motion. On July 10, Chief Justice Heavican appointed Judge Jodi L. Nelson to preside, and the order was filed in the district court on July 16.

Judge Nelson subsequently conducted a hearing on the pending motions. The following exchange occurred between counsel for the State and Judge Nelson:

[State's counsel]: Judge, I was wondering if we could take up the — uh — motion for discharge first. Because I think some of the documents that will pertain to the motion to reconsider — uh — I plan to offer during that, as well.

If the Court — I guess — technically thought that there was merit to the motion for discharge, then I guess my motion to reconsider probably is moot. Uh, but that was just kind of my thought. I don't know if —

THE COURT: Well, we're going to hear them all today.

[State's counsel]: Sure.

THE COURT: (Laughs.) So, how I decide them may be another story; but I — I think we're going to take them up all today so that we can get what is pending — uh — taken care of. I don't particularly care what order you want to do that in.

The parties proceeded to address the motion for absolute discharge first, then the motion for reconsideration.

On February 4, 2019, Judge Nelson entered an order granting Harris' motion for absolute discharge and ruling moot the State's motion for reconsideration and Harris' motion to dismiss it. Judge Nelson determined that the State was permitted to file a motion for reconsideration, but did not consider the merits of the motion and concluded that the State had failed

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to show that any of the days between the September 21, 2017, order and Harris' motion for discharge on May 10, 2018, were excludable for speedy trial purposes.

5. PRESENT APPEALS

On February 8, 2019, the State filed a notice of appeal from the district court order entered September 21, 2017, that granted Harris' motion for new trial and from the order entered February 4, "2018," that sustained Harris' motion for absolute discharge and found the State's motion for reconsideration moot. We docketed this appeal as case No. S-19-133.

On the same date, the State filed an application for leave to docket exception proceedings pursuant to Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2018), which we granted.

On February 12, 2019, the district court granted the State's motion to stay the February 4 discharge order pending appeal, "provided the State files any appeal today."

Within 30 days of this court's approval, on February 21, 2019, the State filed a notice of appeal in the district court pursuant to § 29-2315.01 from the district court's orders entered February 4, 2019, and September 21, 2017. We docketed this appeal as case No. S-19-130.

On March 11, 2019, Harris moved to dismiss both appeals, which we have consolidated, for lack of jurisdiction. We overruled Harris' motions to dismiss and reserved jurisdictional issues until plenary submission of appeals.

The State has addressed both appeals in the same brief, with a single list of assigned errors.

Harris has cross-appealed.

II. ASSIGNMENTS OF ERROR

The State assigns that the district court erred in (1) sustaining Harris' motion for new trial and not sustaining the State's motion for reconsideration, (2) sustaining Harris' motion for speedy trial discharge, and (3) sustaining Harris' objection to the prosecutor's affidavit at the speedy trial discharge hearing.

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On cross-appeal, Harris assigns that the district court erred in (1) finding that Judge Zastera's order granting Harris' motion for new trial was a final, appealable order and (2) determining that the State could move for reconsideration of that order and finding that Harris' motion to dismiss the State's motion for reconsideration was moot.

III. STANDARD OF REVIEW

[1,2] A question of jurisdiction is a question of law. *State v. Uhing*, 301 Neb. 768, 919 N.W.2d 909 (2018). Appellate courts independently review questions of law decided by a lower court. *Id.*

[3] The construction of a mandate issued by an appellate court presents a question of law, on which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Henk*, 299 Neb. 586, 909 N.W.2d 634 (2018).

IV. ANALYSIS

[4] As noted above, the validity of the State's appeals is in question, a matter we now must decide. 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. *State v. Fredrickson*, 305 Neb. 165, 939 N.W.2d 385 (2020). This case comes to us under unusual circumstances. The State attempts to challenge the new trial order and the discharge order by filing not one but two notices of appeal, invoking two different mechanisms for review: first, a conventional direct appeal pursuant to Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2018), which we docketed as case No. S-19-133, and, later, exception proceedings pursuant to § 29-2315.01, docketed as case No. S-19-130.

For reasons we will now explain, we conclude that the direct appeal conferred jurisdiction on this court as to both the new trial order and the discharge order, and we consider both orders on the merits in case No. S-19-133. Consequently, we

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dismiss as moot the exception proceedings, docketed as case No. S-19-130.

1. CASE NO. S-19-133: DIRECT APPEAL

(a) New Trial Order

(i) *State's Right to Direct Appeal*

The first question that confronts us in this case is whether the State can appeal when a trial court grants a defendant's motion for new trial after the time for direct appeal of a criminal conviction has expired. The statutory scheme governing motions for new trial in criminal cases does not speak to the matter, see Neb. Rev. Stat. § 29-2101 et seq. (Reissue 2016), and neither party has directed us to any cases in which we have addressed this specific issue. We are thus faced with an issue of first impression.

Harris contends that we need not spend much time on this issue, because the State is precluded from appealing by a well-established principle: that absent specific statutory authorization, the State generally has no right to appeal an adverse ruling in a criminal case. See *State v. Thalken*, 299 Neb. 857, 911 N.W.2d 562 (2018). This principle bars the State's appeal, Harris asserts, because the district court granted him a new criminal trial and the State can point to no specific statute authorizing an appeal. As we will explain, however, although the district court purported to grant Harris a new criminal trial, it does not follow that the new trial order itself was issued in a criminal case.

In a number of contexts, we have held that the State may mount a direct appeal to challenge adverse rulings when an individual convicted and sentenced for a crime collaterally attacks his or her conviction and sentence. We have held that the State may appeal in habeas corpus proceedings, postconviction proceedings, and cases arising under the DNA Testing Act. See, e.g., *State v. Thieszen*, 295 Neb. 293, 887 N.W.2d 871 (2016) (postconviction); *Meyer v. Frakes*, 294 Neb. 668, 884 N.W.2d 131 (2016) (habeas corpus); *State v. Pratt*, 273 Neb.

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817, 733 N.W.2d 868 (2007) (DNA Testing Act). See, also, *State v. Jerke*, 302 Neb. 372, 923 N.W.2d 78 (2019) (reviewing State's appeal from district court order granting defendant's motion to vacate sentence and withdraw plea).

The foregoing proceedings are civil in nature. From the earliest days of our state Constitution, habeas corpus proceedings have been designated as civil, see *Morrill v. Taylor*, 6 Neb. 236 (1877), and that has remained unchanged, see, e.g., *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016). Similarly, postconviction proceedings are termed civil by statute and may be appealed as provided for appeals in civil cases. See Neb. Rev. Stat. §§ 29-3001(2) and 29-3002 (Reissue 2016). See, also, *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993) (citing U.S. Supreme Court opinion for proposition that postconviction proceedings are civil). By analogy, we have determined proceedings under the DNA Testing Act are also civil in nature because, like postconviction proceedings, they too are a collateral attack on a conviction, not part of the criminal proceeding itself. See, *State v. Pratt*, *supra*; *State v. Poe*, 271 Neb. 858, 717 N.W.2d 463 (2006). Recognizing the civil nature of proceedings under the DNA Testing Act and the absence of any restrictions on the State's right to appeal under that act, we have held that the State may appeal from an adverse ruling in such a proceeding. See *State v. Pratt*, 287 Neb. 455, 842 N.W.2d 800 (2014). As we will explain, the same reasoning leads us to conclude that the order that granted Harris' motion for new trial based on newly discovered evidence was appealable by the State pursuant to § 25-1912.

Like habeas corpus proceedings, postconviction proceedings, and proceedings under the DNA Testing Act, Harris' motion for new trial based on newly discovered evidence was a collateral attack on a final criminal judgment and not part of the criminal proceeding itself. When a judgment is attacked in a way other than by proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to

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prevent its enforcement, the attack is a collateral attack. *State v. Barnes*, 303 Neb. 167, 927 N.W.2d 64 (2019). The framework under which Harris brought his motion for new trial fits this description.

Harris sought a new trial pursuant to § 29-2101(5), under which relief may be granted based on “newly discovered evidence material for the defendant which he or she could not with reasonable diligence have discovered and produced at the trial” and which materially affects the defendant’s substantial rights. A motion for new trial alleging newly discovered evidence must be filed “within a reasonable time after the discovery of the new evidence” and “cannot be filed more than five years after the date 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.” § 29-2103(4). In response to a motion for new trial under § 29-2101(5) and following a hearing, a court may “vacate and set aside the judgment and release the person from custody or grant a new trial as appropriate.” § 29-2102(3).

Under § 29-2101(5), as in other collateral attacks, Harris sought to have the existing judgment vacated. Harris’ motion did not occur in the original criminal proceeding: Harris could and did move for new trial after the time for direct appeal had expired. Thus, like habeas corpus proceedings, postconviction proceedings, and proceedings under the DNA Testing Act, Harris’ motion for new trial based on newly discovered evidence was a collateral attack on a conviction, not part of the criminal proceeding itself, and therefore civil in nature. And like the law concerning other collateral attacks, no provision in the statutes governing new criminal trials restricts the State’s right to appeal. Accordingly, we conclude that the State has a right to file a direct appeal from an order granting a new trial in a criminal case based on newly discovered evidence after the time for direct appeal has expired.

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Harris asserts that motions for new trial based on newly discovered evidence under § 29-2101(5), even when filed after the time to challenge the conviction and sentence on direct appeal has passed, are more similar to other motions for new trial than they are to proceedings under the DNA Testing Act. He cites *State v. Bronson*, 267 Neb. 103, 672 N.W.2d 244 (2003), in which we noted the similarities between motions for new trial based on newly discovered evidence under § 29-2101(5) and those based on newly discovered DNA evidence under § 29-2101(6). In *Bronson*, we held that these motions were separate and distinct from the proceedings under Neb. Rev. Stat. § 29-4123(2) (Reissue 2016) of the DNA Testing Act such that an appeal arising from a motion to vacate and set aside a judgment under § 29-4123(2) does not deprive a trial court of jurisdiction to consider a motion for new trial filed under § 29-2101(6). However, we do not believe this holding makes motions for new trial based on newly discovered evidence any less collateral in nature.

Harris also disputes that motions for new trial based on newly discovered evidence are civil in nature. He points out that the Legislature has adopted separate statutes governing motions for new trial in civil and criminal contexts and that the new trial statutes in chapter 29 of the Nebraska Revised Statutes are written in terms reflecting its criminal law application. See, Neb. Rev. Stat. § 25-1144 et seq. (Reissue 2016); § 29-2101 et seq. But the same could be said about postconviction proceedings and proceedings under the DNA Testing Act, and in the case of postconviction proceedings, we have stated that they are “not . . . ordinary civil action[s].” See *State v. Robertson*, 294 Neb. 29, 41, 881 N.W.2d 864, 875 (2016). Harris posits that this statement calls into question the ongoing validity of our previous determinations that proceedings under the DNA Testing Act are civil in nature. However, we disagree. Our holding in *Robertson* that civil pleading rules did not apply to postconviction proceedings did not make postconviction

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proceedings or proceedings under the DNA Testing Act any less civil in nature.

Harris argues that even if his motion for new trial was a civil proceeding, once it was granted, the matter reverted to a criminal proceeding, from which the State could not file a direct appeal. To illustrate, he points out that a defendant has no right to counsel during a collateral attack, see *State v. Pratt*, 273 Neb. 817, 733 N.W.2d 868 (2007), but does have a right to counsel in any new trial resulting therefrom. We agree that under such circumstances, any new trial *following* a collateral attack is criminal in nature, but the same is not true of the order granting the new trial. Indeed, in appeals involving collateral attacks, we have treated the resulting order as civil in nature. See, e.g., *id.*

Harris also relies on *State v. Taylor*, 179 Neb. 42, 136 N.W.2d 179 (1965), for the proposition that there is no authority for an appellate court to reinstate a guilty verdict upon a State's appeal from a new trial order and argues that therefore, the rights attending criminal matters should reattach. But as we explain in more detail in the next section, Harris misconstrues *Taylor*, an exception proceedings case in which we spoke of the necessity of rendering an advisory opinion, not the practicalities of reinstating a conviction such as would arise in this case.

Finally, Harris argues that this is not actually a case of first impression and that our precedent forecloses any possibility of review of his motion for new trial. Again, he points to *State v. Taylor*, *supra*, and the cases that followed it, *State v. Martinez*, 198 Neb. 347, 252 N.W.2d 630 (1977), and *State v. Linn*, 192 Neb. 798, 224 N.W.2d 539 (1974). In those cases, we did not allow the State to appeal from an order granting new trial in a criminal case. However, unlike the instant case, none of the three cases upon which Harris relies involved a judgment, because the appeals in those cases were filed in the original criminal proceedings before the defendants were sentenced. See *State v. Jackson*, 291 Neb. 908, 870 N.W.2d 133 (2015) (final judgment in criminal case means sentence).

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In *Taylor*, the district court sustained the defendant's motion for new trial following an adverse verdict; but significantly, *Taylor* does not reflect that the defendant was sentenced before this ruling. The State sought review under § 29-2315.01 (Reissue 1964), and we dismissed the State's appeal. In doing so, we discussed the necessity of a final order and characterized the order in *Taylor* as interlocutory because further action was required: "It is apparent that an order setting aside a verdict and requiring a retrial does not dispose of the cause." 179 Neb. at 46, 136 N.W.2d at 182. In *Linn*, we applied the same rationale in dismissing the State's exception proceedings challenging a new trial order that followed a defendant's conviction, again with no mention of any sentence. And again, in *Martinez*, the defendant had not been sentenced for the conviction for which he was granted a new trial, and under *Taylor*, we dismissed the State's cross-appeal in the matter for lack of a final order. Because *Taylor*, *Linn*, and *Martinez* did not involve a collateral attack on a final criminal judgment, they do not govern the State's right to appeal the order in this case.

In sum, the State has the right to appeal an order granting a motion for new trial based on newly discovered evidence that has been filed after the time for direct appeal has expired. Yet our analysis of the validity of the State's appeal of the new trial order is not at an end. We must next consider whether the State appeals from a final, appealable order.

(ii) *Final, Appealable Order*

[5,6] For an appellate court to acquire jurisdiction of an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken. *State v. Paulsen*, 304 Neb. 21, 932 N.W.2d 849 (2019). Among the three types of final orders which may be reviewed on appeal is an order affecting a substantial right made during a special proceeding. See Neb. Rev. Stat. § 25-1902 (Reissue 2016). For the reasons below, we conclude that the order granting Harris' motion for new trial based on newly discovered evidence was this type of final order.

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[7] First, the order granting Harris’ motion for new trial based on newly discovered evidence was made in a special proceeding. Special proceedings entail civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes and have also been described as every special statutory remedy which is not in itself an action. See *State v. Pratt*, 287 Neb. 455, 842 N.W.2d 800 (2014). An action involves prosecuting the alleged rights between the parties and ends in a final judgment, whereas a special proceeding does not. *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005). Where the law confers a right, and authorizes a special application to a court to enforce it, the proceeding is special, within the ordinary meaning of the term “special proceeding.” *Id.* A special proceeding is not an integral part of or a step in the action; it is not part of what is sometimes referred to as the “main case.” See *State v. Vela*, 272 Neb. 287, 721 N.W.2d 631 (2006).

Under these principles, Harris’ motion for new trial initiated a special proceeding. As we have explained in the section above, Harris’ motion was civil in nature, not part of the criminal proceeding itself. That is, having been filed long after judgment, it was not part of the main case. And it bore other hallmarks of a special proceeding. Section 29-2101(5) confers a right to a new trial upon the discovery of new evidence that fits certain criteria and also authorizes a special application to a court to enforce the right. Harris’ motion requested a new trial and alleged facts to support the claim that a new trial was warranted. He did not seek a final judgment.

Harris argues that a motion for new trial does not fit the description of a special proceeding, because it is in itself an action. He refers to cases in which we have determined that the district court may exercise jurisdiction over motions for new trial based on § 29-2101(5) and (6) at the same time as this court exercises jurisdiction over a direct appeal or an appeal under the DNA Testing Act. See, *State v. Bronson*, 267 Neb. 103, 672 N.W.2d 244 (2003); *Smith v. State*, 167 Neb. 492, 93 N.W.2d 499 (1958). However, we do not understand

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how the separate and independent nature of these types of proceedings could alter the character of a motion for new trial based on newly discovered evidence.

[8-10] Second, the order that granted Harris' motion for new trial based on newly discovered evidence affected a substantial right of the State. Whether an order affects a substantial right for purposes of appeal depends on a number of factors. See *State v. Fredrickson*, 305 Neb. 165, 939 N.W.2d 385 (2020). The inquiry focuses on whether the right at issue is substantial and whether the court's order has a substantial impact on that right. *Id.* Regarding the importance of the right affected, we often state that a substantial right is an essential legal right, not merely a technical right. See *State v. Paulsen*, 304 Neb. 21, 932 N.W.2d 849 (2019). Whether an order affects a substantial right depends on whether it affects with finality the rights of the parties in the subject matter. *State v. Fredrickson, supra*. It also depends on whether the right could otherwise effectively be vindicated. *Id.* An order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review. *Id.*

We conclude that because the State had already obtained a criminal judgment, the order that granted Harris' motion for new trial based on newly discovered evidence affected a substantial right of the State. Both this court and the U.S. Supreme Court have recognized the State's interest in the finality of criminal judgments of conviction. See, e.g., *Ramos v. Louisiana*, ___ U.S. ___, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020); *United States v. Frady*, 456 U.S. 152, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); *State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999); *State v. Lee*, 251 Neb. 661, 558 N.W.2d 571 (1997). This finality interest is premised in part on the significant expenditure of the State's time and resources required to secure a criminal conviction. “““Society's resources have been concentrated at [the time of trial] in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens.””” *State v. Lotter*, 278 Neb. 466, 481, 771 N.W.2d 551, 563 (2009), quoting *Herrera v.*

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Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993). It also rests on the fact that “with the passage of time and the erosion of memory and the dispersion of witnesses, there is no guarantee that the truth-seeking function of a new trial would be any more exact than the first trial.” *Id.* at 481, 771 N.W.2d at 563. And courts have observed that without finality, the criminal law is deprived of much of its deterrent effect. See, e.g., *McCleskey v. Zant*, 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991) (superseded by statute on other grounds as stated in *Banister v. Davis*, 590 U.S. 504, 140 S. Ct. 1698, 207 L. Ed. 2d 58 (2020)).

We further determine that the order granting Harris’ motion for new trial had a substantial impact on the State’s right. An order granting new trial following a conviction significantly undermines the State’s interest in finality. The State cannot recoup the costs occasioned by a new trial, and if the defendant is ultimately acquitted, the State cannot lodge a direct appeal to seek reinstatement of the conviction. See *State v. Thalcken*, 299 Neb. 857, 911 N.W.2d 562 (2018) (generally, State has no right to appeal adverse ruling in criminal case).

At oral argument, Harris asserted that criminal new trial statutes do not expressly address the State’s substantial rights, only the defendant’s. See § 29-2101(5). While this is true, it does not negate the State’s substantial right as we have described it. Furthermore, our finding that the State has a substantial right in the finality of a criminal conviction, and therefore the ability to appeal following the grant of a new trial based on newly discovered evidence, does not impinge on a defendant’s right to seek a new trial; it only allows for the possibility of appellate review to ensure a grant of a new trial is properly ordered.

Harris claims we have previously held that an order granting a motion for new trial in a criminal case is not a final, appealable order. He relies on three cases mentioned above: *State v. Taylor*, 179 Neb. 42, 136 N.W.2d 179 (1965); *State v. Linn*, 192 Neb. 798, 224 N.W.2d 539 (1974); and *State v. Martinez*, 198 Neb. 347, 252 N.W.2d 630 (1977). In each of

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those cases, we rejected the State's appellate challenge of an order granting a motion for new trial, stating in each case that the order appealed from was not final and appealable. But as we describe in more detail in the previous section, *Taylor*, *Linn*, and *Martinez* are distinguishable from this case, partly because, unlike Harris' motion for new trial, the motions for new trial in those cases were not collateral attacks on a final criminal judgment.

Taylor and *Linn* are further distinguishable from this case because they were decided under exception proceedings. In part, *Taylor* based its decision, which *Linn* followed, on reasoning that were it to find the new trial order in error, the district court could be bound by that decision. This would run contrary to the legislative mandate that our holdings in exception proceedings are advisory when the defendant has already been placed in jeopardy in the trial court. See Neb. Rev. Stat. § 29-2316 (Reissue 2016). This is not a concern in the instant case, because we have concluded that the State may challenge the new trial order in its direct appeal, a review process that cannot result in an advisory opinion. See *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006) (stating that in direct appeal, it is not function of appellate court to render advisory opinions).

Having determined that the new trial order is a final, appealable order, we proceed to consider the remaining requirements of appellate jurisdiction.

(iii) Timely Perfection of Direct Appeal

As we have explained, the State appeals from a final, appealable order, but there is one more hurdle to clear before we can reach the merits of the State's challenge to the new trial order. We next must assess whether the State's direct appeal from the new trial order was timely perfected. We conclude that it was.

As an initial matter, we take up Harris' position that the State did not fulfill two of the basic requirements to perfect an appeal in case No. S-19-133: a notice of appeal and a

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docket fee. First, Harris points out that the notice of appeal identifies the orders appealed from as having been filed on September 21, 2017, and February 4, “2018.” The new trial order was in fact entered on September 21, 2017, but the discharge order was entered on February 4, 2019. However, this error is not fatal to the State’s appeal. Section 25-1912, which governs the filing of an appeal, does not require that the order appealed from be correctly identified to confer appellate jurisdiction. See *Dominguez v. Eppley Transp. Servs.*, 277 Neb. 531, 763 N.W.2d 696 (2009). Second, Harris claims that the record does not contain any indication that the docket fee for case No. S-19-133 has been paid as required to perfect an appeal. See, § 25-1912(1); Neb. Ct. R. App. P. § 2-101(A) (rev. 2015). But upon an examination of our records, we are satisfied that the docket fee has been timely deposited.

With an adequate notice of appeal having been filed and the docket fee deposited, we need only examine whether the State’s notice of appeal was timely filed. See *id.* Generally, appeals must be filed within 30 days after the entry of the judgment, decree, or final order. § 25-1912(1). However, that period may be terminated by filing a motion to alter or amend within 10 days of the judgment. §§ 25-1329 and 25-1912(3). See, also, *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009). A new period of 30 days for filing a notice of appeal commences when the terminating motion is ordered dismissed. *Id.* Here, the State filed a valid terminating motion in the form of a “Motion for Reconsideration.”

Typically, a motion for reconsideration does not terminate the time for appeal and is considered nothing more than an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment. See *State v. Lotter*, 301 Neb. 125, 917 N.W.2d 850 (2018), citing *Kinsey v. Colfer, Lyons*, 258 Neb. 832, 606 N.W.2d 78 (2000). For this reason, we have held that once a notice of appeal is filed, any pending motions to reconsider that have not been ruled upon become moot. See *Kinsey v. Colfer, Lyons, supra*. Harris asserts that is what happened to the State’s motion for reconsideration

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when the State filed its initial unsuccessful appeal, which we dismissed for lack of jurisdiction. But Harris is mistaken, as we will explain.

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. *State v. Lotter*, *supra*. To be treated as a motion to alter or amend a judgment, a motion for reconsideration must be filed no later than 10 days after the entry of judgment and seek substantive alteration of the judgment. See *id.* See, also, *State v. Gibilisco*, 279 Neb. 308, 778 N.W.2d 106 (2010).

The State’s motion for reconsideration meets the criteria to be treated as a terminating motion. It was filed on September 29, 2017, less than 10 days after the new trial order was entered on September 21. The motion for reconsideration sought substantive alteration of the new trial order by asking that the court alter, amend, or vacate it because it was “based on precepts and legal standards reserved for Motions for Post-Conviction Relief and not on the requisite standards and precepts required to be considered, analyzed and addressed in an order granting or denying a Motion for New Trial.”

The State’s motion for reconsideration remained pending, even when the State filed its first appeal to this court, which we dismissed for lack of jurisdiction. Under § 25-1912(3), a notice of appeal filed before a pending terminating motion has been dismissed shall have no effect. But the terminating motion continues to operate until it is dismissed, even if the proponent attempts to appeal in the meantime. See § 25-1912(3).

With the motion for reconsideration operating as a terminating motion pursuant to § 25-1912, the State’s 30-day appeal period commenced when the district court dismissed the motion for reconsideration as moot on February 4, 2019. The State filed its notice of appeal in case No. S-19-133 on February 8. Therefore, the State’s direct appeal was timely.

Harris challenges the validity of the State’s motion for reconsideration as a terminating motion on two bases. First, he argues that such a terminating motion is reserved for civil

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cases and thus could not serve as a terminating motion in this matter. Second, Harris claims that by not obtaining an earlier ruling, the State waived or abandoned the motion or filed it in bad faith. We reject both of these arguments.

In support of his first point, Harris mainly asserts that because the statutes relating to terminating motions are located in the chapter addressing civil procedure, they cannot apply to the new trial order arising from a motion filed under § 29-2101(5), which is located in the chapter addressing criminal procedure. Like Harris' previous arguments that the motion for new trial based on newly discovered evidence is not civil in nature, this argument also fails, and for the same reasons. As we have explained, such motions are civil in nature, similar to habeas corpus proceedings, postconviction proceedings, and proceedings under the DNA Testing Act. And we have previously allowed motions to alter or amend under § 25-1329 in postconviction proceedings, including when filed by the State. See, *State v. Gibilisco*, 279 Neb. 308, 778 N.W.2d 106 (2010) (State's motion for reconsideration treated as motion to alter or amend); *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009) (defendant filed motion to alter or amend); *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005) (defendant's motion to alter or amend treated as terminating motion). While our postconviction statutes do specifically provide that appeals may be taken from the district court as provided for appeals in civil cases, see § 29-3002, that provision did not dissuade us from allowing a civil appeal path in cases involving proceedings under the DNA Testing Act, even though that statutory scheme contains no comparable provision and is located in chapter 29 of the Nebraska Revised Statutes. See, *State v. Pratt*, 287 Neb. 455, 842 N.W.2d 800 (2014); Neb. Rev. Stat. § 29-4116 et seq. (Reissue 2016). Today, we reach the same conclusion regarding an order granting a motion for new trial based on newly discovered evidence that has been filed after the time for direct appeal has expired. It logically follows that the appeal process in this case would allow for terminating motions.

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We discern no provision of law that would preclude the State from filing a motion for reconsideration that operates as a terminating motion in this case. Indeed, we have recognized that “[j]udicial efficiency is served when any court . . . is given the opportunity to reconsider its own rulings, either to supplement its reasoning or correct its own mistakes.” See *State v. Hausmann*, 277 Neb. 819, 827, 765 N.W.2d 219, 225 (2009), *overruled on other grounds*, *McEwen v. Nebraska State Coll. Sys.*, 303 Neb. 552, 931 N.W.2d 120 (2019) (statute governing motions to alter or amend judgment applies to judgment of district court acting as intermediate appellate court).

We are also unpersuaded by the arguments Harris makes in support of his position that the motion to reconsider was waived, was abandoned, or was pursued in bad faith. Harris argues that the State waived the right to rely on the motion for reconsideration as a terminating motion by not setting the matter for hearing and securing a ruling before its initial unsuccessful attempt to appeal. For support, Harris relies on *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006). In *Aldaco*, the defendant filed a pro se notice of appeal after his motion for speedy trial discharge was orally overruled and the matter proceeded to trial. The appeal was dismissed for lack of jurisdiction because no file-stamped order had been entered by the trial court. The defendant did not seek further review. The trial court subsequently entered a written order, which the defendant appealed within 30 days. We concluded that regardless of whether the first appeal should have been dismissed, the 30-day period to appeal began to run after the trial court orally overruled the motion and proceeded to trial, and that the second notice of appeal was filed out of time. We do not understand how the holding in *Aldaco* warrants a waiver of the motion for reconsideration in this case. *Aldaco* did not deal with a terminating motion, and our jurisprudence concerning terminating motions does not address waiver.

Harris also asserts that the motion for reconsideration should have no effect because the State abandoned it by failing to

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pursue it once it was filed. Harris relies on the proposition that 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 that 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. See, *ACI Worldwide Corp. v. Baldwin Hackett & Meeks*, 296 Neb. 818, 896 N.W.2d 156 (2017); *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 235 Neb. 207, 454 N.W.2d 671 (1990).

Harris seems to characterize observations made by Judge Nelson that the State failed to obtain a hearing date in compliance with local rules as a finding that the State abandoned the motion for reconsideration. We do not read the discharge order that way, and we do not believe the State abandoned its motion for reconsideration. Failure to set a hearing date in accordance with a local rule does not invalidate a terminating motion; the statutes governing terminating motions do not require it. See *Lombardo v. Sedlacek*, 299 Neb. 400, 908 N.W.2d 630 (2018). Further, the State *did* bring the motion for reconsideration to the district court's attention. The district court held a hearing on the motion before ultimately dismissing it as moot. This is not a case where the motion was never brought to the attention of the court.

Similarly, we are not convinced by Harris' argument that the State's motion for reconsideration should not operate as a terminating motion due to the State's "dubious actions" or bad faith. See brief for appellee on cross-appeal at 83. Harris cites *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005), where we treated the defendant's motion for reconsideration as a terminating motion, even though the defendant had withdrawn it. Citing to a similar federal case, we concluded that a new 30-day appeal period began after the withdrawal because there was no indication that the terminating motion was filed and withdrawn in bad faith. In the present case, the State never withdrew its terminating motion, and we do not discern bad faith on the part of the State.

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In short, none of the arguments raised by Harris on this subject have merit. The State's direct appeal in case No. S-19-133 was timely perfected and has met the other requirements for our appellate jurisdiction to review the new trial order.

*(iv) Merits: New Trial Order's Noncompliance
With This Court's Mandate*

As we have established, we have appellate jurisdiction to review the new trial order. Even so, Harris makes one last argument that we should not consider the State's arguments regarding it. According to Harris, comments by the State's counsel at the hearing on the State's motion for reconsideration and Harris' motion to discharge waived as invited error any opposition to the district court's ruling that the motion for reconsideration was denied as moot.

At the hearing, counsel for the State, during a discussion about which order should be addressed first, remarked, "If the Court — I guess — technically thought that there was merit to the motion for discharge, then I guess my motion to reconsider probably is moot. Uh, but that was just kind of my thought. I don't know if — [.]" It is true that a party cannot complain of error which he or she has invited the court to commit. *State v. Dixon*, 286 Neb. 157, 835 N.W.2d 643 (2013). But we do not consider a party's equivocal suggestion of the possibility of an adverse ruling, during a discussion about the order in which matters would be addressed at the hearing, to be the equivalent of inviting error.

Turning now to the State's arguments regarding the new trial order, the State contends that the new trial order was erroneous because the district court did not receive any evidence to support it, because the court applied the wrong standard in granting it, and because the motion for new trial is meritless. The State's arguments may be correct, but we need not and, in fact, cannot decide them because of a more fundamental problem with the district court's new trial order identified by the State: In granting Harris' motion for new trial, the district court did not comply with our mandate in *Harris V.*

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[11-13] In appellate procedure, a “remand” is an appellate court’s order returning a proceeding to the court from which the appeal originated for further action in accordance with the remanding order. *TransCanada Keystone Pipeline v. Tanderup*, 305 Neb. 493, 941 N.W.2d 145 (2020). After receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court. *Id.* When a lower court is given specific instructions on remand, it must comply with the specific instructions and has no discretion to deviate from the mandate. See *id.* To carry out its unqualified duty to follow the mandate issued by an appellate court, a lower court may not modify a judgment directed by an appellate court; nor may it engraft any provision on it or take any provision from it. *State v. Payne*, 298 Neb. 373, 904 N.W.2d 275 (2017).

Guided by these principles, we turn now to the question of whether the district court’s new trial order was in accordance with the specific mandate of *Harris V*. Where the mandate incorporates the appellate court’s opinion by reference, we examine the opinion in conjunction with the mandate to determine how the lower court should have proceeded. See *State v. Payne*, *supra*. In *Harris V*, our mandate ordered the district court to “proceed to enter judgment in conformity with the judgment and opinion of this court.” Our opinion in *Harris V* instructed the district court, upon remand, to clarify whether it had addressed Harris’ second postconviction motion or third amended postconviction motion and to apply the correct standard to Harris’ claims concerning the suppression of Allgood’s statements, an issue raised in both motions. Finally, we directed the district court to rule, if necessary, on Harris’ claims raised in the third amended motion for postconviction relief regarding Hicks’ plea agreement.

On remand, the district court clarified that its previous order pertained to the second postconviction motion, but its compliance with our mandate stopped there. After identifying the second postconviction motion as the subject of its previous order, the district court did not address the suppression of

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Allgood's statements in the context of that motion, as clearly directed by *Harris V*. Instead, it took up that analysis in the context of Harris' later-filed motion for new trial. Because it disposed of the matter based on the motion for new trial, the district court dismissed the third amended postconviction motion without prejudice. This was not in compliance with our mandate.

Harris argues that the new trial order was not beyond the scope of our mandate in *Harris V*. He bases this argument on the premise that the motion for new trial was completely separate and independent from any postconviction proceedings. Harris primarily relies on *Smith v. State*, 167 Neb. 492, 93 N.W.2d 499 (1958), where we held that the trial court should consider a motion for new trial based on newly discovered evidence at the same time as direct appellate review of the criminal conviction. We determined that the two proceedings "should be conducted separately and independently of each other" and that neither the Legislature nor our case law regarded this situation as an invasion of the appellate court's jurisdiction. *Id.* at 494, 93 N.W.2d at 500. See, also, *State v. Bronson*, 267 Neb. 103, 672 N.W.2d 244 (2003) (based on *Smith*, lower court had jurisdiction to consider motion for new trial based on newly discovered exculpatory DNA testing evidence under § 29-2101(6) (Cum. Supp. 2002) during pendency of appeal of denial of motion to vacate and set aside judgment under DNA Testing Act). Harris asserts not only that the district court was permitted by *Smith* to consider his motion for new trial separately from the postconviction issues on remand, but that our holding in *Harris IV* required the court to consider the motion for new trial first. In *Harris IV* we held that a court presented with a postconviction motion simultaneously with a motion seeking relief under another remedy must first determine whether the defendant is entitled to relief under the nonpostconviction remedy.

However, unlike the present case, neither *Smith* and its progeny nor *Harris IV* involved the lower court's implementation

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of an appellate court's mandate on remand. In *Smith*, we observed that the trial court was not required to delay the exercise of its original jurisdiction to consider the motion for new trial because "no such restriction of power is declared" by the Legislature or by our jurisprudence. 167 Neb. at 494-95, 93 N.W.2d at 501. But our mandate in the instant case introduced restrictions that barred the district court from considering Harris' motion for new trial before it carried out our mandate.

Our mandate jurisprudence is clear: A trial court is without power to affect rights and duties outside the scope of the remand from an appellate court. See *State v. Payne*, 298 Neb. 373, 904 N.W.2d 275 (2017). And, as noted above, we have consistently held that when a lower court is given specific instructions on remand, it must comply with the specific instructions and has no discretion to deviate from the mandate. *TransCanada Keystone Pipeline v. Tanderup*, 305 Neb. 493, 941 N.W.2d 145 (2020). Allowing expansion of the issues on remand in this manner would not serve the public interest in finality of the litigation process. See *Jurgensen v. Ainscow*, 160 Neb. 208, 69 N.W.2d 856 (1955). We applied these principles in *State v. Henk*, 299 Neb. 586, 909 N.W.2d 634 (2018), where our mandate required the district court to conduct an evidentiary hearing on a single postconviction claim. On remand, the district court gave the defendant leave to amend his motion for postconviction relief to add an additional claim, conducted an evidentiary hearing on both claims, and denied postconviction relief. On appeal, we held that a defendant cannot be allowed to assert new claims on remand when he or she is entitled to an evidentiary hearing on other claims and that the district court acted outside the scope of our mandate. See, also, *State v. Shelly*, 279 Neb. 728, 782 N.W.2d 12 (2010). For the same reasons, the district court in this case was required to follow the directives of our *Harris V* mandate first, before entertaining any subsequent motions. This it did not do.

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As we have explained, *Harris V* required the district court to clarify whether its previous order had addressed the second motion or third amended motion for postconviction relief; to consider Allgood's statements in the context of the postconviction motion from which Harris had appealed; and, if necessary, to rule on Harris' claims raised in the third amended motion for postconviction relief regarding Hicks' plea agreement. The district court clarified that its previous order addressed Harris' second motion, but failed thereafter to comply with our mandate. It did not consider Allgood's statements in the context of a postconviction motion as we directed, and it did not rule on Harris' claims raised in the third amended motion for postconviction relief regarding Hicks' plea agreement.

[14,15] Because everything in the district court's September 21, 2017, order, aside from the court's clarification that its previous order addressed Harris' second postconviction motion, did not comply with our mandate in *Harris V*, we have no choice but to vacate it. The district court's subject matter jurisdiction immediately upon remand was limited to carrying out our mandate. See *State v. Payne, supra*. And "[n]o judgment or order different from, or in addition to, the appellate mandate can have any effect." *Id.* at 379, 904 N.W.2d at 280. Because a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court, any order attempting to do so is entered without jurisdiction and is void. *Id.* In breaching our mandate, the district court acted outside its jurisdiction and entered a void order, which we have the power to vacate. See *In re Interest of Trey H.*, 281 Neb. 760, 798 N.W.2d 607 (2011).

Based on the reasons above, we vacate the September 21, 2017, order, with the exception of the finding that the order appealed from in *Harris V* addressed the second motion for postconviction relief, and remand the cause for compliance with this court's mandate in *Harris V*. To comply with our mandate in *Harris V* and this opinion, the district court shall consider Harris' postconviction claim based on Allgood's

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statements and the claim in his third amended motion regarding Hicks' plea agreement. With the aforementioned exception, the vacated portion of the order encompasses every factual and legal finding made by the district court, including those pertaining to the motion for new trial; and because none of these vacated findings were within the district court's subject matter jurisdiction to decide, they shall not operate as the law of the case on remand.

(b) Discharge Order

(i) *State's Right to Direct Appeal*

We now turn to the order granting Harris' motion for discharge on speedy trial grounds. As with the new trial order, we must first determine whether the State has the right to challenge it with a direct appeal. We conclude that it does.

As with the new trial order, Harris relies on the principle that absent specific statutory authorization, the State generally has no right to appeal an adverse ruling in a criminal case. Harris claims this precludes the State's direct appeal of the discharge order. But whatever merit Harris' argument might have if the State were appealing an ordinary order granting a defendant's motion for absolute discharge, it must be recalled that the order that purported to grant the new trial in this case was void. Because a void order has no legal effect, this did not effectively become a criminal case, and thus the principle Harris invokes is inapplicable.

As we have explained, the district court was permitted to act within a limited scope on remand from *Harris V*. The only matter properly before the court at that time was the resolution of Harris' postconviction claims. That is, the district court was conducting postconviction proceedings. Because the new trial order was void and had no effect, it could not effectively change the nature of the postconviction proceedings. We have allowed the State to file a direct appeal from postconviction proceedings. *State v. Thieszen*, 295 Neb. 293, 887 N.W.2d 871 (2016). Therefore, we conclude that the discharge order is

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reviewable on direct appeal by the State, provided it is a final, appealable order and is timely appealed.

(ii) *Timely Appeal of Final,
Appealable Order*

As we have already said, for an appellate court to acquire jurisdiction of an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken. *State v. Paulsen*, 304 Neb. 21, 932 N.W.2d 849 (2019). We conclude that like the new trial order, the order granting discharge is a type of final order: an order affecting a substantial right made during a special proceeding. See § 25-1902.

The district court purported to grant discharge in what was, in reality, still a postconviction proceeding. And we have long held that postconviction proceedings are special proceedings. See, *State v. Thieszen*, *supra*; *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

Furthermore, we conclude that an order granting discharge on speedy trial grounds affects a substantial right of the State. When the State has invested the time and resources to charge an individual with a crime, it has an interest in the accused's proceeding to trial and not being discharged improperly. See *State v. Sumstine*, 239 Neb. 707, 478 N.W.2d 240 (1991) (recognizing public interest in obtaining convictions of persons who have committed criminal offenses against State). Absent an appeal from the order granting discharge, this right of the State could not otherwise be vindicated, see *State v. Fredrickson*, 305 Neb. 165, 939 N.W.2d 385 (2020), because the State cannot bring the same charges again. See Neb. Rev. Stat. § 29-1208 (Reissue 2016) (providing for "absolute discharge from the offense charged"). Accordingly, the order granting discharge was a final order under § 25-1902 because it was made during a special proceeding and affected a substantial right of the State.

We further determine that the State timely appealed the discharge order. The discharge order was entered on February 4,

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2019. The State filed its notice of appeal on February 8, well within the 30-day period prescribed by § 25-1912(1), and as we have already noted, the required docket fee was timely deposited. Thus, as to the discharge order, the State timely perfected its direct appeal.

We note that we are not persuaded by Harris' argument that the discharge order is not final based on the order that granted the State's request for a stay. He asserts that "to the extent that the February 4, 2019[,] order has stayed the implementation of Harris' discharge past the date of filing the appeal or is conditioned upon the filing of an appeal, the February 4th order remains stayed and is not a final, appealable order." Brief for appellee at 6. However, when the district court purported to discharge Harris, no further action was required to completely dispose of the cause; the order was final. Compare *State v. Warner*, 290 Neb. 954, 863 N.W.2d 196 (2015) (order sustaining defendant's motion to quash gave State 7 days to file amended information; State appealed, and we determined that order was not final because order did not discharge defendant). This argument lacks merit.

(iii) Disposition of Discharge Order

Having determined that we have jurisdiction to review the discharge order, we now consider it. Generally, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Lovvorn*, 303 Neb. 844, 932 N.W.2d 64 (2019). But in this case, as we will explain, there is a legal issue we must address first.

When the order granting Harris' absolute discharge is considered in light of everything we have already said, it quickly becomes clear that we must vacate it. Under § 29-1207, a defendant may be discharged if he or she is not brought to trial for a charged offense within a certain time period following, among other things, an order for a new trial. Here, however, we have already concluded that the order granting the new trial was void. Harris cannot claim a right to discharge for not

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being speedily tried when the order that purported to grant him a new trial was a nullity.

If that were not enough, the order of discharge itself was also outside the scope of our mandate in *Harris V*. As explained above, after receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court. *TransCanada Keystone Pipeline v. Tanderup*, 305 Neb. 493, 941 N.W.2d 145 (2020). Even when Harris moved for absolute discharge, the district court was still subject to the strictures of our mandate in *Harris V*. It clearly acted outside of that mandate when, rather than following our instructions regarding Harris' claims for postconviction relief, it purported to grant absolute discharge based on a new trial order that was issued outside the scope of our mandate. So, like the bulk of the new trial order, the discharge order was void. See *TransCanada Keystone Pipeline v. Tanderup*, *supra*.

The foregoing illustrates the error made by the district court when it concluded the State's challenge to the order granting Harris a new trial was moot in light of its ruling on Harris' motion for absolute discharge. Harris' right to discharge depended on the validity of the order granting him a new trial. At the time of Harris' motion for discharge, the issue of whether the new trial order was valid continued to exist and required resolution. See *State v. Dunster*, 278 Neb. 268, 769 N.W.2d 401 (2009) (case becomes moot when issues initially presented cease to exist or when litigants seek to determine question which does not rest upon existing facts or rights).

For these reasons, we vacate the order that granted Harris absolute discharge and remand the cause with instructions to reinstate his convictions and sentences.

2. CASE NO. S-19-130:

EXCEPTION PROCEEDINGS

Having resolved all the relevant issues presented by the parties in the appeal docketed as case No. S-19-133, we dismiss case No. S-19-130 as moot. See *State v. Dunster*, *supra*.

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V. CONCLUSION

Litigation regarding Harris’ convictions and sentences has lasted many years. And, for a number of reasons, it has become complex. Under these circumstances, one might wonder whether our decision today—which vacates multiple orders entered over the course of several years and largely returns this case to where it stood when we remanded it to the district court in 2017—contributes to advancing the matter to a resolution of some kind. While perhaps an understandable question, it is not a legally relevant one. As we have explained, the district court entered void orders under our law and we are obligated to vacate them. See *DeLima v. Tsevi*, 301 Neb. 933, 946, 921 N.W.2d 89, 98 (2018) (“[s]o while it is certainly regrettable that the significant time and energy devoted to litigating [an issue] was all for naught, upon its correct determination that it never had subject matter jurisdiction, the district court had no choice but to vacate its prior custody orders”).

Accordingly, in case No. S-19-133, we vacate the district court’s order granting Harris a new trial and remand the cause for further proceedings in compliance with this decision and our mandate in *Harris V*. We also vacate the order granting absolute discharge and remand the cause with directions to reinstate Harris’ convictions and sentences. In case No. S-19-130, we dismiss the State’s exception proceedings as moot. In light of these dispositions, we need not address the parties’ remaining arguments.

APPEAL IN NO. S-19-130 DISMISSED.

JUDGMENT IN NO. S-19-133 VACATED, AND

CAUSE REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., and FREUDENBERG, J., not participating.

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

JAYSON H. TILSON, APPELLANT, v. ERICA M. TILSON,
APPELLEE, AND KIMBERLY L. HILL,
INTERVENOR-APPELLEE.

948 N.W.2d 768

Filed September 25, 2020. No. S-19-344.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **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.
3. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
4. **Trial: Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
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 to admit evidence over a hearsay objection or exclude evidence on hearsay grounds.
6. **Modification of Decree: Appeal and Error.** Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and will be affirmed absent an abuse of discretion by the trial court.

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7. **Evidence: Appeal and Error.** In a review de novo on the record, an appellate court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue. When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
8. **Modification of Decree: Attorney Fees: Appeal and Error.** In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
9. **Judges: Recusal.** A judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.
10. **Judges: Recusal: Presumptions.** A party alleging that a judge acted with bias or prejudice bears a heavy burden of overcoming the presumption of judicial impartiality.
11. **Judges: Recusal.** Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.
12. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
13. **Rules of Evidence: Hearsay: Proof.** In order for statements to be admissible under Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2016), the party seeking to introduce the evidence must demonstrate (1) that the circumstances under which the statements were made were such that the declarant's purpose in making the statements was to assist in the provision of medical diagnosis or treatment and (2) that the statements were of a nature reasonably pertinent to medical diagnosis or treatment by a medical professional.
14. **Rules of Evidence: Medical Assistance: Health Care Providers.** Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2016), applies to persons seeking medical assistance from persons who are expected to provide some form of health care.
15. **Modification of Decree: Child Custody: Proof.** Ordinarily, custody of a minor child will not be modified unless there has been a material

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- change in circumstances showing either that the custodial parent is unfit or that the best interests of the child require such action.
16. **Parent and Child: Words and Phrases.** Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.
 17. **Modification of Decree: Visitation.** Visitation rights established by a marital dissolution decree may be modified upon a showing of a material change of circumstances affecting the best interests of the children.
 18. **Modification of Decree: Words and Phrases.** A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.
 19. **Modification of Decree: Visitation: Proof.** The party seeking to modify visitation has the burden to show a material change in circumstances affecting the best interests of the child.
 20. **Modification of Decree: Visitation.** The best interests of the children are primary and paramount considerations in determining and modifying visitation rights.
 21. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change in circumstances that (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Affirmed.

Matt Catlett, of Law Office of Matt Catlett, for appellant.

David P. Kyker for intervenor-appellee.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

PAPIK, J.

Jayson H. Tilson appeals a district court order modifying the decree that dissolved his marriage. The district court rejected Jayson's argument that the original decree was void. It ordered that custody of Jayson's three children should remain with the children's maternal grandmother, but modified the decree

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as to parenting time and child support. On appeal, Jayson primarily argues that because, several years ago, he filed a motion to dismiss his complaint for dissolution, the decree of dissolution that followed was void, even though he withdrew the motion to dismiss hours after he filed it. In the alternative, Jayson challenges admissibility rulings at the modification hearing and the modification order's custody, parenting time, child support, and attorney fees determinations, as well as the denial of his motion to disqualify the presiding judge. We find no merit to Jayson's claims, and we affirm.

BACKGROUND

Motion to Dismiss and Dissolution Decree.

In September 2014, Jayson filed a complaint for dissolution of his marriage to Erica M. Tilson, who has been incarcerated and is not involved in the current appeal. In December 2014, temporary custody of the couple's three minor children was awarded to the maternal grandmother, Kimberly L. Hill (Kimberly). The court subsequently allowed Kimberly to intervene and appointed a guardian ad litem for the children. In August 2015, Kimberly and her husband filed a third-party complaint, asking for grandparent visitation and continued temporary custody of the children.

On November 16, 2015, the day before a scheduled dissolution hearing, Jayson filed a motion to dismiss his complaint for dissolution. The dissolution hearing was held as scheduled on November 17, with Jayson in attendance.

On December 8, 2015, the court entered a decree of dissolution, drafted by Jayson's counsel. Referring to the November 17 hearing, the decree stated, "Upon motion of [Jayson's] attorney . . . [Jayson's] motion to dismiss is withdrawn." The decree ordered the continuation of Kimberly's legal and physical custody, and as to Jayson, it ordered parenting time and a contribution toward childcare expenses. Jayson was not ordered to pay child support. The decree prohibited Jayson from consuming alcohol within 24 hours prior to or during his parenting time and ordered him to administer the children's

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prescribed medications during his parenting time. Erica was ordered to pay child support and was awarded supervised parenting time by arrangement.

Jayson's February 24, 2017, "Complaint," Initial Appeal, and Motion for Judicial Disqualification.

More than a year after the entry of the decree, on February 24, 2017, Jayson filed a "Complaint." Relevant here, the complaint requested (1) that the decree be vacated as void because his November 2015 motion to dismiss was self-executing, and thus the court lacked jurisdiction to enter the decree, and (2) that in the alternative, the decree be modified to place custody of the children with him. In an answer and cross-complaint, Kimberly asked that Jayson's weekly parenting time be reduced and "fully supervised." She also requested child support.

Before any ruling on Jayson's complaint filed February 24, 2017, Jayson filed additional motions upon which the district court ruled, and Jayson appealed. We dismissed the appeal. See *Tilson v. Tilson*, 299 Neb. 64, 907 N.W.2d 31 (2018). We concluded that the ruling appealed from was not a final order because it did nothing more than deny requests for temporary relief and preserve the status quo pending the determination of other issues. *Id.*

On May 5, 2018, Jayson filed a motion for judicial disqualification. As discussed in more detail below, he alleged several ways in which the presiding judge had exhibited bias. Following a hearing, the district court overruled the motion.

Trial Addressing February 24, 2017, "Complaint."

The district court held a trial on Jayson's February 24, 2017, complaint. At trial, Kimberly testified that she is the maternal grandmother of the children: M.T., born in 2007; R.T., born in 2012; and T.T., born in 2013. The children had lived with Kimberly and her husband since December 2014, after Jayson was ticketed for leaving them home alone while he was out drinking at a bar. According to Kimberly, until

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March 2017, Jayson did not exercise all of his allotted parenting time. Kimberly's testimony generally showed that while the children were with her, she took care of all their needs, including food, clothing, bathing, medical appointments and prescriptions, counseling, help with schoolwork, and extracurricular activities.

Kimberly testified that she had many concerns about the children's safety when they were with Jayson. She estimated that she observed the children improperly restrained in Jayson's vehicle 20 times during the year preceding trial and 50 times overall, despite talking to Jayson about the issue multiple times. Kimberly testified that she was also concerned that Jayson did not give the children their medication consistently, in particular, an antidepressant that M.T. used in 2015 and 2016. She testified about various dog and cat scratches the children had received while under Jayson's care. Kimberly acknowledged that Jayson had been good about taking the children "to the lake and to the park," but testified he was not good about supervising them while swimming. As a result, M.T.'s glasses had been lost and broken, and the two younger children had gone beyond where they should safely be in the water and without lifejackets. Kimberly testified that nearly every time the children returned from these outings, they had been "fried" by the sun.

Kimberly had concerns about clothing, cleanliness, and food during the children's time with Jayson. In late 2015 or early 2016, while Jayson was living at his previous residence, Kimberly saw cockroaches in M.T.'s school backpack. Kimberly testified that starting in the summer of 2017, the children had lice for a 4-month period and had not had lice when they left to visit Jayson. She testified that in the year before trial, the children consistently returned from visits with Jayson extremely dirty and dressed in clothes that were the wrong size or inappropriate for the weather. Kimberly also stated that over the preceding 3½ years, the children usually returned from Jayson's home hungry.

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Kimberly also expressed concerns about the effect Jayson's parenting time had on the children's behavior and school performance. She testified that the children were not doing their homework while at Jayson's home. Kimberly testified that after Jayson's overnight parenting time was suspended in March 2018, the children's behavior improved. Before, M.T. was having urinary accidents about four times a year, but since the change in visitation, she had not had any. Similarly, when the two younger children were staying with Jayson overnight, they misbehaved for 2 days afterward, but since March 2018, any misbehavior had been short lived and their school performance had improved.

The children's guardian ad litem, Candice Wooster, testified about her investigation in this case. Wooster was not able to schedule a visit at Jayson's home and has never been informed where he lives. She testified that she spoke to Jayson by telephone a handful of times between December 2015 and May 2017. During one call, Jayson hung up on Wooster. In May 2017, Jayson stopped returning her calls. As a result, Wooster was unable to arrange a home visit with Jayson. She also contacted his attorney and asked if he would like to be present at a home visit, but this did not result in an opportunity to either speak with Jayson or visit his home. Wooster testified that at a hearing during the 3- or 4-month period preceding trial, Jayson's counsel submitted an affidavit in which Jayson stated he would not be speaking to Wooster.

In contrast, Wooster visited Kimberly's home four or five times for an hour and found no concerns. Wooster observed a very loving relationship between Kimberly and the children. She saw Kimberly helping the children with their homework. When R.T. had a tantrum, Kimberly calmly helped her through it. She also observed Kimberly's husband playing with the children.

Dr. Judith Bothern, a licensed psychologist, testified that she provided therapy for M.T., R.T., and T.T. from December 2015 until November 2017. Bothern testified that Kimberly

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initiated this therapy. M.T., who had 89 sessions with Bothern, was Bothern's primary client in the family. Bothern diagnosed M.T. with adjustment disorder and major depressive disorder. Bothern's treatment plan for M.T. included addressing her relationship with Jayson and his knowledge of parenting practices. Pursuant to a court order, Jayson participated in 18 sessions starting around the same time as the children and continuing until September 2016.

Bothern testified regarding several safety concerns about Jayson's care for M.T. M.T. told her that Jayson did not regularly give M.T. her antidepressant medication, which, according to Bothern, could have a significant effect on M.T.'s ability to modulate her moods, emotions, and behavior. M.T. reported to Bothern that sometimes when she reminded Jayson about her medication, he would tell her she had already taken it, when she had not. Bothern testified, however, that Jayson recognized the need to be more consistent with the medication and expressed an intention to make greater efforts.

Bothern testified that she was also concerned about the children's physical safety. In April 2017, R.T. presented with a bruise on her forehead and T.T. presented with bruises on her chest and her leg, apparently caused by Jayson's shooting them with a "Nerf" gun. Bothern testified that this made her concerned that Jayson had poor judgment about what was appropriate with the children. In addition, during her last session, M.T. told Bothern that Jayson used a pellet gun to shoot the children for "'fun.'" As a result, Bothern filed a report with Child Protective Services (CPS).

Bothern had concerns relating to Jayson's living situations. Bothern testified that early on during Jayson's participation, he acknowledged that his residence at that time was in disrepair and had "trouble with mice and bugs," but he claimed he was doing what he could to handle the issue. In early 2016, Jayson's living situation resulted in five or six children, including older boys and younger girls, sharing a bedroom. M.T. reported being very concerned because in the bedroom

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the boys would expose themselves to her and had touched the genitals of a female child living in the home, who was about 3 years old at the time. Bothern filed a CPS report as a result. M.T. also had concerns that the boys were “barging in on her in the bathroom.” When Bothern discussed these things with Jayson, he said he would show M.T. how to lock the bathroom door. But with regard to the incidents in the bedroom, Bothern said Jayson responded with a “boys will be boys type of thing.”

Jayson subsequently moved in to the residence of Lexi Wallen, where the three children shared a bedroom with Wallen’s daughter. In September 2017, M.T., R.T., T.T., and Wallen’s daughter, who was approximately 6 years old at the time, left that residence in the middle of the night and were returned home by the police. M.T. told Bothern they left because their bedroom smelled like urine, there was a moldy hole in the wall, and ants were all over. In her last session, M.T. told Bothern that there were three mice in the residence, which Jayson shot at with a pellet gun.

Bothern testified that she was concerned that Jayson had told M.T. not to tell Kimberly about events in Jayson’s home. When Bothern reported things M.T. had told her to Jayson, Jayson would often subject M.T. to “some backlash.” When Bothern spoke to Jayson about the matter in therapy, he told M.T. that she could talk to Bothern about anything. But when Jayson stopped participating in therapy, M.T. reported that Jayson had told her not to tell Kimberly about certain incidents. M.T. struggled with this because it required her to either lie to Kimberly or betray Jayson. And in June 2017, M.T., then about 9 years old, reported to Bothern that CPS came to Jayson’s home with the police because R.T. had reported to someone that Jayson had left the children home alone. When Jayson got very angry with M.T. over this, she falsely told CPS and the police it never happened. Additionally, Bothern testified that many times throughout treatment, the children told her that Jayson instructed them to misbehave while in Kimberly’s care. This too caused emotional distress for M.T.

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Bothern testified that she was also concerned about supervision being delegated to M.T. For example, Bothern recounted that in the spring of 2016, T.T. had incurred a bad scrape on her face from falling off a retaining wall while under M.T.'s supervision. Bothern testified that around the same time, M.T. had been "terrified" during a swimming outing when a 4-year-old child in their group fell into the water and M.T. felt responsible for bringing her to safety. In October 2017, M.T., then about age 9, reported that Jayson told her it was her responsibility to take care of her 1- or 2-month-old brother while Jayson and a friend were drinking beer in the home and Wallen was away. Bothern further testified that once in her clinic, she observed Jayson instruct M.T. to take the younger children to the bathroom and also observed Jayson instruct M.T. to retrieve the younger children when they went into the toy room without an adult; in Bothern's view, these were "[i]nappropriate" expectations to be placing on M.T. at her level of development.

Bothern testified that she never performed a psychological evaluation on Jayson. Rather, she tried to work with Jayson to understand M.T.'s developmental needs and expectations, along with appropriate discipline and parenting. Bothern characterized Jayson as "very easy to work with"; he always responded well in the clinic and was respectful. Bothern testified that Jayson improved in identifying problem areas, but "not so much in follow through." In Jayson's later sessions, Bothern observed that he was frequently not following through on her recommendations about intervening with the children.

Dr. Colleen M. Lecher, a licensed mental health professional, testified that she had provided therapy to M.T. and R.T., whom she first met in November 2017 upon Bothern's retirement. Lecher testified that she had never met Jayson and that he was not involved in the children's treatment.

Lecher, who had conducted 20 sessions with M.T., testified that she had diagnosed M.T. with adjustment disorder and depression with symptoms of sadness, confusion, and anxiety. Lecher's treatment goals for M.T. were to increase her ability

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to express her emotions and grief over the loss of her mother and to practice relaxation techniques when feeling stressed. Lecher testified that for the numerous adults involved in M.T.'s life, she set a goal of meeting the children's needs of safety and stabilization at home and at school because those issues "looked like a big problem for the group." Lecher described safety and stabilization as making sure transitions are positive and doing everything to be appropriate and consistent, to take care of needs, and to provide structure for adjustment so that the children can "trust their environment."

Lecher observed that M.T. felt compelled to meet the needs of the younger children in Jayson's home as a parenting figure. Lecher opined that the responsibilities M.T. was given for the younger children put their safety at risk because her knowledge of how to care for them was limited and she had no supervision or instruction regarding how to provide care. This, in Lecher's view, also posed a risk to M.T.'s emotional well-being. M.T. told Lecher about an occasion prior to November 2017 when the children were left home alone completely unsupervised and she was scared. Lecher testified this was likely a traumatic memory for M.T. and an "attachment strain" that could cause mistrust of her main caregivers, in addition to the initial risk of having been left home alone.

M.T. reported to Lecher that there were times she wanted to call Kimberly and tell her she was scared or unhappy at Jayson's house, but she thought she would be punished for doing so. M.T. told Lecher that even if she had a cell phone of her own while at Jayson's house, she feared that Jayson would be able to discover that she called Kimberly and she would be grounded or in trouble with Jayson if she did.

M.T. shared with Lecher that she saw Jayson drinking alcohol and getting drunk with his friends. M.T. told Lecher that one time, she crawled underneath a bed at Jayson's residence and found alcohol there. On several occasions, M.T. also brought up the presence in Jayson's living room of what she called marijuana and said she believed there were other illegal drugs in the home as well. M.T.'s mother was incarcerated for

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drug offenses, and she was worried that Jayson would go to jail too. Lecher considered accessible alcohol and drugs in the home to be a safety risk for the children.

Within the first 2 months of treatment, M.T. told Lecher that Jayson transported her in a car without a seatbelt. Around the same time, M.T. also said she was scared because Jayson was texting while driving. Lecher testified that on approximately four occasions at the beginning of treatment, M.T. said that the children did not have enough food at Jayson's house and would go home to Kimberly's house hungry. M.T. also expressed concerns to Lecher about three mice in Jayson's house.

Lecher observed that during the first 3 months of therapy, M.T. was secretive about what went on during visitations and struggled with knowing what to say and to whom because she did not want to get in trouble or get anyone else in trouble. She told Lecher that Jayson had told her to keep certain things that go on in his house "secret," but when Lecher tried to follow up, M.T. was very guarded because she was afraid she would get in trouble. In Lecher's opinion, this was a safety risk. M.T. told Lecher that she loved Jayson, but M.T. also had concerns about Jayson's ability to provide safety and to be in a relationship with her, listen to her, communicate with her, and understand her needs. M.T. expressed to Lecher that she believed Jayson could meet these needs, but he would need help to do that before she felt safe with him. Since the decrease in Jayson's parenting time to Wednesday evenings and Saturdays, M.T. had reported feeling less stressed, enjoying planned activities with Jayson, and being happier with their relationship. Lecher observed that since the change, M.T. was able to concentrate and focus more, her mood was more stabilized, and she was more willing to talk about her feelings.

Lecher started seeing R.T. in family sessions shortly after Lecher began treating M.T., and she began treating R.T. on March 1, 2019. Lecher diagnosed R.T. with adjustment disorder with "disturbance of conduct." Lecher explained that this means that R.T. is adjusting to transitions in her living arrangements and separation from her parents and communicating

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through negative conduct rather than words. R.T.'s treatment goals were the same as M.T.'s, and she required safety and stabilization in the home, consistency, and plans for de-escalating her "meltdown[s]" and making her feel calm. Like M.T., R.T. had reported that Jayson had instructed her not to disclose to Kimberly everything that went on at his house; R.T. also referred to this information as "secrets" and was very guarded when Lecher asked for more information, fearing she would get into trouble.

Jayson testified that in addition to being the father of M.T., R.T., and T.T., he was the father of a son born in 2006, as well as a son born to Wallen in 2017. Jayson testified that his younger son lived with him and Wallen, along with Wallen's two children, in a three-bedroom, two-bathroom trailer home that belonged to Wallen. Jayson testified that he and Wallen had been in a relationship and lived together for approximately 2 years. Jayson asked the court not to grant access to the children to anyone other than himself. Jayson generally denied or explained the bases for the concerns voiced by other witnesses. Wallen also testified and provided details that generally discounted the concerns brought up by other witnesses.

*District Court Order Disposing of
February 24, 2017, "Complaint."*

The district court denied the relief Jayson requested in his February 24, 2017, complaint. It found that Jayson's motion to dismiss the dissolution complaint had not rendered the decree void or unlawful.

Regarding custody, the district court stated that it had "observed the parties, the witnesses and their demeanors, and made determinations as to credibility." It continued, "To the extent the court's recitation of the facts differ from a party's position on those facts, the court's recitation will constitute the court's findings of disputed facts." In particular, the district court noted that Jayson's failure to meet with the guardian ad litem "casts doubt upon his true motivations" and "works against his credibility and position that he is fit, has

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satisfactory living arrangements for the children, has the children's best interests in mind, and can care for them appropriately." The district court decided that the parental preference principle had been rebutted by showings of parental forfeiture and unfitness and that the best interests of the children "lie elsewhere." It awarded Kimberly legal and physical custody of the children.

Addressing parenting time, the district court found that Kimberly had proved a material change in circumstances and that the children's best interests required changes to Jayson's parenting time then in effect. Jayson received parenting time every other week from Thursday afternoon through Sunday afternoon and for designated holidays and 4 weeks total during the summer, a change from the initial decree's schedule of Friday evenings through Monday mornings and Wednesday evenings through Thursday mornings.

As to child support, the district court completed child support worksheets based in part on Kimberly's suggested calculations and found a material change in circumstances. For the first time, it ordered Jayson to pay child support on a permanent basis, in the amount of \$587 per month.

The district court found that the remainder of the dissolution decree was to stay in effect and that any other relief sought was denied. The parties were ordered to pay their own attorney fees.

Subsequent Motions and Amended Order.

Jayson filed a motion for new trial and a motion to vacate, alter, or amend the judgment. The latter motion again asserted, among other things, that the dissolution decree was void. The district court denied the motions, with the exception of the issue of child support.

At a subsequent hearing on the child support issue, Jayson testified regarding his employment history and income. As of February 26, 2019, Jayson was unemployed and looking for employment and also spending time with his young son. Jayson testified that he did not believe he should be ordered to

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pay child support because he “takes care of” the children when he has them. Kimberly testified that shortly after December 2015, when Jayson began exercising less parenting time than was awarded him in the original decree, her expenses increased because the children were with her more often.

The district court completed new child support worksheets and entered an order amending the child support aspects of the judgment to require Jayson to pay \$236 per month. Jayson was not required to contribute to childcare expenses.

Jayson now appeals.

ASSIGNMENTS OF ERROR

Jayson assigns that the district court erred in not vacating the decree and declaring it to be void. In the alternative, Jayson assigns that the district court erred in (1) denying Jayson’s motion for disqualification for judicial bias, (2) receiving the children’s statements to therapists and the therapists’ opinions, (3) not modifying the decree to award custody to Jayson, (4) modifying the decree as to parenting time and child support, and (5) not awarding Jayson attorney fees.

STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court’s decision. *Simms v. Friel*, 302 Neb. 1, 921 N.W.2d 369 (2019).

[2] 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. *McCullough v. McCullough*, 299 Neb. 719, 910 N.W.2d 515 (2018).

[3,4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *Lindsay Internat.*

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Sales & Serv. v. Wegener, 301 Neb. 1, 917 N.W.2d 133 (2018). A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion. *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 to admit evidence over a hearsay objection or exclude evidence on hearsay grounds. *Pantano v. American Blue Ribbon Holdings*, 303 Neb. 156, 927 N.W.2d 357 (2019).

[6,7] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and will be affirmed absent an abuse of discretion by the trial court. *Jones v. Jones*, 305 Neb. 615, 941 N.W.2d 501 (2020). In a review de novo on the record, an appellate court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue. When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Dooling v. Dooling*, 303 Neb. 494, 930 N.W.2d 481 (2019).

[8] In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014).

ANALYSIS

Motion to Vacate Decree as Void.

We begin with Jayson's contention that the district court erred by not vacating the decree and declaring it void. Jayson takes the position that the motion to dismiss he filed on November 16, 2015, terminated the dissolution action. According to

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Jayson, because the district court did not have jurisdiction of the matter after he filed his motion, the entire decree, which includes custody and child support orders, was void and should have been vacated.

Jayson's argument rests on his understanding that he, as the party that filed the dissolution action, had an absolute right to voluntarily dismiss it and that his filing of the motion to dismiss had the effect of immediately terminating the action without need for additional action by the district court. In short, Jayson claims that his November 16, 2015, motion dismissed the action by operation of law the moment it was filed.

Kimberly disagrees, arguing that Jayson did not have the right to unilaterally dismiss the action. Although she concedes that a plaintiff has the right to unilaterally dismiss an action without prejudice under some circumstances, she contends Jayson did not have such a right in this case, because she had filed a third-party complaint seeking temporary custody or visitation, which remained pending at the time of Jayson's motion to dismiss.

It does not appear that when he filed his November 16, 2015, motion, Jayson or his counsel believed that Jayson could unilaterally terminate the dissolution proceedings. Jayson filed a *motion* to dismiss, which would seem to request that the district court take action to effectuate a dismissal rather than notifying it and the other parties of a self-executing dismissal. See Black's Law Dictionary 1168 (10th ed. 2014) (defining "motion" as "written or oral application requesting a court to make a specified ruling or order"). But even if that issue is set to the side and, further, even if we assume that Jayson is correct that he could and did, in fact, dismiss the dissolution proceeding at the moment he filed his motion to dismiss, we still disagree with Jayson that the subsequent decree was void.

If the dissolution action was terminated the moment Jayson filed his motion to dismiss, the action was effectively reinstated. While Jayson is correct that an order of dismissal or dismissal by operation of law generally divests a court of

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jurisdiction to take any further action in the matter, we have also held that parties may move to reinstate a dismissed action, that such a motion is treated as a motion to vacate, and that courts generally have jurisdiction to vacate an order of dismissal and reinstate a case. See *Molczyk v. Molczyk*, 285 Neb. 96, 825 N.W.2d 435 (2013). Here, the record indicates that Jayson filed a motion to withdraw his motion to dismiss on November 17, 2015. Although framed as a motion to withdraw his motion to dismiss, our law treats motions according to their substance and not their title. See *Gerber v. P & L Finance Co.*, 301 Neb. 463, 919 N.W.2d 116 (2018). The substance of a motion to withdraw a motion to dismiss asks that the action continue. Accordingly, even if the action was automatically dismissed upon Jayson's motion, Jayson's motion to withdraw the motion to dismiss operated as a motion to vacate the dismissal and reinstate the action, a request that the district court had jurisdiction to entertain. Under this scenario, the district court effectively granted the motion to reinstate by recognizing that Jayson desired that the action continue and proceeding to enter a decree.

For these reasons, we find that the district court did not err in concluding that the decree was not void. We thus proceed to address Jayson's alternative assignments of error.

Motion for Judicial Disqualification.

[9,10] Before moving to Jayson's substantive challenges to the modification order, we address his claim that the district court judge erred in not recusing himself. 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. *McCullough v. McCullough*, 299 Neb. 719, 910 N.W.2d 515 (2018). A judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even

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though no actual bias or prejudice was shown. *Thompson v. Millard Pub. Sch. Dist. No. 17*, 302 Neb. 70, 921 N.W.2d 589 (2019). 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. See *In re Interest of J.K.*, 300 Neb. 510, 915 N.W.2d 91 (2018). A party alleging that a judge acted with bias or prejudice bears a heavy burden of overcoming the presumption of judicial impartiality. *Thompson v. Millard Pub. Sch. Dist. No. 17*, *supra*. Jayson has not satisfied this burden.

Jayson’s brief contends there were many instances in which the district court demonstrated bias. Because Jayson did not raise some of those allegations before the district court, we will not consider them all. See *Weber v. Gas ’N Shop*, 278 Neb. 49, 54, 767 N.W.2d 746, 750 (2009) (“[a]n appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court”). See, also, *In re Interest of Michael N.*, 302 Neb. 652, 925 N.W.2d 51 (2019). Instead, we confine our review to alleged instances of judicial bias that were raised below and on appeal; and we conclude that the presiding judge did not err in declining to remove himself from the case.

The allegations of bias that Jayson has made below and on appeal arise from hearings in June 2017 and February 2018 relating to temporary alterations of his parenting time. At the hearings, the presiding judge twice allowed Kimberly’s counsel additional time to submit exhibits in proper form, over Jayson’s objections. On one of those occasions, the judge granted a continuance. The judge also allowed the guardian ad litem to offer opinions despite Jayson’s objection. Further, the judge asked Jayson’s counsel whether Jayson’s affidavit stated that he would not answer any questions posed by any court-appointed guardian ad litem.

[11] Jayson’s allegations of bias relate to the presiding judge’s courtroom administration and evidentiary and substantive rulings. But “‘judicial rulings alone almost never constitute a valid basis for a bias or partiality motion’” directed to a trial judge. *Huber v. Rohrig*, 280 Neb. 868, 875, 791 N.W.2d

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590, 598 (2010), quoting *Liteky v. United States*, 510 U.S. 540, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994). See, also, *Young v. Govier & Milone*, 286 Neb. 224, 835 N.W.2d 684 (2013). Nor can a judge's ordinary efforts at courtroom administration be a basis for bias or partiality. *Id.* Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. *In re Interest of J.K.*, *supra*.

Our review of the record reveals nothing in the district judge's rulings or other actions that indicates bias or prejudice necessitating recusal. Accordingly, we conclude that the district court did not abuse its discretion when it denied Jayson's motion for recusal.

Evidentiary Rulings at Modification Hearing.

Jayson also challenges the district court's modification of the dissolution decree. Relevant to that issue are admissibility rulings at the modification hearing that Jayson also disputes. We address those rulings now.

[12] First, Jayson argues that the district court erred in admitting testimony based on statements that the children and Kimberly made to Bothern and Lecher. He claims those statements were inadmissible hearsay. However, Jayson only assigns that the district court erred in receiving the children's statements, and to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Fetherkile v. Fetherkile*, 299 Neb. 76, 907 N.W.2d 275 (2018). Therefore, we will address only the admissibility of the children's statements to the therapists.

Jayson is correct in identifying the children's statements as hearsay, because it was not the declarants who testified to them and they were received for the truth of the matters asserted. See, Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 2016). However, we conclude that they fall under the

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medical purpose exception to the hearsay rule and were therefore properly admitted.

[13] Under the medical purpose exception, “[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment” are not excluded by the hearsay rule. Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2016). Rule 803(3) is based on the notion that a person seeking medical attention will give a truthful account of the history and current status of his or her condition in order to ensure proper treatment. See, *State v. Beeder*, 270 Neb. 799, 707 N.W.2d 790 (2006), *disapproved on other grounds*, *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007); *State v. Hardin*, 212 Neb. 774, 326 N.W.2d 38 (1982). In order for statements to be admissible under rule 803(3), the party seeking to introduce the evidence must demonstrate (1) that the circumstances under which the statements were made were such that the declarant’s purpose in making the statements was to assist in the provision of medical diagnosis or treatment and (2) that the statements were of a nature reasonably pertinent to medical diagnosis or treatment by a medical professional. *State v. Mora*, 298 Neb. 185, 903 N.W.2d 244 (2017).

Jayson asserts, without additional elaboration, that statements made by M.T. and R.T. to Bothern and Lecher were not made for the purposes of or reasonably pertinent to medical diagnosis or treatment. To the extent Jayson implies that the mental health professional services provided by Bothern and Lecher were not medical in nature and that therefore, the medical purpose exception cannot apply, we disagree.

[14] Our prior cases in this area do not support an argument that the medical purpose exception cannot apply to statements made to mental health professionals. First of all, we have stated that “[a]lthough the heart of the rule 803(3) exception lies in statements made by a patient to a treating physician, the exception casts its net wider than the patient-physician

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relationship.” *State v. Vigil*, 283 Neb. 129, 136, 810 N.W.2d 687, 695 (2012). As a general rule, then, this hearsay exception applies to persons seeking medical assistance from persons who are expected to provide some form of health care. *Vacanti v. Master Electronics Corp.*, 245 Neb. 586, 514 N.W.2d 319 (1994).

More specifically, our cases have applied this hearsay exception to statements made for purposes of obtaining a mental health diagnosis or mental health treatment. In *In re Interest of B.R. et al.*, 270 Neb. 685, 708 N.W.2d 586 (2005), we applied the medical purpose exception to statements a foster mother made to a therapist regarding evidence that the minor patient may have been sexually abused. Although our primary focus in that case was whether statements from someone other than the child herself could be admitted, we concluded that the statements fell within the exception as long as the declarant’s purpose in making the statements was to assist in the provision of medical diagnosis or treatment, the declarant’s statements were reasonably pertinent to such diagnosis or treatment, and a doctor would reasonably rely on such statements. We determined that statements to the child’s therapist setting forth evidence that the child had been sexually abused met these requirements and were thus admissible.

Later, in *State v. Vigil*, *supra*, we applied the exception to statements made during a child advocacy center forensic interview regarding a sexual assault. There, we considered the dual medical and investigatory purposes of the interview. We held that even when an interview is conducted for both medical and investigatory purposes, the medical purpose exception will apply if the statements were made in legitimate and reasonable contemplation of medical diagnosis or treatment. Relying on our decision in *In re Interest of B.R. et al.*, *supra*, we held that when an individual is alleged to be the victim of sexual assault, “statements reasonably pertinent to medical diagnosis and treatment of both physical and *psychological trauma*” were admissible under rule 803(3). *State v. Vigil*, 283 Neb. at 141, 810 N.W.2d at 698 (emphasis supplied).

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Our cases are consistent with those of federal appeals courts. A recent opinion from the Third Circuit Court of Appeals noted that every federal court of appeals that has considered the issue has concluded that statements to mental health professionals for purposes of diagnosis or treatment are admissible under the medical purpose exception to the hearsay rule in the Federal Rules of Evidence. See *U.S. v. Gonzalez*, 905 F.3d 165 (3d Cir. 2018), cert. denied 587 U.S. 1068, 139 S. Ct. 2727, 204 L. Ed. 2d 1120 (2019) (collecting cases).

Having determined that statements made to mental health professionals can fall within the medical purpose exception to the hearsay rule, we must consider whether the statements at issue here met the necessary requirements: that the declarant's purpose in making the statements was to assist in the provision of medical diagnosis or treatment, that the declarant's statements were reasonably pertinent to such diagnosis or treatment, and that a medical professional would reasonably rely on such statements. Whether a statement was both taken and given in contemplation of medical diagnosis or treatment is a factual finding made by the trial court in determining the admissibility of the evidence under rule 803(3), and we review that determination for clear error. *State v. Vigil*, *supra*. Applying that standard here, we find no clear error on the part of the district court.

In the case before us, Kimberly sought assistance for M.T. and R.T. from Bothern and Lecher, health care professionals expected to provide mental or psychological health care. Bothern diagnosed M.T. with adjustment disorder along with depression. In treating M.T., Bothern testified that it was necessary to address her relationship with Jayson and his parenting practices. Lecher made the same diagnosis for M.T., and her treatment goals included helping the adults in M.T.'s life meet M.T.'s needs for safety and stabilization. This entailed providing structure and consistency so that M.T. could trust her environment. Lecher set the same treatment goals for R.T., whom she also diagnosed with adjustment disorder. Statements by M.T. and R.T. relating to their relationship with Jayson

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and their time under his care were integral to their diagnosis and treatment, and considering the context in which they were made, the statements could be reasonably relied upon. We find no error in admitting the disputed testimony over Jayson's objections.

Second, Jayson argues that the testimony of Bothern and Lecher lacked foundation and relevance because of what he claims are admissions that they could not offer opinions about Jayson's parental fitness or the best interests of the children. But even if such admissions exist, it does not follow that Bothern and Lecher lacked knowledge relevant to issues that the district court had to resolve in this case. Whether in the form of opinions or personal observations, the testimony of Bothern and Lecher was relevant to custody and parenting time because it painted a picture of the children's time and relationship with Jayson, the children's perception of it, and the effects it was having on them.

As for foundation, the testimony of Bothern and Lecher was based on their personal knowledge. They both spent time with the children in therapy over the course of months or years, with Bothern spending some therapeutic time with Jayson, and as explained above, the therapy itself necessarily focused on Jayson's parenting time and his relationship with the children. Therefore, we are not persuaded that the district court abused its discretion in admitting the therapists' testimony over Jayson's relevance and foundation objections.

We proceed to consider Jayson's remaining claims in light of this admissible evidence.

Child Custody.

[15] Jayson challenges the district court's determination that custody of the children should remain with Kimberly. This matter has come to us by way of modification proceedings. Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing either that the custodial parent is unfit or that the best interests of the child require such action. *Jones v. Jones*,

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305 Neb. 615, 941 N.W.2d 501 (2020). Jayson does not argue that there has been a material change in circumstances, but argues that modification of the decree to award him custody is required under the parental preference principle.

The parental preference principle establishes a presumption that the best interests of a minor child are served by placing custody with his or her parent. See *In re Guardianship of K.R.*, 304 Neb. 1, 932 N.W.2d 737 (2019). We agree that the parental preference principle governs our analysis. But based on this record and our standard of review, we conclude that the parental preference principle did not require the district court to place the children with Jayson.

The parental preference principle applies to child custody controversies between a biological or adoptive parent on one hand and one who is neither a biological or adoptive parent on the other. See *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004). In those cases, the parent has a superior right to and is entitled to custody of the child unless the third party negates the parental preference principle. See *id.* On many occasions, we have recognized that the parental preference principle can be overcome by a showing that the parent is unfit or has forfeited the right to custody. See *In re Guardianship of K.R.*, *supra* (collecting cases). In addition, in *Windham v. Griffin*, 295 Neb. 279, 288, 887 N.W.2d 710, 717 (2016), we indicated that the preference could be “negated by a demonstration that the best interests of the child lie elsewhere.” We cautioned, however, that we viewed cases in which the best interests of the child defeated the parental preference principle as “exceptional” and further explained that a third party could not overcome the parental preference principle merely by showing that he or she would be able to provide more amenities for the child. *Id.* at 290, 887 N.W.2d at 718.

In this case, the district court concluded that the parental preference principle applied, but found that Kimberly was nonetheless entitled to custody. The district court found the parental preference principle was overcome because Jayson was unfit to have custody of the children, he had forfeited his

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right to custody, and it was in the best interests of the children for Kimberly to have custody.

Jayson argues that the district court erred by finding that he was unfit or forfeited his right to custody. As for the district court's conclusion that it was in the children's best interests for Kimberly to have custody, he argues that the parental preference principle cannot be overcome by a showing that it is in the children's best interests for someone other than the parent to have custody and urges us to overrule *Windham v. Griffin, supra*, to the extent it holds otherwise.

We find that it is not necessary for us to consider whether Jayson forfeited his right to custody or whether the parental preference principle was overcome by a showing that it was in the children's best interests for Kimberly to have custody. Even if Jayson's arguments on those points have merit, the parental preference principle would still be negated by a showing that Jayson is unfit. And, as we will explain, viewing the admissible evidence through the lens of the district court's credibility determinations, we cannot say that the district court abused its discretion in finding Jayson was unfit.

[16] Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being. *In re Guardianship of K.R.*, 304 Neb. 1, 932 N.W.2d 737 (2019). Evidence of unfitness should be focused upon a parent's ability to care for a child, and not any other moral failings a parent may have. *In re Interest of Lakota Z. & Jacob H.*, 282 Neb. 584, 804 N.W.2d 174 (2011). Evidence of a parent's past failings is pertinent only insofar as it suggests present or future faults. *Id.* Parental unfitness must be shown by clear and convincing evidence. See *In re Guardianship of D.J., supra*.

The district court heard evidence that under Jayson's care, the children's physical well-being was at risk. This included evidence of poor living conditions. Jayson had acknowledged that his earlier residence was in disrepair and had issues

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with mice and insect infestations. Kimberly testified that at the time Jayson lived there, she found cockroaches in M.T.'s school backpack. There was evidence that at Jayson's next residence with Wallen, similar problems persisted, including mice and a months-long lice issue. In September 2017, the children left Jayson's residence in the middle of the night due to an odor of urine, a moldy hole in the wall, and the presence of ants in their bedroom. While Jayson insists his home was in a much better condition than portrayed by Kimberly's witnesses, he passed up the opportunity to have a third party, the guardian ad litem, visit it.

Other evidence showed a risk to the children's safety. Kimberly testified that the children often returned from Jayson's home with animal bites or scratches. During the year before trial, the children routinely returned from Jayson's house hungry, dirty, and dressed in clothing that was either the wrong size or inappropriate for the weather. At that time, M.T. reported that she had been punished by losing a meal and told Lecher that she did not have enough food to eat when she was at Jayson's house. During the year preceding trial, M.T. also reported that for "fun," Jayson had shot the children with a pellet gun. Also during the year before trial, M.T. reported the presence of drugs and alcohol in Jayson's home, which she was able to access, and said she had observed Jayson intoxicated, when the decree prohibited Jayson from consuming alcohol within 24 hours prior to or during his parenting time. Kimberly testified that Jayson often transported the children without proper car restraints, and during the year before trial, M.T. also reported that Jayson had transported her without a seatbelt and had texted while driving. Evidence was also introduced that Jayson did not supervise the children properly, including during swimming outings. When the children were returned from swimming outings with Jayson, Kimberly testified that they were nearly always sunburned. Sometimes Jayson entrusted M.T. with supervising the younger children, leaving them home alone, when, according to Bothern and Lecher, M.T. was not developmentally ready to supervise

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others. According to Lecher, this posed an initial safety risk to the children and also could diminish M.T.'s ability to trust her caregivers, posing a future safety risk.

In addition to issues of physical health and safety, there was evidence that Jayson had not routinely contributed financially to the children's care. Until these proceedings, Jayson was not obligated to pay child support, but there was no evidence that he had otherwise contributed to their maintenance aside from childcare expenses he paid after contempt proceedings and what was incidental to his limited and inconsistent parenting time.

The record in this case also contains evidence that Jayson's parental shortcomings have been or probably will be detrimental to his children's mental and emotional well-being. At the time of trial, both M.T. and R.T. were undergoing treatment for adjustment disorders. An atmosphere of safety and stabilization was part of their treatment, but their experience under Jayson's care, described above, was inconsistent with these mental health needs. And in assessing parental fitness, we have considered a parent's ability to meet the particular needs of a child. See *In re Guardianship of K.R.*, 304 Neb. 1, 932 N.W.2d 737 (2019).

Other evidence also showed that Jayson posed a detriment to the children's mental and emotional well-being. Contrary to the initial decree, in 2015 and 2016, Jayson was inconsistent about giving M.T. antidepressant medication she needed regularly to modulate her moods, emotions, and behavior, despite reminders from M.T. herself. Jayson's "boys will be boys" response to M.T.'s concerns about older boys at his previous residence exposing themselves to her and touching the genitals of a young girl in the home could be understood as dismissive. And Jayson consistently put the children, especially M.T., in a position that required them to choose whether they were loyal to him or to Kimberly. He asked them to keep the goings-on at his home "secret," and if the children did disclose such information, they would be in trouble with Jayson. This caused internal struggles for M.T. Fearing

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discovery and punishment, M.T. reported that she did not feel free to call Kimberly if she was scared or unhappy at Jayson's house. In June 2017, CPS and the police came to the home after Jayson left the children home alone, and due to Jayson's anger with M.T. over the situation, M.T. lied about the matter. Lecher observed that M.T. had an "attachment strain" as a result of being left home alone. Jayson caused further emotional turmoil for M.T. by telling the children to misbehave for Kimberly.

Jayson's detrimental effect on the children's mental and emotional health was evident when his visitation was temporarily reduced. Kimberly testified that when visits with Jayson were scaled back, the children's behavior and school performance improved, and Lecher testified that upon Jayson's reduced visitation, M.T. became less stressed, more stable in her mood, able to focus more, and more open about her feelings. M.T. was also happier with her relationship with Jayson, whom she loved, but she questioned his ability to provide for her safety and understand her needs.

Despite Jayson's expressing intentions to improve as a parent, this history, along with other testimony, is evidence that at the time of trial, he did not have either the will or the capacity to do so. According to Bothern, she observed that Jayson frequently did not follow through with her recommendations, even though he was easy to work with in the clinic. This may not, on its own, demonstrate unfitness, but it could reasonably be understood as demonstrating a reluctance or inability to change his parenting practices.

We have reviewed the testimony of Jayson and Wallen, in which they either denied or explained the circumstances above and generally cast a positive light on Jayson as a parent. But the district court's order demonstrates that it did not find this testimony to be credible. In child custody cases, where the credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

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Dooling v. Dooling, 303 Neb. 494, 930 N.W.2d 481 (2019). Because this court is not positioned to pass on the credibility of the witnesses like the district court was, we defer to the district court’s credibility determinations in our assessment of the facts.

Jayson argues that this case is “*nothing* like notable parental preference cases in which the appellate court affirmed the lower court’s decision to award custody . . . of a child to a nonparent.” Brief for appellant at 24 (emphasis in original), citing *In re Guardianship of K.R.*, 304 Neb. 1, 932 N.W.2d 737 (2019); *State on behalf of Lilliana L. v. Hugo C.*, 26 Neb. App. 923, 924 N.W.2d 743 (2019); and *State on behalf of Combs v. O’Neal*, 11 Neb. App. 890, 662 N.W.2d 231 (2003). But the cases Jayson cites are as different from one another as they are from this one. And, even if the cases presented by Jayson shared some factual similarities with this case, our analysis would not depend on a fact-for-fact comparison.

Taken alone, many of Jayson’s individual parental shortcomings might not amount to unfitness. However, the parental fitness analysis is a fact-intensive inquiry. See *In re Interest of Noah C.*, 306 Neb. 359, 945 N.W.2d 143 (2020). Accordingly, we must review the record in this case in totality, rather than focusing on whether any one piece of evidence, viewed in isolation, demonstrates unfitness. Having done so in this case, and given the deference we owe to the trial court’s credibility determinations, we cannot say that the district court abused its discretion in finding Jayson unfit by clear and convincing evidence and ordering that custody remain with Kimberly.

Parenting Time.

Jayson asserts that even if the district court did not err in its custody determination, it erred in modifying his parenting time. The district court modified Jayson’s unsupervised parenting time to every other week from Thursday afternoon through Sunday afternoon and designated holidays, plus summer visitation. Under the initial decree, Jayson’s unsupervised parenting time had been previously scheduled for Friday evenings

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through Monday mornings and Wednesday evenings through Thursday mornings.

[17-20] Visitation rights established by a marital dissolution decree may be modified upon a showing of a material change of circumstances affecting the best interests of the children. *VanSkiver v. VanSkiver*, 303 Neb. 664, 930 N.W.2d 569 (2019). A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Id.* The party seeking to modify visitation has the burden to show a material change in circumstances affecting the best interests of the child. *Id.* The best interests of the children are primary and paramount considerations in determining and modifying visitation rights. *Id.*

Jayson argues the district court could only modify his parenting time if Kimberly proved that between the December 2015 decree and the modification proceedings, a material change of circumstances had taken place and Kimberly failed to prove such a change. We disagree. Evidence during this time period showed that Jayson was inconsistent in exercising his parenting time, and when he did, it negatively affected the children's mental and physical well-being. There was also testimony that the children had a therapeutic need for stability and consistency, which Jayson was not able to provide. Thus, it was not an abuse of discretion for the district court to find there had been a material change of circumstances regarding parenting time that affected the best interests of the children.

Jayson also argues the district court abused its discretion in modifying Jayson's parenting time, because the district court modified it to a "level below" the parenting time Kimberly requested in her answer and cross-complaint. Brief for appellant at 32. The parenting time ordered by the district court did differ from that requested by Kimberly, but it is not so clear to us that it was a "level below," as Jayson contends. The district court's parenting time order granted Jayson less time with the children than Kimberly requested, but it also granted

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Jayson unsupervised time when Kimberly requested that it be “fully supervised.” In any event, we are not convinced by Jayson’s position.

Jayson argues that *Eric H. v. Ashley H.*, 302 Neb. 786, 925 N.W.2d 81 (2019), precluded the district court from reducing Jayson’s parenting time below that requested by Kimberly. In that case, we held that a district court did not abuse its discretion by concluding that sexual abuse by the child’s stepfather was the only material change of circumstances alleged in a complaint to modify and therefore within the scope of the modification proceeding. Jayson makes no argument here that Kimberly relied on evidence outside the scope of her pleadings to demonstrate a material change of circumstances.

Kimberly’s answer and cross-complaint alleged several material changes in circumstances affecting the children’s best interests and requested a change to the parenting time schedule. Jayson was on notice that parenting time was at issue, and he had the opportunity to put on any and all evidence pertinent to the parenting time schedule. See *Fetherkile v. Fetherkile*, 299 Neb. 76, 907 N.W.2d 275 (2018) (due process requires reasonable notice and opportunity to be heard appropriate to nature of proceeding and character of rights to be affected). We conclude that the district court did not exceed the scope of the pleadings or rule without notice to Jayson in modifying his parenting time.

Child Support.

Jayson argues that the district court erred in modifying the decree to impose a child support obligation on him, when none existed before. Jayson does not dispute the district court’s calculation of the amount of child support or that Kimberly, as a third party, could be entitled to child support. See Neb. Ct. R. § 4-222 (rev. 2011) (if child resides with third party, court shall order each parent to pay to third party his or her respective amount of child support). Instead, Jayson contends that there was no material change in circumstances to justify any modification to his child support obligation.

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[21] A party seeking to modify a child support order must show a material change in circumstances that (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered. *Hotz v. Hotz*, 301 Neb. 102, 917 N.W.2d 467 (2018). According to Jayson, there was no material change in circumstances as to child support because there was no evidence that his income or the children's expenses had increased since the original decree and because custody remained with Kimberly. We find no merit to this argument.

Although Jayson asserts that there was no change in custody between the original decree and the order modifying it, a closer analysis reveals a more complicated picture. The initial decree provided that Kimberly had physical and legal custody of the children. The decree scheduled Jayson's parenting time for Friday evenings through Monday mornings and Wednesday evenings through Thursday mornings. Supervised parenting time with Erica was by arrangement. Under this schedule, the amount of time the children were to spend with Jayson was nearly equal to the amount of time the children were to spend with Kimberly. In fact, this schedule provided for the children to spend more nights with Jayson than with Kimberly. And we have previously explained that a trial court can effectively establish a joint physical custody arrangement by awarding nearly equal parenting time even if it uses a different label to describe the arrangement. See *State on behalf of Kaaden S. v. Jeffery T.*, 303 Neb. 933, 932 N.W.2d 692 (2019). See, also, Neb. Rev. Stat. § 43-2922(20) (Reissue 2016) (defining physical custody as authority and responsibility regarding child's place of residence and exertion of continuous parenting time for significant periods of time). In the order modifying the decree, however, the district court reduced Jayson's parenting time to every other week from Thursday afternoon through Sunday afternoon and designated holidays, with 4 weeks total during the summer. After the modification order, Jayson clearly did not have physical custody of the children.

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Regardless of whether there was a change in custody, Kimberly's regular time with the children increased significantly between the original and modified decrees. And even when Jayson's blocks of summer parenting time are considered, her overall time with the children was no longer roughly equivalent to Jayson's. Under the modified decree, the children would spend more than twice as many nights with Kimberly than they would with Jayson. Further, Kimberly testified that the more time she had the children, the more expenses she incurred. This permanent change to Jayson's parenting time and the corresponding increase in expenses for Kimberly were not contemplated at the time of the original decree, and we conclude that they amounted to a material change in circumstances, which permitted modification of Jayson's child support obligation. But see *Brodrick v. Baumgarten*, 19 Neb. App. 228, 809 N.W.2d 799 (2011) (finding *temporary* change to amount of parenting time did not amount to material change in circumstances).

Attorney Fees.

Jayson contends that the district court erred in declining to award him attorney fees. This argument is based on his position that he should have prevailed in this matter. Because we have found no merit to Jayson's other claims, we conclude that the district court did not abuse its discretion in rejecting this one. See *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001).

CONCLUSION

For the reasons set forth above, we find no error on the part of the district court and affirm.

AFFIRMED.

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

GASPAR NOLASCO, PERSONAL REPRESENTATIVE OF
THE ESTATE OF MARIA E. NOLASCO, DECEASED,
APPELLANT, v. BRENNON MALCOM, SPECIAL
ADMINISTRATOR OF THE ESTATE
OF CATARINA A. NOLASCO,
DECEASED, APPELLEE.

GASPARINY NOLASCO, APPELLANT, v. BRENNON
MALCOM, SPECIAL ADMINISTRATOR OF THE
ESTATE OF CATARINA A. NOLASCO,
DECEASED, APPELLEE.

949 N.W.2d 201

Filed September 25, 2020. Nos. S-19-729, S-19-730.

1. **Immunity.** The scope of a judicially created rule of immunity, including whether such rule should be limited or extended, presents a question of law.
2. **Appeal and Error.** To the extent an appeal presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Immunity: Parent and Child: Damages.** The doctrine of parental immunity, as it has been articulated in Nebraska, provides generally that an unemancipated minor cannot maintain an action against his or her parents, or any other person standing in that relation to the minor, to recover damages for ordinary negligence, but can maintain an action to recover damages for brutal, cruel, or inhuman treatment.
4. **Immunity: Parent and Child: Negligence.** The doctrine of parental immunity, as adopted and applied in Nebraska, has always been confined to that class of ordinary negligence claims involving conduct related to parental authority, discretion, or decisionmaking in the supervision, care, and treatment of a minor child.

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5. **Immunity: Parent and Child.** The justifications for adopting the doctrine of parental immunity in Nebraska include protecting the proper exercise of parental authority, recognizing parental discretion in raising and disciplining minor children, and protecting against tort liability based on a legitimate parental decision.
6. **Immunity: Parent and Child: Negligence.** When a negligence claim does not pertain in any respect to the exercise of parental authority, discretion, or decisionmaking in the supervision, care, and treatment of a minor child, the claim falls outside the scope of Nebraska's modified parental immunity doctrine.

Appeals from the District Court for Dawson County: JAMES E. DOYLE IV, Judge. Reversed and remanded for further proceedings.

Tod A. McKeone, of Heldt, McKeone & Copley, for appellants.

Elizabeth Ryan Cano and Stephen L. Ahl, of Wolfe, Snowden, Hurd, Ahl, Sitzmann, Tannehill & Hahn, L.L.P., for appellee.

Daniel J. Thayer, of Thayer & Thayer, P.C., L.L.O., and Benjamin I. Siminou, of Siminou Appeals, Inc., for amicus curiae Nebraska Association of Trial Attorneys.

MILLER-LERMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

STACY, J.

Appellants' automobile negligence actions were dismissed on summary judgment after the district court concluded they were barred by the parental immunity doctrine. In these consolidated appeals, appellants challenge the applicability and the continued viability of that doctrine in Nebraska.¹ After considering the origins, development, and application of the doctrine,

¹ See *Pullen v. Novak*, 169 Neb. 211, 99 N.W.2d 16 (1959).

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we conclude the automobile negligence claims alleged in these cases fall outside the scope of Nebraska's parental immunity doctrine. We therefore reverse the judgments of the district court and remand the causes for further proceedings.

I. BACKGROUND

On January 21, 2017, Catarina A. Nolasco was operating a motor vehicle on the interstate near Wood River, Nebraska, when the vehicle left the roadway and entered the ditch, rolling several times. Nolasco's unemancipated minor children were riding in the vehicle with her at the time; her son was seriously injured and her daughter died from injuries sustained in the accident. Nolasco also died as a result of the accident.

The daughter's estate filed a wrongful death and survival action against Nolasco's estate, and the son (now an adult) filed a separate negligence action against Nolasco's estate to recover for his injuries. Both actions alleged that Nolasco's negligent operation of the vehicle caused the accident. Specifically, they alleged Nolasco was negligent in failing to maintain a proper lookout, driving at a speed greater than was reasonable and prudent under the conditions then existing, and failing to exercise proper control over her vehicle.

Nolasco's estate moved for summary judgment in both actions, alleging the doctrine of parental immunity applied to bar the negligence claims. The district court agreed. The court's order discussed and considered several Nebraska cases, including the seminal case of *Pullen v. Novak*,² and ultimately determined the doctrine of parental immunity applied to automobile negligence claims. It acknowledged the appellants' request to abrogate or limit the doctrine, but declined to do so, reasoning that any changes to the judicially created doctrine must come from either the Nebraska Supreme Court or the Nebraska Legislature. The district court thus granted

² *Id.*

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summary judgment in favor of Nolasco's estate and dismissed the actions.

Timely appeals were filed by the son and by the daughter's estate. We granted their petitions to bypass and consolidated the cases for purposes of appeal.

II. ASSIGNMENT OF ERROR

Appellants assign that the district court erred in dismissing the actions based on the parental immunity doctrine.

III. STANDARD OF REVIEW

[1] The scope of a judicially created rule of immunity, including whether such rule should be limited or extended, presents a question of law.³

[2] To the extent an appeal presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.⁴

IV. ANALYSIS

[3] The doctrine of parental immunity, as it has been articulated in Nebraska, provides generally that an unemancipated minor cannot maintain an action against his or her parents, or any other person standing in that relation to the minor, to recover damages for ordinary negligence, but can maintain an action to recover damages for “brutal, cruel, or inhuman treatment.”⁵ We have described this as a “modified

³ See, *Wood v. McGrath, North*, 256 Neb. 109, 589 N.W.2d 103 (1999) (discussing judgmental immunity rule); *Frey v. Blanket Corp.*, 255 Neb. 100, 582 N.W.2d 336 (1988) (discussing quasi-judicial immunity and parental immunity); *Imig v. March*, 203 Neb. 537, 279 N.W.2d 382 (1979) (addressing spousal immunity).

⁴ See *In re Adoption of Micah H.*, 301 Neb. 437, 918 N.W.2d 834 (2018).

⁵ *Pullen*, *supra* note 1, 169 Neb. at 223, 99 N.W.2d at 25.

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version” of the parental immunity doctrine adopted in other jurisdictions.⁶

In these consolidated appeals, the threshold question is one of first impression: Does Nebraska’s modified parental immunity doctrine apply to bar automobile negligence claims brought by unemancipated minors against a parent? To answer that question, we begin our analysis with a general overview of the origins of the judicially created doctrine in the United States. We then discuss the development, recognition, and application of the doctrine in Nebraska. And finally, we consider the parties’ arguments as to whether the doctrine applies to bar automobile negligence claims and whether this court should modify or abrogate the doctrine.

1. GENERAL HISTORY OF PARENTAL
IMMUNITY DOCTRINE

The doctrine of parental immunity did not originate in English common law,⁷ but instead was introduced into American tort jurisprudence by the 1891 Mississippi Supreme Court case of *Hewlett v. Ragsdale*.⁸ In *Hewlett*, the court held that an unemancipated minor could not sue her mother for damages sustained when the mother confined the child in a mental institution. *Hewlett* reasoned:

[S]o long as the parent is under obligation to care for, guide and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society, and

⁶ *Id.* See, also, *Richards v. Meeske*, 268 Neb. 901, 689 N.W.2d 337 (2004).

⁷ See, 4 Restatement (Second) of Torts § 895G, comment *b.* (1979); 2 Dan B. Dobbs et al., *The Law of Torts* § 358 (2d ed. 2011); 2 Stuart M. Speiser et al., *The American Law of Torts* § 6:49 (2014).

⁸ *Hewlett v. Ragsdale*, 68 Miss. 703, 9 So. 885 (1891), *abrogated*, *Glaskox by and through Denton v. Glaskox*, 614 So. 2d 906 (Miss. 1992).

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of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrong-doing, and this is all the child can be heard to demand.⁹

In the decades immediately following *Hewlett*, courts in all but a handful of states¹⁰ adopted some version of the doctrine of parental immunity, but courts were not consistent in articulating either the scope of the doctrine or the public policy reasons justifying its adoption.¹¹ Common justifications for adopting the doctrine included (1) maintaining family harmony; (2) preserving parental autonomy and authority over the discipline, supervision, and care of children; (3) preventing fraud and collusion between family members; and (4) protecting family

⁹ *Id.* at 711, 9 So. at 887.

¹⁰ See, e.g., *Petersen v. City and County of Honolulu*, 51 Haw. 484, 462 P.2d 1007 (1969) (declining to adopt doctrine, reasoning minors are entitled to same redress for wrongs as other persons and reasons other jurisdictions give for doctrine not sufficient to overcome that basic right); *Rupert v. Stienne*, 90 Nev. 397, 528 P.2d 1013 (1974) (abrogating interspousal immunity while clarifying parental immunity was never adopted); *Nuelle v. Wells*, 154 N.W.2d 364 (N.D. 1967) (finding court had never adopted doctrine and should not); *Wood v. Wood*, 135 Vt. 119, 370 A.2d 191 (1977) (answering certified question by holding minor's suit against parent for negligent supervision not categorically barred by unrecognized doctrine of parental immunity).

¹¹ See Annot., 6 A.L.R.4th 1066, § 2[a] (1981).

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assets from depletion in favor of one child at the expense of others.¹²

By the mid-20th century, jurisdictions began to reexamine the blanket doctrine.¹³ The Wisconsin Supreme Court's opinion in *Goller v. White*¹⁴ is generally recognized as the first case to abrogate the doctrine,¹⁵ but it was only a partial abrogation. *Goller* abolished blanket parental immunity, but expressly retained immunity where the alleged negligence involved either the exercise of parental authority over the child or "ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care."¹⁶

After *Goller*, a few states chose to maintain blanket parental immunity,¹⁷ but most jurisdictions moved away from blanket immunity and narrowed the practical application of the doctrine by recognizing a wide variety of exceptions and limitations.¹⁸

¹² See *id.* See, also, 4 Restatement (Second), *supra* note 7, § 895G, comment c.; 2 Dobbs et al., *supra* note 7; 2 Speiser et al., *supra* note 7.

¹³ See 2 Speiser et al., *supra* note 7.

¹⁴ *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

¹⁵ See 4 Restatement (Second), *supra* note 7, § 895G, comment j.

¹⁶ *Goller*, *supra* note 14, 20 Wis. 2d at 413, 122 N.W.2d at 198.

¹⁷ See, e.g., *Rambo v. Rambo*, 195 Ark. 832, 114 S.W.2d 468 (1938); *Blake v. Blake*, 235 Ga. App. 38, 508 S.E.2d 443 (1998); *Vaughan v. Vaughan*, 161 Ind. App. 497, 316 N.E.2d 455 (1974); La. Rev. Stat. Ann. § 9:571 (2016).

¹⁸ See, Annot., 6 A.L.R. 4th 1066, §§ 6 through 12 (1981 & Supp. 2020) (discussing various exceptions to doctrine including claims related to motor vehicle accidents, death of parent or child, breach of duty to general public, parent's business activity, claims covered by liability insurance, and claims against noncustodial parents); 2 Dobbs et al., *supra* note 7.

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The most commonly recognized limitation has been to allow suits against parents for the negligent operation of an automobile.¹⁹ Some states adopted a *Goller*-like approach and limited the doctrine to bar tort claims only when the negligent conduct at issue is inherent to the parent-child relationship, such as the

¹⁹ See 4 Restatement (Second), *supra* note 7, § 895G, comment *k*. at 430 (noting “most of the cases abrogating the immunity have involved automobile accidents”). Accord, e.g., *Hebel v. Hebel*, 435 P.2d 8, 15 (Alaska 1967) (finding it “unnecessary to attempt to define precisely what scope should be given to the doctrine of parental immunity,” but holding minor can sue parent for negligent driving); *Nocktonick v. Nocktonick*, 227 Kan. 758, 611 P.2d 135 (1980) (holding minor may sue parent for automobile negligence and declining to otherwise define scope of doctrine); *Glaskox*, *supra* note 8 (abrogating doctrine as applied to suits for negligent operation of vehicle); *Transamerica Ins. Co. v. Royle*, 202 Mont. 173, 656 P.2d 820 (1983) (declining to define scope of doctrine but holding it does not apply to actions based on automobile negligence); *Briere v. Briere*, 107 N.H. 432, 224 A.2d 588 (1966) (allowing minor to sue parent for negligence in automobile accident); *France v. A. P. A. Transport Corp.*, 56 N.J. 500, 267 A.2d 490 (1970) (abrogating doctrine to allow suits based on negligent operation of motor vehicle and declining to address its continued scope beyond facts presented); *Silva v. Silva*, 446 A.2d 1013 (R.I. 1982) (abrogating doctrine in automobile tort actions); *Smith v. Kauffman*, 212 Va. 181, 183 S.E.2d 190 (1971) (abrogating doctrine in actions for automobile negligence); *Merrick v. Sutterlin*, 93 Wash. 2d 411, 610 P.2d 891 (1980) (abrogating doctrine in automobile negligence action and holding continued application of doctrine in other circumstances should be determined on case-by-case basis); *Lee v. Comer*, 159 W. Va. 585, 224 S.E.2d 721 (1976) (abrogating doctrine regarding actions based on negligent operation of motor vehicle); *Dellapenta v. Dellapenta*, 838 P.2d 1153 (Wyo. 1992) (holding automobile negligence actions do not involve parental authority or discretion and thus fall outside doctrine of parental immunity).

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exercise of parental authority, supervision, care, or discipline.²⁰ Some states have abolished the doctrine in toto,²¹ and others

²⁰ See, *Schneider v. Coe*, 405 A.2d 682 (Del. 1979) (noting preservation of parental authority vital to public policy and refusing to abrogate immunity in actions based on negligent supervision of children); *Pedigo v. Rowley*, 101 Idaho 201, 610 P.2d 560 (1980) (retaining doctrine at least in cases of negligent supervision because family plays essential role in welfare of society); *Cates v. Cates*, 156 Ill. 2d 76, 104-05, 619 N.E.2d 715, 729, 189 Ill. Dec. 14, 28 (1993) (holding parental immunity extends only to conduct “inherent to the parent-child relationship” which involves an “exercise of parental authority and supervision over the child”); *Rigdon v. Rigdon*, 465 S.W.2d 921 (Ky. 1970) (abrogating doctrine except where conduct involves reasonable exercise of parental authority over child or where negligence involves providing care and necessities to child); *Black v. Solmitz*, 409 A.2d 634 (Me. 1979) (abrogating doctrine as categorical ban but retaining it for conduct involving care and discipline of children, which parameters can be defined in future cases); *Plumley v. Klein*, 388 Mich. 1, 199 N.W.2d 169 (1972) (abrogating doctrine except for conduct involving exercise of reasonable parental authority over child or reasonable parental discretion with respect to provisions of food, clothing, housing, and other care); *Broadwell by Broadwell v. Holmes*, 871 S.W.2d 471, 476-77 (Tenn. 1994) (finding parental immunity limited to conduct that “constitutes the exercise of parental authority, the performance of parental supervision, and the provision of parental care and custody”); *Jilani by and through Jilani v. Jilani*, 767 S.W.2d 671 (Tex. 1988) (holding immunity extends to acts involving exercise of parental authority and provision of care and necessities); *Goller*, *supra* note 14 (abrogating immunity except for acts of ordinary parental authority and discretion).

²¹ See, e.g., *Kirchner v. Crystal*, 15 Ohio St. 3d 326, 474 N.E.2d 275 (1984) (abolishing blanket immunity doctrine in toto with no exceptions); *Falco v. Pados*, 444 Pa. 372, 282 A.2d 351 (1971) (abrogating doctrine and noting minors can sue parents in property and contract); *Elam v. Elam*, 275 S.C. 132, 268 S.E.2d 109 (1980) (abolishing doctrine and noting minors can sue parents in property and contract).

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have replaced it with either a “reasonable parent” rule or the approach followed by the Restatement (Second) of Torts.²²

2. PARENTAL IMMUNITY DOCTRINE
IN NEBRASKA

The first Nebraska case to formally recognize the doctrine of parental immunity was the 1959 case of *Pullen v. Novak*.²³ In *Pullen*, we identified three earlier cases that established the framework for the doctrine in Nebraska: *Nelson v. Johansen*,²⁴ *Clasen v. Pruhs*,²⁵ and *Fisher v. State*.²⁶ All three cases involved claims of cruel parental treatment of a minor child.

²² See 4 Restatement (Second), *supra* note 7, § 895G, comment *k*. at 431 (rejecting tort immunity between parent and child based solely on relationship but recognizing not all acts or omissions undertaken in course of parent-child relationship will result in liability because some conduct is protected by parental discipline privilege and, to be tortious, parental conduct should be “palpably unreasonable”). See, e.g., *Broadbent v. Broadbent*, 184 Ariz. 74, 907 P.2d 43 (1995) (holding status as parent does not bar suit, but adopting reasonable parent test for suits of minors against parents); *Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) (overruling prior adoption of doctrine and adopting reasonable and prudent parent test); *Rousey v. Rousey*, 528 A.2d 416 (D.C. 1987) (declining to adopt doctrine and instead endorsing approach of 4 Restatement (Second), *supra* note 7, § 895G); *Anderson v. Stream*, 295 N.W.2d 595 (Minn. 1980) (abolishing doctrine and adopting reasonable parent standard); *Hartman by Hartman v. Hartman*, 821 S.W.2d 852 (Mo. 1991) (abrogating doctrine and adopting reasonable parent test); *Winn v. Gilroy*, 296 Or. 718, 681 P.2d 776 (1984) (agreeing with 4 Restatement (Second), *supra* note 7, § 895G, approach and focusing on nature of parent’s negligent act).

²³ *Pullen*, *supra* note 1.

²⁴ *Nelson v. Johansen*, 18 Neb. 180, 24 N.W. 730 (1885).

²⁵ *Clasen v. Pruhs*, 69 Neb. 278, 95 N.W. 640 (1903).

²⁶ *Fisher v. State*, 154 Neb. 166, 47 N.W.2d 349 (1951).

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Well over a century ago, in *Nelson*,²⁷ we considered a negligence claim brought on behalf of a 10-year-old girl who was sent by her parents to work for and live with the defendant and his family. It was alleged the defendant sent the child out in bitterly cold weather to walk some distance back to her parent's home without sufficient clothing, which caused her to become "badly frozen" and remain bedridden in "great pain" for a long time.²⁸ We affirmed the jury verdict in favor of the child, reasoning in part that the defendant stood in the relation of the child's parent and it was his "duty to see that she was properly clothed [and if] he failed in this through negligence he would be liable for the consequences."²⁹

The 1903 case of *Clasen*³⁰ was the first Nebraska case to expressly limit tort recovery by minors against parents. In *Clasen*, a 6-year-old child was sent by her parents in Germany to live with an aunt in Nebraska. Eventually, the aunt returned the child to her parents, after which the child, through a next friend, sued the aunt seeking damages for cruel and inhuman treatment. It was alleged the aunt had unnecessarily beaten, tortured, and whipped the child, and had denied her proper food and clothing, causing permanent injury to her health and growth. The jury returned a verdict in favor of the child. On appeal, the aunt admitted she stood in loco parentis to the child but argued that a parent should not be held liable in tort for correcting a child unless the parent acted with "wicked impulses" or the punishment was "of such a nature as to seriously injure the life, limbs or health of the child."³¹ We noted there was some authority for a rule that a parent cannot be

²⁷ *Nelson*, *supra* note 24.

²⁸ *Id.* at 181, 24 N.W. at 730.

²⁹ *Id.* at 183, 24 N.W. at 731.

³⁰ *Clasen*, *supra* note 25.

³¹ *Id.* at 283, 95 N.W. at 642.

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held liable for punishment that “falls short of maiming or disfiguring . . . or seriously injuring or endangering life and health”³² of the child. But we declined to adopt such a rule, preferring instead to follow “the trend of a long line of well considered cases”³³ that predicated the child’s right of recovery on proof that the parental treatment was unreasonable or cruel. We reasoned:

That much of the welfare of society rests on the proper exercise of parental authority is self-assertive, but that there is and should be a reasonable limitation on the right of parents to punish their offspring, is an elemental principle of modern civilization. The question then is, what is the right, and what [is] the proper limitation of the right, and who shall judge when the right has been exceeded?³⁴

Clasen answered that question by announcing the rule that “[a] parent, teacher or master is not liable either civilly or criminally for moderately correcting a child, pupil or apprentice, but it is otherwise if the correction is immoderate and unreasonable.”³⁵ This principle from *Clasen* would eventually be cited by this court as support for both the parental immunity doctrine³⁶ and for the related parental discipline privilege.³⁷

³² *Id.*

³³ *Id.* at 284, 95 N.W. at 642.

³⁴ *Id.* at 283, 95 N.W. at 642.

³⁵ *Id.*

³⁶ *Pullen, supra* note 1.

³⁷ See, e.g., *Cornhusker Christian Ch. Home v. Dept. of Soc. Servs.*, 227 Neb. 94, 106, 416 N.W.2d 551, 560 (1987) (recognizing that rule announced in *Clasen* was “a restatement of the common-law rule that was later codified in the criminal defense provision of § 28-1413”). See, also, 1 Restatement (Second) of Torts, §§ 147 and 150 (1965) (regarding parental discipline privilege).

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In *Fisher*,³⁸ a mother was charged with manslaughter after her 4-year-old son died. The mother admitted hitting the child with a stick when he was disobedient, but she maintained the punishment was moderate and appropriate. The State offered medical evidence that an examination conducted a few hours after the child's death revealed he was extremely malnourished and had abrasions, contusions, and lacerations on his face, neck, arms, chest, and scalp. His scalp was reportedly twice the normal thickness due to the formation of scar tissue caused by repeated trauma. A doctor testified the cause of death was repeated trauma to his head and malnutrition. We affirmed the mother's manslaughter conviction, reiterating the general principle announced in *Clasen* that a parent or one standing in the relation thereof "is not liable either civilly or criminally for moderately and reasonably correcting a child, but it is otherwise if the correction is immoderate and unreasonable"³⁹

(a) *Pullen v. Novak*

The principles articulated in *Nelson*, *Clasen*, and *Fisher* were all cited as support when this court formally recognized the doctrine of parental immunity in *Pullen*.⁴⁰ In that case, a toddler was injured when he was struck by a backing vehicle in his parents' driveway while in his father's care. The vehicle that struck the child was being driven by the father's friend, who at the time was helping the father return a customer's vehicle that had been serviced at the repair shop where the father worked.

Through a next friend, the toddler brought a negligence action against his father, the father's friend, and the father's

³⁸ *Fisher*, *supra* note 26.

³⁹ *Id.* at 176, 47 N.W.2d at 355.

⁴⁰ See *Pullen*, *supra* note 1, citing *Nelson*, *supra* note 24; *Clasen*, *supra* note 25; and *Fisher*, *supra* note 26.

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employer. The father was dismissed from the action on grounds the toddler, “being an unemancipated minor child as shown in the petition, has no right of action against the parent for the negligent tort of such parent.”⁴¹ The father’s employer was subsequently dismissed on summary judgment, and the claim against the father’s friend proceeded to trial but was dismissed by the court at the close of the plaintiff’s evidence. The plaintiff appealed, assigning error to the dismissal of the claims against the friend and the employer, but not the father.

In addressing whether the father’s employer could be vicariously liable for the toddler’s injuries, we noted such liability depended on whether the father could himself be liable in tort to his minor son. On that question, we first considered parental immunity cases from other jurisdictions, observing:

The cases from other jurisdictions run strongly to the effect that an unemancipated minor, such as appellant was and is, cannot maintain an action against his parent, or any other person standing in that relation to the minor, to recover damages for negligence The reason for the rule is stated in *Meece v. Holland Furnace Co.*, 269 Ill. App. 164, as follows: “It is a rule of common law based upon public policy that a minor child cannot sue his father in tort unless a right of action is authorized by statute.”⁴²

We then cited *Nelson*, *Clasen*, and *Fisher* for the proposition that “Nebraska has adopted a modified version of this rule.”⁴³ The rule we articulated in *Pullen* was not one of blanket immunity. Rather, we announced a rule that allows unemancipated minors to recover from a parent in tort “‘where the child is subjected to . . . brutal, cruel, or inhuman treatment,’”

⁴¹ *Pullen*, *supra* note 1, 169 Neb. at 214, 99 N.W.2d at 20.

⁴² *Id.* at 223, 99 N.W.2d at 25.

⁴³ *Id.*

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but which generally prohibits minors from “maintain[ing] an action against his parents, or any other person standing in that relation to the minor, to recover damages for ordinary negligence.”⁴⁴

Until the instant appeals, we have not been asked to limit the parental immunity rule announced in *Pullen*. But we have, in two reported opinions we address next,⁴⁵ discussed the possibility of expanding the doctrine’s application.

(b) Post-*Pullen* Cases

In *Frey v. Blanket Corp.*,⁴⁶ we discussed the potential applicability of the parental immunity doctrine to the ordinary negligence of court-appointed guardians in the performance of their duties on behalf of their ward. In *Frey*, the guardian placed the adult ward in an institution, where a roommate later fatally assaulted her. The ward’s estate sued the guardian for negligently failing to supervise the ward’s placement and living conditions. The trial court granted the guardian’s motion for summary judgment, finding the doctrine of quasi-judicial immunity applied and entitled the guardian to absolute immunity from suit.

On appeal in *Frey*, we concluded quasi-judicial immunity did not apply to the guardian merely because she had been court appointed. We also suggested that quasi-judicial immunity was not necessary to protect court-appointed guardians from exposure to liability for ordinary negligence in the performance of their duties, reasoning that a guardian’s duty to a ward was “equivalent to that owed by a parent to an unemancipated minor child.”⁴⁷ We noted that *Clasen* and

⁴⁴ *Id.* at 223, 224, 99 N.W.2d at 25.

⁴⁵ See, *Richards*, *supra* note 6; *Frey*, *supra* note 3.

⁴⁶ *Frey*, *supra* note 3.

⁴⁷ *Id.* at 107, 582 N.W.2d at 341.

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Pullen recognized that a minor may recover against a parent in tort only for brutal, cruel, or inhuman treatment, and we suggested that parental immunity may protect court-appointed guardians for ordinary negligence in supervising their wards. But *Frey* reversed the judgment and remanded the cause for further proceedings without actually applying the parental immunity doctrine.

In *Richards v. Meeske*,⁴⁸ we again discussed the parental immunity doctrine without applying it. In that case, a 9-year-old girl was injured when her father allowed her to operate an all-terrain vehicle on the farm where he lived and worked. A negligence action was brought on behalf of the child against her father and the owner of the farm. The farm owner successfully moved for summary judgment, and the trial court certified the ruling as final for purposes of appeal.⁴⁹ We reversed the summary judgment, finding the lower courts had not analyzed the claim against the farm owner using the proper premises liability framework. But our opinion also addressed an issue the lower courts had not considered: whether the farm owner had a duty to protect the child from the allegedly negligent parenting decision of her father. In that regard, we observed the parental immunity doctrine might also limit the landowner's duty:

Here, a policy consideration might prevent the imposition of a duty on [the landowner] to protect a child lawfully on the land from negligent parenting decisions Courts have traditionally recognized that parents are entitled to discretion in how they raise and discipline their children. As a result, courts have been hesitant to impose tort liability because of a legitimate parental decision. This court, for example, has adhered to a modified

⁴⁸ *Richards*, *supra* note 6.

⁴⁹ See Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

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version of the parent-child tort immunity, holding that a child cannot recover in tort from his or her parent unless “the child is subjected to . . . brutal, cruel, or inhuman treatment.” *Pullen v. Novak*, 169 Neb. 211, 223, 99 N.W.2d 16, 25 (1959). See, also, *Frey v. Blanket Corp.*, 255 Neb. 100, 582 N.W.2d 336 (1998).⁵⁰

Richards questioned whether the public policy interest underpinning the parental immunity doctrine “suggests that possessors of land should not be required to protect a child lawfully on the land from the negligent parenting decisions of the child’s parent, at least when those decisions are not palpably unreasonable.”⁵¹ But *Richards* ultimately decided it was not appropriate to answer that question, in part because the claim against the child’s father was still pending before the trial court. We thus reversed the summary judgment and remanded the cause for further proceedings without expressing an opinion on whether Nebraska landowners have a duty to protect a child lawfully on the land from negligent parenting decisions.

3. ARGUMENTS OF PARTIES

Appellants present two basic arguments in support of their request to reverse the decisions of the district court. First, they argue the parental immunity doctrine, as applied in Nebraska, only precludes tort actions by unemancipated minors against their parents for negligent acts involving the exercise of parental discretion. Appellants argue that our cases have never applied the doctrine to an automobile negligence claim, and they suggest such claims do not ordinarily implicate the exercise of parental discretion or authority. As such, they suggest the district court erred by expanding the doctrine to bar automobile negligence claims.

⁵⁰ *Richards*, *supra* note 6, 268 Neb. at 911-12, 689 N.W.2d at 346.

⁵¹ *Id.* at 912, 689 N.W.2d at 346.

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Alternatively, appellants argue that if Nebraska's parental immunity doctrine does broadly bar all negligence actions by minors against their parents except those involving cruel or inhuman treatment, then either it should be modified to permit automobile negligence actions like the ones at issue here or it should be abrogated altogether. In support of this alternative argument, appellants generally suggest that the doctrine is outdated and that the national trend is to either limit or abrogate parental immunity. They also argue that the doctrine, if applied to bar automobile negligence cases by a child against a parent, is inconsistent with the Legislature's 2010 repeal of the guest statute in Nebraska.⁵²

Appellee responds that the district court correctly applied the parental immunity doctrine to bar the instant automobile negligence actions. Appellee argues, "A fair reading of *Pullen*, and of Nebraska precedent as a whole, shows that Nebraska has long adopted a broad parental-immunity doctrine that applies to all general-negligence claims."⁵³ Appellee opposes abrogation or modification of Nebraska's parental immunity doctrine, arguing the historical justifications for the doctrine remain applicable to modern families. Appellee also suggests the Legislature's repeal of the guest statute did not reference or impact the continued viability of the parental immunity doctrine in Nebraska.

4. DOES NEBRASKA'S MODIFIED PARENTAL
IMMUNITY DOCTRINE APPLY TO BAR
AUTOMOBILE NEGLIGENCE CLAIMS?

As stated, the modified parental immunity doctrine as articulated in *Pullen* bars unemancipated minors from suing a parent, or one standing in that relation, for conduct involving

⁵² See 2010 Neb. Laws, L.B. 216, § 1 (repealing Neb. Rev. Stat. § 25-21,237 (Reissue 2008) effective July 15, 2010).

⁵³ Brief for appellee in cases Nos. S-19-729 and S-19-730 at 5.

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“ordinary negligence,”⁵⁴ but allows such suits when the conduct involves “brutal, cruel, or inhuman treatment.”⁵⁵ It is apparent, then, that Nebraska’s doctrine is not a blanket bar on all negligence claims because it expressly allows tort claims alleging brutal, cruel, or inhuman treatment of a child by a parent. But we have not had occasion to precisely define the class of “ordinary negligence” claims to which the doctrine does apply.

Appellee argues Nebraska’s doctrine broadly bars all “general-negligence claims”⁵⁶ except those alleging brutal, cruel, or inhuman treatment. Appellants disagree and argue that Nebraska’s doctrine has always been limited to that class of negligence claims involving parental discretion in the treatment of their child.

[4] We conclude it is not necessary, in this case, to define the outermost limits of Nebraska’s modified parental immunity doctrine. But we generally agree with appellants that the doctrine, as adopted and applied in Nebraska by this court, has always been confined to that class of ordinary negligence claims involving conduct related to parental authority, discretion, or decisionmaking in the supervision, care, and treatment of a minor child.

Pullen announced and applied the doctrine to bar a claim related to a father’s conduct in failing to supervise his toddler in the driveway.⁵⁷ *Clasen* and *Nelson* both allowed tort recovery by a child who was injured by the mistreatment of someone standing in loco parentis.⁵⁸ And to the extent our post-*Pullen* cases discussed the potential application of the parental

⁵⁴ *Pullen*, *supra* note 1, 169 Neb. at 224, 99 N.W.2d at 25.

⁵⁵ *Id.* at 223, 99 N.W.2d at 25.

⁵⁶ Brief for appellee in cases Nos. S-19-729 and S-19-730 at 5.

⁵⁷ See *Pullen*, *supra* note 1.

⁵⁸ See, *Clasen*, *supra* note 25; *Nelson*, *supra* note 24.

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immunity doctrine in other contexts, *Frey* involved applying the doctrine to the conduct of a court-appointed guardian who was alleged to have negligently supervised her ward and *Richards* considered applying the doctrine to limit a landowner's duty to protect children on the land from allegedly negligent parental decisionmaking regarding the child.⁵⁹

[5] All of our reported opinions developing, applying, and discussing the doctrine have involved allegations of negligence relating directly to the treatment or supervision of a child or ward by a parent or one standing in relation to a parent. Stated differently, we have neither applied nor discussed applying the parental immunity doctrine to conduct that did not involve the exercise of parental authority, discretion, or decisionmaking regarding the supervision, care, and treatment of a minor child. And our application of the doctrine has been entirely consistent with the expressed reasons for adopting a modified immunity rule in Nebraska: to protect "the proper exercise of parental authority,"⁶⁰ to recognize that "parents are entitled to discretion in how they raise and discipline their children,"⁶¹ and to protect against "tort liability because of a legitimate parental decision."⁶² We consider these justifications for the doctrine to be as valid today as when *Clasen* and *Pullen* were decided.

Consequently, because appellants are correct that this court has never applied the parental immunity doctrine beyond that class of claims alleging ordinary negligence in the exercise of parental authority, discretion, or decisionmaking in the supervision, care, and treatment of a minor child, we agree there is no need to expressly modify the doctrine to exclude automobile

⁵⁹ See, *Richards*, *supra* note 6; *Frey*, *supra* note 3.

⁶⁰ *Clasen*, *supra* note 25, 69 Neb. at 283, 95 N.W. at 642.

⁶¹ *Richards*, *supra* note 6, 268 Neb. at 911, 689 N.W.2d at 346.

⁶² *Id.*

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negligence cases. Claims of negligence in the operation of a motor vehicle rarely involve the exercise of parental authority or discretion in the supervision, care, and treatment of a child,⁶³ which likely explains why Nebraska has no reported cases in which the parental immunity doctrine has been applied to such a case.

[6] In the instant appeals, the allegations of negligence against Nolasco were limited to driving at an unreasonable speed, failing to keep a reasonable lookout, and failing to exercise proper control of her vehicle. Because none of this alleged conduct pertains in any respect to the exercise of parental authority, discretion, or decisionmaking in the supervision, care, and treatment of a minor child, the claim falls outside the scope of Nebraska's modified parental immunity doctrine.

We therefore hold that the negligence actions in this case, as currently alleged, are not barred by the doctrine of parental immunity and should not have been dismissed on that basis. And because the negligence claims presented here do not actually implicate the continued viability of the parental immunity doctrine, we leave for another day the question whether Nebraska's modified parental immunity doctrine should be revisited in any respect.

V. CONCLUSION

For the foregoing reasons, we reverse the summary judgments in favor of Nolasco's estate and remand the causes to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

HEAVICAN, C.J., not participating.

CASSEL, J., concurs in the result.

⁶³ See, e.g., *Cates*, *supra* note 20; *Winn*, *supra* note 22; *Dellapenta*, *supra* note 19.

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Cite as 307 Neb. 330



Nebraska Supreme Court

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STATE OF NEBRASKA, APPELLANT, v.
DEBORAH S. ARCHER, APPELLEE.

STATE OF NEBRASKA, APPELLANT, v.
CORY L. RUSSELL, APPELLEE.

948 N.W.2d 762

Filed September 25, 2020. Nos. S-19-802, S-19-803.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Criminal Law: Preliminary Hearings: Probable Cause.** The purpose of a preliminary hearing is to ascertain whether a crime has been committed and whether there is probable cause to believe the accused committed it.
3. **Constitutional Law: Criminal Law: Preliminary Hearings.** A preliminary hearing is not a criminal prosecution or trial within the meaning of the Nebraska Constitution. Nor is it a trial of the person charged in regard to his or her guilt or innocence.
4. **Criminal Law: Preliminary Hearings: Probable Cause.** If after a preliminary hearing the court finds that a crime has been committed and there is probable cause to show that the accused committed it, the effect of the hearing is to hold the accused for trial.

Appeals from the District Court for Washington County:
JOHN E. SAMSON, Judge. Exceptions overruled.

M. Scott Vander Schaaf, Washington County Attorney, for
appellant.

Mallory N. Hughes, of Dornan, Troia, Howard, Breitkreutz
& Conway, P.C., L.L.O., for appellees.

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HEAVICAN, C.J., MILLER-LEMAN, CASSEL, STACY, FUNKE,
PAPIK, and FREUDENBERG, JJ.

HEAVICAN, C.J.

INTRODUCTION

The State of Nebraska seeks appellate review of the district court's dismissal of charges filed against Deborah S. Archer and Cory L. Russell. The Nebraska Court of Appeals granted leave to appeal, and we moved this case to our docket. We overrule the State's exceptions.

BACKGROUND

Archer owned DJ's Vapes, located in Herman, Washington County, Nebraska. Russell was employed by Archer at DJ's Vapes. Archer and Russell were arrested in December 2017, following an investigation by local law enforcement into whether DJ's Vapes was engaged in selling illegal drugs. Specifically at issue on appeal is the sale of products containing cannabidiol, also known as CBD.

Archer and Russell were both first charged in Washington County Court with possession of CBD with the intent to manufacture, deliver, or dispense under Neb. Rev. Stat. § 28-416(1) (Cum. Supp. 2018) and conspiracy under Neb. Rev. Stat. § 28-202 (Cum. Supp. 2018). A preliminary hearing was held in March 2018.

At the preliminary hearing, a member of law enforcement testified that he purchased from Archer and Russell items advertised as containing CBD oil. Following that hearing, the county court found sufficient probable cause to bind Archer and Russell over to district court. Accordingly, an information was filed in the district court charging the same counts.

Archer and Russell then filed pleas in abatement, and in June 2018, the district court dismissed all of the counts. According to the State's application for leave to docket an appeal, an order explaining the court's reasoning accompanied its decision. That reasoning is not part of our record.

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In July 2018, the county attorney refiled the criminal cases in county court, and a preliminary hearing was held in October. The laboratory technician who tested the CBD oil at issue testified that tetrahydrocannabinol, otherwise known as THC, and CBD had a similar chemical structure. The technician also indicated, in response to cross-examination, that his testing revealed no THC in the CBD oil sold by Archer and Russell, and he further testified that his testing did not reveal whether the CBD in question was synthetically produced. The county court dismissed the charges, finding that the county attorney did not establish probable cause. Apparently no explanation of reasoning accompanied these dismissals.

The present charges were filed in November 2018. A preliminary hearing was held in May 2019. A clinical neuropsychologist at the University of Nebraska Medical Center testified at the preliminary hearing that the pharmacological effects of THC and CBD were not similar. In addition, the transcripts of proceedings from the prior cases were offered as exhibits. In July, the district court dismissed without prejudice all charges for failure of sufficient probable cause. No reasoning was given.

The State filed an application to docket appeals, taking exception to the district court's July 2019 dismissals.¹ The Court of Appeals granted those applications, and the exception proceedings were consolidated and moved to this court's docket.

ASSIGNMENT OF ERROR

The State assigns that the district court erred in dismissing the charges against Archer and Russell.

STANDARD OF REVIEW

[1] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an

¹ See Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2018).

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independent conclusion irrespective of the decision of the court below.²

ANALYSIS

Archer and Russell were charged with possession of CBD with the intent to manufacture, deliver, or dispense under § 28-416(1) and conspiracy under § 28-202. The issue presented by this appeal is whether the district court erred when, following a preliminary hearing, it dismissed the charges against Archer and Russell.

Legal Principles.

Section 28-202(1) provides:

A person shall be guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a felony:

(a) He agrees with one or more persons that they or one or more of them shall engage in or solicit the conduct or shall cause or solicit the result specified by the definition of the offense; and

(b) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy.

Section 28-416(1) provides that “[e]xcept as authorized by the Uniform Controlled Substances Act, it shall be unlawful for any person knowingly or intentionally: (a) To manufacture, distribute, deliver, dispense, or possess with intent to manufacture, distribute, deliver, or dispense a controlled substance” “Controlled substance” is defined as “a drug, biological, substance, or immediate precursor in Schedules I through V of section 28-405.”³

Neb. Rev. Stat. § 28-405(c) [Schedule I] (Cum. Supp. 2018) of the Uniform Controlled Substances Act lists the following as prohibited substances:

² *State v. Rossbach*, 264 Neb. 563, 650 N.W.2d 242 (2002).

³ See Neb. Rev. Stat. § 28-401(4) (Cum. Supp. 2018).

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Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, their salts, isomers, and salts of isomers, unless specifically excepted, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation, and, for purposes of this subdivision only, isomer shall include the optical, position, and geometric isomers:

.....
(12) *Tetrahydrocannabinols, including, but not limited to, synthetic equivalents of the substances contained in the plant or in the resinous extractives of cannabis, sp. or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity*
.....

.....
(25) *Any material, compound, mixture, or preparation containing any quantity of synthetically produced cannabinoids* Since nomenclature of these synthetically produced cannabinoids is not internationally standardized and may continually evolve, these structures or compounds of these structures shall be included under this subdivision, regardless of their specific numerical designation of atomic positions covered, so long as it can be determined through a recognized method of scientific testing or analysis that the substance contains properties that fit within one or more of the following categories:

.....
(M) *Any nonnaturally occurring substance, chemical compound, mixture, or preparation, not specifically listed elsewhere in these schedules and which is not approved for human consumption by the federal Food and Drug Administration, containing or constituting a cannabinoid receptor agonist as defined in section 28-401.*

(Emphasis supplied.)

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A preliminary hearing did not exist at common law.⁴ A preliminary hearing is a creature of statute, and its functional purpose is stated in Neb. Rev. Stat. § 29-506 (Reissue 2016):

If upon the whole examination, it shall appear that no offense has been committed or that there is no probable cause for holding the accused to answer for the offense, he shall be discharged; but if it shall appear that an offense has been committed and there is probable cause to believe that the person charged has committed the offense, the accused shall be committed to the jail of the county in which the same is to be tried, there to remain until he is discharged by due course of law

[2-4] In short, the purpose of a preliminary hearing is to ascertain whether a crime has been committed and whether there is probable cause to believe the accused committed it.⁵ Its purpose is not a criminal prosecution or trial within the meaning of the Nebraska Constitution.⁶ Nor is it a trial of the person charged in regard to his or her guilt or innocence.⁷ Rather, if after a preliminary hearing the court finds that a crime has been committed and there is probable cause to show that the accused committed it, the effect of the hearing is to hold the accused for trial.⁸

Did District Court Err?

In this appeal, the State assigns that the district court erred in dismissing the charges against Archer and Russell following a preliminary hearing. The county attorney requests this court to provide a legal analysis, reason, and opinion providing direction of this issue for prosecuting attorneys, and further

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See *id.*

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asserts that sufficient evidence was presented to establish that probable cause existed.

As to the merits, the county attorney argues that sufficient evidence was presented to establish probable cause because items sold by Archer and Russell contained CBD, which is listed as a Schedule I substance under the Uniform Controlled Substances Act. The county attorney takes issue with Archer and Russell’s expert’s testimony that CBD did not have the same pharmacological effect as THC, calling it “irrelevant.”⁹

Finally, at oral argument in this case, the county attorney indicated that because the district court failed to explain why the charges were lacking in probable cause, the county attorney was unsure how to proceed. The county attorney further indicated that the Legislature’s passage of 2019 Neb. Laws, L.B. 657, otherwise known as the Nebraska Hemp Farming Act, and its impact upon such prosecutions, had not been addressed by this court.

As noted, the purpose of a preliminary hearing is to ascertain whether a crime has been committed and whether there is probable cause to believe the accused committed it. While certainly most preliminary hearings center on questions of fact related to the alleged crime, the preliminary hearing in this case was different in that its focus was on whether a crime was committed at all. As such, a prosecutor was required to show (1) possession and/or distribution (2) of a controlled substance. Only the second requirement—whether the CBD oil is a controlled substance—is at issue here.

In order to determine if a substance is a “controlled substance,” one must examine the Uniform Controlled Substances Act. Before the district court, the record shows that both § 28-405(c)(12) and § 28-405(c)(25) were at issue.

We turn first to § 28-405(c)(12), which lists as a controlled substance THC and synthetic equivalents of THC, as well as any substances “with similar chemical structure and

⁹ Brief for appellant at 6.

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pharmacological activity” as THC. Archer and Russell concede the CBD in this case had a similar chemical structure as THC, but they argue that the prosecutor failed to show the CBD oil had “similar . . . pharmacological activity” to an illegal substance as set forth in § 28-405(c)(12) and that to the contrary, Archer and Russell’s expert’s testimony showed that it did not.

Our review of the record supports the contention of Archer and Russell that the CBD oil in question did not contain THC and did not have the same pharmacological effects as THC. Therefore, the State failed to establish that the CBD tested in this matter was a “controlled substance” under the Uniform Controlled Substances Act.

We turn next to whether the CBD was a synthetic equivalent to an illegal substance for purposes of § 28-405(c)(25). At issue here is whether Archer and Russell possessed or distributed “[a]ny material, compound, mixture, or preparation containing any quantity of synthetically produced cannabinoids”¹⁰ The county attorney has proved there was cannabinoids, or CBD, in the CBD oil. But the record establishes that the county attorney failed to show the source of the CBD, i.e., failed to show that it was “synthetically produced.” As such, the record presented by the State fails to establish that the CBD in question was a prohibited “controlled substance” under the Uniform Controlled Substances Act.

We finally turn to the county attorney’s request, not specifically assigned on appeal,¹¹ that we provide direction on how to prosecute cases involving CBD. But these exception proceedings do not involve anything other than the State’s failures of proof at the preliminary hearing, and do not implicate L.B. 657. We therefore decline the invitation to address the prosecution of cases involving CBD products in this opinion.

¹⁰ See § 28-405(c)(25).

¹¹ See, e.g., *State v. Lierman*, 305 Neb. 289, 940 N.W.2d 529 (2020).

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Finally, we note that there is no requirement in either statute or case law for a district court to provide explanation for a decision to dismiss charges following a preliminary hearing, and thus to the extent the county attorney seeks a finding of error for the court's failure to do so, we find none.

CONCLUSION

We find no error in the district court's dismissal of the informations filed against Archer and Russell, and thus, we overrule the State's exceptions.

EXCEPTIONS OVERRULED.

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STATE EX REL. COUNSEL FOR DIS. v. KOZLIK
Cite as 307 Neb. 339



Nebraska Supreme Court

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STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE
OF THE NEBRASKA SUPREME COURT, RELATOR,
v. MICHAEL D. KOZLIK, RESPONDENT.

948 N.W.2d 792

Filed September 25, 2020. No. S-20-459.

Original action. Judgment of disbarment.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE,
PAPIK, and FREUDENBERG, JJ.

PER CURIAM.

INTRODUCTION

On May 22, 2020, the Iowa Supreme Court entered an order revoking the license to practice law of the respondent, Michael D. Kozlik. The Counsel for Discipline of the Nebraska Supreme Court, the relator, filed a motion for reciprocal discipline against the respondent. We grant the motion for reciprocal discipline and impose discipline of disbarment from the practice of law in the State of Nebraska.

FACTS

The respondent was admitted to the practice of law in the State of Nebraska on September 12, 1979. He was licensed to practice law in Iowa in 2000. On May 22, 2020, the Iowa Supreme Court entered an order revoking the respondent's license to practice law in Iowa.

Based on the respondent's misappropriation of funds while serving as the administrator of his uncle's estate, the Iowa Supreme Court Attorney Disciplinary Board sought

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disciplinary sanctions against the respondent based on violations of the following Iowa Rules of Professional Conduct: rule 32:8.4(b) (criminal act reflects adversely on lawyer's honesty, trustworthiness, or fitness) and rule 32:8.4(c) (misconduct involving dishonesty, fraud, deceit, or misrepresentation). The respondent argued that the unauthorized payments were an honest mistake because he believed the payments he made to himself from the estate were permitted without prior court authorization, although it is required in Iowa. The commission found a violation of rule 32:8.4(c) and recommended a public reprimand.

On review, the Iowa Supreme Court found violations of both rule 32:8.4(b) and rule 32:8.4(c) and entered an order revoking the respondent's license to practice law in Iowa. The court noted numerous examples of the respondent's prior legal work in Iowa probate cases to demonstrate his knowledge of the statutes requiring court approval prior to the payment of administrator fees. In reaching its decision, the court concluded that the respondent misappropriated funds and breached a fiduciary duty to the estate.

On May 14, 2020, the relator filed a motion for reciprocal discipline pursuant to Neb. Ct. R. § 3-321 of the disciplinary rules. The motion stated that the above-cited Iowa Supreme Court rules are in sum and substance the equivalent of Neb. Ct. R. of Prof. Cond. § 3-508.4(b) and (c) (rev. 2016).

This court filed an order to show cause as to why it should not impose reciprocal discipline. On July 8, 2020, the relator filed a response that requested reciprocal discipline of disbarment. On July 27, the respondent filed a response in which he requested that this court impose no discipline or, at most, a public reprimand.

ANALYSIS

The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.

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State ex rel. Counsel for Dis. v. Murphy, 283 Neb. 982, 814 N.W.2d 107 (2012). In a reciprocal discipline proceeding, a judicial determination of attorney misconduct in one jurisdiction is generally conclusive proof of guilt and is not subject to relitigation in the second jurisdiction. *Id.* 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:

- (1) Disbarment by the Court; or
- (2) Suspension by the Court; or
- (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
- (4) Censure and reprimand by the Court; or
- (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.

Section 3-321 of the disciplinary rules provides in part:

(A) Upon being disciplined in another jurisdiction, a member shall promptly inform the Counsel for Discipline of the discipline imposed. Upon receipt by the Court of appropriate notice that a member has been disciplined in another jurisdiction, the Court may enter an order imposing the identical discipline, or greater or lesser discipline as the Court deems appropriate, or, in its discretion, suspend the member pending the imposition of final discipline in such other jurisdiction.

In imposing attorney discipline, we evaluate each case in light of its particular facts and circumstances. *State ex rel. Counsel for Dis. v. Murphy, supra*.

Upon due consideration of the record, and the facts as determined by the Iowa Supreme Court, we determine that disbarment is appropriate. Therefore, we grant the motion for reciprocal discipline and disbar the respondent from the practice of law in the State of Nebraska.

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CONCLUSION

The motion for reciprocal discipline is granted. It is the judgment of this court that the respondent should be and hereby is disbarred from the practice of law in the State of Nebraska, and we therefore order him disbarred from the practice of law, effective immediately. The respondent shall comply with all notification requirements by disbarred members provided by Neb. Ct. R. § 3-316 (rev. 2014), and upon failure to do so, he shall be subject to punishment for contempt of this court. The respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2019) and 3-323(B) of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

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STATE EX REL. COUNSEL FOR DIS. v. WALDRON
Cite as 307 Neb. 343



Nebraska Supreme Court

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STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE
OF THE NEBRASKA SUPREME COURT, RELATOR,
v. NANCY G. WALDRON, RESPONDENT.

948 N.W.2d 795

Filed September 25, 2020. No. S-20-556.

Original action. Judgment of disbarment.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE,
PAPIK, and FREUDENBERG, JJ.

PER CURIAM.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by the respondent, Nancy G. Waldron, on August 10, 2020. The court accepts the respondent's voluntary surrender of her license and enters a judgment of disbarment.

STATEMENT OF FACTS

The respondent was admitted to the practice of law in the State of Nebraska on September 12, 1984. On August 10, 2020, the respondent filed a voluntary surrender of her license to practice law, in which she stated that on July 31, 2018, she was charged in the county court for Fillmore County, Nebraska, with a Class IIA felony count of theft by unlawful taking in violation of Neb. Rev. Stat. § 28-511 (Reissue 2016). See Neb. Rev. Stat. § 28-518(1) (Reissue 2016). The respondent ultimately was convicted and sentenced by the district court to a 5-year term of probation and ordered to pay restitution of \$56,913. The respondent stated that she freely

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and voluntarily surrenders her privilege to practice law in the State of Nebraska; waives her right to notice, appearance, or hearing prior to the entry of an order of disbarment; and consents to the entry of an immediate order of disbarment.

ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

(A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.

(1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315 of the disciplinary rules, we find that the respondent has voluntarily surrendered her license to practice law and, for purposes of her license to practice law, knowingly does not challenge or contest the fact of her conviction referenced above. Further, the respondent has waived all proceedings against her in connection with the disciplinary proceeding. We further find that the respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration, the court accepts the respondent's voluntary surrender of her license to practice law, finds that the respondent should be disbarred, and hereby orders her disbarred from the practice of law in the State of Nebraska, effective immediately. The respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316 (rev. 2014) of the disciplinary rules, and upon failure to do so, she shall be subject to punishment for contempt of this court. Accordingly, the respondent is directed to pay costs and expenses in accordance

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STATE EX REL. COUNSEL FOR DIS. v. WALDRON

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with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2019) 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 DISBARMENT.

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IN RE CLAIM OF ROBERTS FOR ATTORNEY FEES
Cite as 307 Neb. 346



Nebraska Supreme Court

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IN RE CLAIM OF ROBERTS FOR ATTORNEY FEES.
KRISTINE ROBERTS, APPELLEE, v. COUNTY OF
WASHINGTON, NEBRASKA, APPELLANT.
949 N.W.2d 299

Filed October 2, 2020. Nos. S-19-378, S-19-533, S-19-932.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. An appellate court independently reviews questions of law decided by the lower court.
2. **Judgments: Statutes: Rules of the Supreme Court: Appeal and Error.** For purposes of construction, Nebraska Supreme Court rules are treated like statutes, and therefore an appellate court independently reviews the conclusion of a lower court.
3. **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 absent an abuse of discretion.
4. **Courts: Statutes: Appeal and Error.** The right of appeal in Nebraska is purely statutory, and courts have no power to allow an appeal when it is not authorized by statute.
5. **Final Orders: Appeal and Error.** Neb. Rev. Stat. § 25-1902 (Supp. 2019) authorizes appeals from four types of final orders: (1) those affecting a substantial right in an action that, in effect, determines the action and prevents a judgment; (2) those affecting a substantial right made during a special proceeding; (3) those affecting a substantial right made on summary application in an action after judgment is rendered; and (4) those denying a motion for summary judgment when such motion is based on the assertion of sovereign immunity or the immunity of a government official.
6. **Juvenile Courts: Attorney Fees: Final Orders.** Orders fixing fees for court-appointed counsel in juvenile cases under Neb. Rev. Stat. § 43-273 (Reissue 2016) fall into the second category of final order

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under Neb. Rev. Stat. § 25-1902 (Supp. 2019), because they are made in a special proceeding and affect a substantial right.

7. **Actions: Final Orders: Words and Phrases.** A “special proceeding” occurs where the law confers a right and authorizes a special application to a court to enforce the right. A special proceeding includes every special statutory remedy that is not in itself an action, and a proceeding may be special, even if the proceeding is connected with a pending action.
8. **Juvenile Courts: Attorney Fees: Final Orders.** Fee applications under Neb. Rev. Stat. § 43-273 (Reissue 2016) meet the definition of a special proceeding.
9. **Attorney Fees: Statutes: Final Orders: Counties.** When court-appointed counsel is authorized by statute to apply to the appointing court to fix reasonable fees for legal services rendered, an order fixing such fees is a final, appealable order from which either appointed counsel or the county board responsible for payment may appeal.
10. **Statutes: Rules of the Supreme Court: Appeal and Error.** When construing both statutes and Nebraska Supreme Court rules, an appellate court applies familiar rules of statutory interpretation. The language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of words which are plain, direct, and unambiguous. It is not within the province of the courts to read meaning into a statute that is not there or to read anything direct and plain out of a statute.
11. **Juvenile Courts: Attorney Fees: Rules of the Supreme Court.** Neither Neb. Rev. Stat. § 43-273 (Reissue 2016) nor Neb. Ct. R. § 6-1407 requires that the county must be notified when a fee application is filed by court-appointed counsel, nor does either require that an evidentiary hearing be routinely held on such an application.
12. **Attorney Fees: Statutes: Evidence.** When a statute requires the court to fix reasonable fees for appointed counsel, the trial court has a duty to determine whether the requested fees are in fact reasonable, even if there is no objection to the application or no contrary evidence presented.
13. **Juvenile Courts: Attorney Fees.** Once a juvenile court appoints counsel in a juvenile proceeding, it has a duty under Neb. Rev. Stat. § 43-273 (Reissue 2016) to fix reasonable fees for the necessary legal services performed.
14. **Attorney Fees.** When fixing reasonable fees, a court considers several factors: the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.

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15. **Attorney Fees: Counties: Appeal and Error.** In the absence of an appeal, a court's order fixing court-appointed counsel fees is conclusive upon both appointed counsel and the county as to the amount allowed.
16. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
17. **Courts: Attorney Fees: Appeal and Error.** While both trial courts and appellate courts are regarded as experts on the value of legal services, a trial court ordinarily has a better opportunity for practically appraising the situation, and an appellate court will interfere only to correct a patent injustice, where the allowance is clearly excessive, or insufficient.
18. **Juvenile Courts: Attorney Fees: Appeal and Error.** When a juvenile case is appealed, Neb. Rev. Stat. § 43-273 (Reissue 2016) requires appointed counsel to apply to the juvenile court, not the appellate court, for payment of services performed on appeal.

Appeals from the County Court for Washington County: C. MATTHEW SAMUELSON, Judge. Affirmed.

M. Scott Vander Schaaf, Washington County Attorney, and Desirae M. Solomon for appellant.

Kristine Roberts, of Roberts Law Office, L.L.C., for appellee.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

STACY, J.

In these consolidated appeals, the county attorney for Washington County, Nebraska, challenges a series of orders fixing fees for court-appointed counsel in a juvenile proceeding. This opinion clarifies the statutory framework for appealing such orders and explains how the appeal should be styled. It then addresses the procedural and evidentiary challenges raised by the county, including its contentions that (1) the county is entitled by law to notice and an evidentiary hearing whenever a fee application is filed, (2) fee applications must be supported by evidence of the client's continued indigency, (3) courts may not allow fees for defending objections to a

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fee application, and (4) only an appellate court may award fees for services performed on appeal.

Finding no abuse of discretion, we affirm the fee orders entered by the juvenile court.

I. BACKGROUND

1. PROCEDURAL HISTORY OF JUVENILE PROCEEDINGS

In March 2016, the State filed a petition in the county court for Washington County alleging the minor children of Kilynn K. were within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2015) due to the faults and habits of Kilynn. Pursuant to an ex parte order, the children were removed from Kilynn's home, which was alleged to be unsanitary and bug infested.

Early in the case, the county court, sitting as a juvenile court, granted Kilynn's request for court-appointed counsel and appointed attorney Kristina Roberts.¹ Roberts has represented Kilynn during all phases of this juvenile proceeding.

Eventually, the children were adjudicated under § 43-247(3)(a). The court set a permanency goal of reunification, and Kilynn was ordered to work with family support services, complete a psychological evaluation, attend therapy, attend parenting classes, learn how to clean and organize the home, and eradicate insects from the home. At regular review hearings throughout 2017, the court found that Kilynn was making progress and that supervised visits were going well. However, in the spring of 2018, Kilynn started to backslide, and in June 2018, the State moved to terminate her parental rights.

Trial on the motion to terminate was held in November 2018. The trial lasted 4 full days; more than 20 witnesses testified, and approximately 90 exhibits were offered. At the conclusion of trial, the juvenile court denied the State's motion,

¹ See Neb. Rev. Stat. § 43-279.01(1) (Reissue 2016) (authorizing juvenile court to appoint counsel to represent parent in adjudication and termination proceeding if parent unable to afford attorney).

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finding it had not shown that Kilynn was unfit or that terminating her parental rights was in the children's best interests. The State timely appealed that ruling, and the Nebraska Court of Appeals affirmed.²

2. ORDERS COMPENSATING COURT-APPOINTED COUNSEL

(a) Fee Applications From 2016
Through 2018

During the first few years of this juvenile proceeding, Roberts filed an application in the county court for Washington County every 3 to 4 months seeking payment for past legal services at the approved hourly rate, which at the time was \$75 per hour. There were no objections to any of these fee applications. The court routinely allowed Roberts' fee applications without a hearing, and no appeals were taken from any of the fee orders during this time period.

(b) February 2019 Fee Application

On February 13, 2019, Roberts filed a verified fee application seeking payment of \$12,103.80 for 151 hours of services rendered from August 30, 2018, through February 6, 2019. The application included time billed by Roberts in preparing for and defending the 4-day termination trial. The fee application was supported by Roberts' affidavit, which included a detailed billing statement. Roberts served a copy of the February 2019 fee application, along with a notice of hearing, on the Washington County Attorney.

Washington County filed a written objection to Roberts' fee application, alleging Roberts' affidavit contained hearsay and lacked necessary foundation. In a subsequently filed brief, the county also challenged evidence of Kilynn's indigency and argued that Roberts' fee application should be denied because prior fee orders had sufficiently compensated Roberts for her services.

² *In re Interest of A.M. & S.K.S.*, No. A-19-247, 2019 WL 5561409 (Neb. App. Oct. 29, 2019) (selected for posting to court website).

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At the hearing, Roberts offered a copy of her affidavit and the court received it without objection. Roberts also called a local attorney, who testified that for the past 30 years, a portion of his general law practice involved representing parents in termination proceedings. He described parental rights termination cases as the “capital punishment of all family law cases.” When privately retained, he billed his time for such work at \$200 an hour. He also accepted juvenile court appointments despite the lower hourly rate, because he understood the court “wants experienced trial attorneys to be available on the court list.” The attorney testified that trial preparation time varies from case to case, but that, generally, an attorney prepares approximately 2 hours for each hour spent in trial. He testified that other attorneys in the area often consult him about handling parental rights termination cases and that Roberts consulted him several times during the pendency of this case but did not bill the county for any of that time. The attorney was familiar with the history of this juvenile case and had reviewed Roberts’ affidavit and her billing statement. When asked his opinion on whether Roberts’ fees and expenses were fair and reasonable, he testified that if anything, Roberts underbilled for the time she spent defending Kilynn.

Washington County offered no evidence at the hearing. It instead urged the court to deny Roberts’ February 2019 fee application in its entirety, based on the arguments it raised in its objection and brief. Summarized, it was the county’s primary position that Roberts’ past fee awards were sufficient to compensate her for all of her legal services in the case, even if it meant she received no payment for the time billed defending Kilynn in the parental rights termination trial.

On March 28, 2019, the court entered an order overruling Washington County’s objection to Roberts’ February 2019 fee application. The court found Roberts’ requested fees were fair and reasonable, and it allowed fees in the sum of \$12,103.80. The county timely appealed from that order, and the appeal was docketed as case No. A-19-378.

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(c) April 2019 Fee Application

Roberts filed another verified fee application on April 25, 2019, seeking payment of \$2,347.50 for approximately 31 hours of legal services performed from February 11 to April 25, 2019. This application included 3 hours billed in connection with preparing for and attending the evidentiary hearing on Washington County's objection to the February 2019 fee application and 1.2 hours of work in connection with the county's direct appeal of the decision declining to terminate Kilynn's parental rights. Roberts' April 2019 fee application was supported by her own affidavit and a detailed billing invoice. Roberts served the Washington County Attorney with a copy of the April 2019 fee application and a notice of hearing.

The county did not file an objection to the April 2019 fee application, but it did appear at the scheduled hearing. At the hearing, Roberts offered a copy of her affidavit and the court received it over the State's objections. Washington County offered no evidence, but made an oral objection to the fee application, claiming the court lacked jurisdiction over the matter, because the county had appealed some of the juvenile court's recent orders.

The juvenile court rejected the county's jurisdictional argument and, speaking from the bench, found that Roberts had been properly appointed and that "[t]here were no irregularities" in her fee request. The county took exception to the latter finding and asked to be heard, arguing that Roberts' April 2019 fee application was irregular because some of the billed time pertained to work performed in defending the county's appeals. It was the county's position that Roberts could not ask the juvenile court to compensate her for work performed in the appellate court. According to the county, if Roberts wanted to be paid for work performed on appeal, she would need to "re-apply to the Court of Appeals to get separately appointed for the purposes of the appeal," and then "the Court of Appeals takes up that application for attorney fees when that case closes."

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The county also argued that Roberts' fee request was irregular because she was seeking compensation for time spent defending the county's objection to her February 2019 fee application. The county argued that such time "ha[d] nothing to do with" representing Kilynn in the juvenile proceeding and, thus, was not compensable under Neb. Rev. Stat. § 43-273 (Reissue 2016). When the court asked what Roberts should have done when the county objected to her fee application, the county conceded it was appropriate for Roberts to prepare for and appear at the hearing on the county's objection. But it maintained Roberts was not entitled to be compensated for that time.

The juvenile court ruled from the bench and allowed Roberts' fee request after making a minor deduction. Later that same day, the court entered an order overruling the county's objection, finding that Roberts' fees were fair and reasonable, and allowing fees in the sum of \$2,325. The county timely appealed from that order, and the appeal was docketed as case No. A-19-533.

(d) July 2019 Fee Application

On July 12, 2019, Roberts filed a verified application seeking fees in the amount of \$2,991.85 for nearly 40 hours of legal services performed from April 26 through July 1, 2019. This application included approximately 19 hours of time billed for activities related to defending Kilynn in the ongoing juvenile court proceedings, approximately 1 hour billed for defending the county's objection to Roberts' April 2019 fee application, and approximately 20 hours billed for reviewing, researching, and drafting briefs in the various appeals taken by the county. Roberts' July 2019 fee application was accompanied by a detailed billing statement, but unlike her prior two applications, it contained no certificate of service and no notice of hearing. Washington County contends it was never served with a copy of this fee application.

Without setting the matter for hearing, the court entered an order on August 26, 2019, allowing Roberts' July 2019 fee

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application in the amount of \$ 2,991.85. Washington County timely appealed from that order, and the appeal was docketed as case No. A-19-932.

We moved all three appeals to our docket on our own motion and consolidated them for purposes of this opinion.

II. ASSIGNMENTS OF ERROR

In its first appeal, Washington County assigns, restated, that the juvenile court's February 2019 fee order was erroneous, because Roberts offered no evidence that Kilynn was still unable to afford a lawyer and because Roberts had already been adequately compensated by prior fee orders.

In its second appeal, Washington County assigns that the April 2019 fee order was erroneous for the same reasons raised in the first appeal and, in addition, assigns that the allowed fees were excessive because Roberts was compensated for time spent defending the county's objection to her February 2019 fee application.

In its third appeal, Washington County assigns that the July 2019 fee order was erroneous for the same reasons raised in the first and second appeals and, in addition, assigns that the order was erroneous because fees were allowed without providing Washington County notice or an opportunity to be heard.

III. STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law.³ An appellate court independently reviews questions of law decided by the lower court.⁴

[2] For purposes of construction, Nebraska Supreme Court rules are treated like statutes,⁵ and therefore an appellate court independently reviews the conclusion of a lower court.⁶

³ *State v. Brye*, 304 Neb. 498, 935 N.W.2d 438 (2019).

⁴ *Id.*

⁵ *Hotz v. Hotz*, 301 Neb. 102, 917 N.W.2d 467 (2018).

⁶ See *Sellers v. Reefer Systems*, 305 Neb. 868, 943 N.W.2d 275 (2020).

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[3] 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 absent an abuse of discretion.⁷

IV. ANALYSIS

When the juvenile case was filed in 2016, Kilynn advised the court she could not afford to hire a lawyer and she requested court-appointed counsel.⁸ The court appointed Roberts, and Washington County does not, in these appeals, challenge the basis for that appointment. Instead, the county challenges the court's 2019 orders fixing Roberts' attorney fees.

The parties' appellate briefing demonstrates considerable confusion regarding the proper procedure under Nebraska law for requesting and fixing fees for court-appointed counsel in juvenile proceedings. We therefore begin by setting out the statutes and uniform court rules governing that procedure.

1. STATUTES AND COURT RULES GOVERNING PAYMENT OF COURT-APPOINTED COUNSEL

Section 43-273 provides in relevant part that counsel appointed under the juvenile code

shall apply to the court before which the proceedings were had for fees for services performed. The court upon hearing the application shall fix reasonable fees. The county board of the county wherein the proceedings were had shall allow the account, bill, or claim presented by any attorney . . . in the amount determined by the court. No such account, bill, or claim shall be allowed by the county board until the amount thereof shall have been determined by the court.

In addition to the statutory process outlined in § 43-273, the Supreme Court has adopted a uniform court rule which applies in all county courts and governs the content and filing

⁷ See *State v. Rice*, 295 Neb. 241, 888 N.W.2d 159 (2016).

⁸ See § 43-279.01(1).

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of fee applications in both criminal and juvenile matters.⁹ That uniform court rule provides:

Before the claim of any attorney appointed by the court is allowed in criminal and juvenile matters, such attorney shall make a written application for fees, positively verified, stating time and expenses in the case. Counsel shall also state in the application that counsel has not received and has no contract for the payment of any compensation by such defendant or anyone in the defendant's behalf, or, if counsel has received any fee or has a contract for the payment of same, shall disclose the same fully so that the proper credit may be taken on counsel's application. The application shall be filed with the clerk. If a hearing is required, the time and date of hearing shall be set by court order.¹⁰

A different uniform court rule governs the rate of compensation for court-appointed counsel and provides in relevant part:

(E) Compensation for Court-Appointed Attorneys.

(1) An attorney appointed by a court shall be paid at the hourly rate established by the court.

(2) Generally, no distinction should be made between rates for services performed in and outside of court, and the same rate should be paid for any time the attorney spends traveling in fulfilling his or her professional obligations.¹¹

Similar uniform court rules apply to court-appointed counsel in separate juvenile courts.¹²

Finally, in addition to the statute and uniform court rules just referenced, some judicial districts have adopted local court rules, not inconsistent with statute or Supreme Court

⁹ Neb. Ct. R. § 6-1407.

¹⁰ *Id.*

¹¹ Neb. Ct. R. § 6-1470(E) (rev. 2017).

¹² See Neb. Ct. R. §§ 6-1704 (rev. 2014) and 1706(B)(3) and (E) (rev. 2017).

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rules,¹³ establishing additional procedures for paying court-appointed counsel in that district.¹⁴ However, during the relevant time period, the county court judges in the Sixth Judicial District, which includes Washington County, had no local court rule governing the procedure for paying court-appointed counsel.

We note the appellate briefing in this case refers to a “Washington County Attorney Fee Policy”¹⁵ which purportedly requires court-appointed counsel to present all fee applications to the county attorney for “approval or objection”¹⁶ before the court rules on the application. But no such policy was included in our record, and no local court rule reflecting such a policy has been adopted by the judges of that district or approved by the Supreme Court. We therefore do not consider, and express no opinion regarding, any informal procedures or policies in Washington County pertaining to compensating court-appointed counsel.

2. RIGHT TO APPEAL FROM
ORDER ALLOWING FEES

In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an

¹³ See, Neb. Ct. R. § 6-1448 (providing each county court by majority of its judges may adopt local rules not inconsistent with uniform court rules or state statute); Neb. Ct. R. § 6-1501 (providing each district court by majority of its judges may adopt local rules concerning matters not covered by uniform district court rules which are not inconsistent with statute or any Supreme Court directive).

¹⁴ See, e.g., Rules of Dist. Ct. of First Jud. Dist. 1-19 (rev. 2005); Rules of Dist. Ct. of Third Jud. Dist. 3-14 (rev. 2013); Rules of Dist. Ct. of Fifth Jud. Dist. 5-17 (rev. 2016); Rules of Dist. Ct. of Sixth Jud. Dist. 6-8 (rev. 2010); Rules of Dist. Ct. of 10th Jud. Dist. 10-23 (rev. 2010); Rules of Dist. Ct. of 11th Jud. Dist. 11-6 (rev. 2002). See, also, Rules of Sep. Juv. Ct. of Douglas Cty. 11.4 and 11.6 (rev. 2014); Rules of Sep. Juv. Ct. of Lancaster Cty. VI(G) (rev. 2018).

¹⁵ Brief for appellee in case No. S-19-932 at 9.

¹⁶ *Id.*

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appellate court to determine whether it has jurisdiction over the matter before it.¹⁷ Washington County filed a timely notice of appeal within 30 days after the entry of each of the fee orders it seeks to challenge, but the threshold jurisdictional question is whether those orders are appealable.

The right to appeal from orders in juvenile court is governed by Neb. Rev. Stat. § 43-2,106.01(1) (Reissue 2016). That statute permits authorized parties to appeal from “[a]ny final order or judgment” entered by a juvenile court.¹⁸ The instant appeals were filed by the county attorney, who is among those authorized by § 43-2,106.01 to take an appeal. Setting aside for now the question of whether the county attorney has styled these appeals to correctly reflect the proper parties, the pertinent jurisdictional question is one we have not yet addressed: Is an order ruling on a fee application of court-appointed counsel in a juvenile matter a final, appealable order? Our opinions addressing appeals of fee awards in other appointed-counsel contexts provide some guidance.¹⁹

In the 1987 case of *In re Claim of Rehm and Faesser (Rehm)*,²⁰ court-appointed counsel in a criminal case appealed from a fee order, claiming the fees were inadequate to compensate counsel for the work performed. We recognized that some of our earlier cases had been inconsistent regarding both the right to appeal, and the procedure for appealing, from fee awards to appointed counsel in criminal cases. *Rehm* expressly disapproved of our prior cases on the issue and announced the following rule regarding the appealability of fee orders and the manner in which such appeals should be styled:

¹⁷ *In re Interest of Paxton H.*, 300 Neb. 446, 915 N.W.2d 45 (2018).

¹⁸ § 43-2,106.01(1). See § 43-2,106.01(2)(a) through (d).

¹⁹ See, e.g., *White v. White*, 296 Neb. 772, 896 N.W.2d 600 (2017); *Rice*, *supra* note 7; *White v. White*, 293 Neb. 439, 884 N.W.2d 1 (2016); *In re Claim of Rehm and Faesser*, 226 Neb. 107, 410 N.W.2d 92 (1987).

²⁰ *Rehm*, *supra* note 19.

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We hold, therefore, that either appointed counsel or the county involved may appeal to this court from an order determining the amount of fees and expenses allowed appointed counsel under § 29-1804.12. Such an appeal is a proceeding separate from the criminal case. It should be docketed separately and disposed of without regard to the result of any appeal in the criminal case itself. In the absence of an appeal, the order of the district court is conclusive upon both appointed counsel and the county as to the amount allowed.²¹

Rehm acknowledged that the county was not a party to the criminal case “in the usual sense,”²² because the county attorney was prosecuting the matter on behalf of the State, not the county. But *Rehm* reasoned that because any order awarding fees to court-appointed counsel would be presented to the county for payment, the county attorney could be expected to “make whatever showing is necessary”²³ to ensure a proper decision regarding fees. And *Rehm* expressly found that “both appointed counsel and the county must be afforded a right of [appellate review] in the event either is dissatisfied with the order of the district court.”²⁴

We have applied the reasoning from *Rehm* to appeals from fee awards to appointed counsel in both postconviction proceedings²⁵ and domestic relations proceedings.²⁶ We see no principled reason to depart from the *Rehm* reasoning in appeals from fee awards to appointed counsel in juvenile proceedings. We do, however, take this opportunity to explain the statutory basis for our conclusion in *Rehm* that such orders are final and appealable.

²¹ *Id.* at 113-14, 410 N.W.2d at 96.

²² *Id.* at 113, 410 N.W.2d at 96.

²³ *Id.*

²⁴ *Id.*

²⁵ *Rice*, *supra* note 7.

²⁶ *White*, *supra* note 19 (2017); *White*, *supra* note 19 (2016).

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(a) Order Fixing Fees Under
§ 43-273 Is Final Order

[4-6] The right of appeal in Nebraska is purely statutory, and courts have no power to allow an appeal when it is not authorized by statute.²⁷ Neb. Rev. Stat. § 25-1902 (Supp. 2019) authorizes appeals from four types of final orders: (1) those affecting a substantial right in an action that, in effect, determines the action and prevents a judgment; (2) those affecting a substantial right made during a special proceeding; (3) those affecting a substantial right made on summary application in an action after judgment is rendered; and (4) those denying a motion for summary judgment when such motion is based on the assertion of sovereign immunity or the immunity of a government official.²⁸ As we explain below, orders fixing fees for court-appointed counsel in juvenile cases under § 43-273 fall into the second category of final order under § 25-1902, because they are made in a special proceeding and affect a substantial right.

[7] A “special proceeding” occurs where the law confers a right and authorizes a special application to a court to enforce the right.²⁹ A special proceeding includes every special statutory remedy that is not in itself an action,³⁰ and “a proceeding may be special, even if the proceeding is connected with a pending action.”³¹ Section 43-273 authorizes appointed counsel to apply to the appointing court for payment of earned fees, and once the appointing court fixes a reasonable fee, the county board is required to allow the claim in the amount determined by the court.

[8] Fee applications under § 43-273 meet the definition of a special proceeding. The law authorizes the fee application so

²⁷ *Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017).

²⁸ See *State v. Kelley*, 305 Neb. 409, 940 N.W.2d 568 (2020).

²⁹ See *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997).

³⁰ *In re Estate of Abbott-Ochsner*, 299 Neb. 596, 910 N.W.2d 504 (2018).

³¹ *Jacques*, *supra* note 29, 253 Neb. at 253, 570 N.W.2d at 336.

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that appointed counsel can enforce the right to be compensated for services rendered, and the application is not itself an action or a step in an action. Moreover, while we did not expressly use final order terminology in *Rehm*, our analysis recognized that orders determining court-appointed attorney fees affect a substantial right of both the lawyer seeking payment of earned fees and the county responsible for paying those fees.³² And while an order fixing fees does not result in a judgment, it “is conclusive upon both appointed counsel and the county as to the amount allowed.”³³

[9] We therefore hold that when court-appointed counsel is authorized by statute to apply to the appointing court to fix reasonable fees for legal services rendered, an order fixing such fees is a final, appealable order from which either appointed counsel or the county board responsible for payment may appeal.

(b) Proper Parties in Appeal From
Final Order Fixing Fees

The county attorney has styled these appeals as though the State of Nebraska is the appellant and Kilynn is the appellee. This is not accurate, because neither the State nor Kilynn was involved in the special proceeding to fix court-appointed counsel’s fees. Rather, these consolidated appeals were brought by the county attorney for Washington County on behalf of the county board to challenge the fee orders. And it is Roberts, not Kilynn, who was allowed the fees and is defending the fee orders on appeal.

We therefore modify the caption of these consolidated appeals to reflect that Washington County is the appellant and that Roberts is the appellee. Consistent with the manner in which *Rehm* was styled, the proper caption for these appeals is as follows: *In re Claim of Roberts for Attorney*

³² See *Rehm*, *supra* note 19.

³³ *Id.* at 114, 410 N.W.2d at 96.

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Fees. Kristine Roberts, Appellee, v. County of Washington, Nebraska, Appellant.

3. ARGUMENTS ON APPEAL

Regarding the merits of these consolidated appeals, Washington County's assignments of error fall generally into one of three categories: (1) claims that the juvenile court erred in the procedure followed when fixing fees, (2) claims that the evidence was insufficient to support the fee orders, and (3) claims that the amount of fees allowed was excessive. We address these assignments collectively where appropriate, and we begin with the county's procedural claim that it was entitled to notice and an evidentiary hearing on the July 2019 fee application.

(a) Notice and Hearing

In its third appeal, Washington County argues the August 2019 fee order should be vacated because it was entered without providing notice to the county that the July 2019 fee application had been filed and without holding an evidentiary hearing on the application. The county generally frames this as a constitutional due process violation, arguing, "The juvenile court in this case violated the due process of the county by ordering fees without [a] hearing, notice or evidence."³⁴

We dispense quickly with the county's constitutional due process argument, because the law is well settled that the county has no such constitutional right.³⁵ We instead focus

³⁴ Supplemental brief for appellant in case No. S-19-932 at 4.

³⁵ See, *White, supra* note 19 (2016) (holding county has no constitutional right to due process); *Schropp Indus. v. Washington Cty. Atty.'s Ofc.*, 281 Neb. 152, 164, 794 N.W.2d 685, 696 (2011) (holding "Washington County has no constitutional right to due process that the court could have violated"); *City of Lincoln v. Central Platte NRD*, 263 Neb. 141, 146, 638 N.W.2d 839, 844 (2002) (refusing to consider county's constitutional due process arguments, because "[a] county, as a creature and political subdivision of the State, is neither a natural nor an artificial person").

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our analysis on whether § 43-273, or any of the applicable court rules, entitles the county to notice that a fee application has been filed, or requires that an evidentiary hearing be held before the court fixes reasonable fees.

[10] When construing both statutes and Supreme Court rules, we apply familiar rules of statutory interpretation.³⁶ The language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of words which are plain, direct, and unambiguous.³⁷ It is not within the province of the courts to read meaning into a statute that is not there or to read anything direct and plain out of a statute.³⁸

Washington County directs us to nothing in the plain language of either § 43-273 or the applicable court rules that requires notifying the county or holding an evidentiary hearing when a fee application is filed by court-appointed counsel. Instead, Washington County argues we should construe the following statutory language to require evidentiary hearings on all fee applications: “The court upon hearing the application shall fix reasonable fees.”³⁹ The county suggests this language “indicates that there should be a hearing conducted”⁴⁰ on every fee application. We disagree.

Section 43-273 requires the court to fix reasonable fees “upon hearing the application,” but we understand that phrase to refer broadly to the court’s consideration of the fee application, not as a mandate to hold an evidentiary hearing before fixing fees. When the Legislature wants to mandate an evidentiary hearing before allowing a ruling, it knows how to

³⁶ See *Hotz*, *supra* note 5 (explaining for purposes of construction, Supreme Court rules treated like statutes).

³⁷ See *State v. Wal*, 302 Neb. 308, 923 N.W.2d 367 (2019).

³⁸ *Rogers v. Jack’s Supper Club*, 304 Neb. 605, 935 N.W.2d 754 (2019).

³⁹ § 43-273.

⁴⁰ Brief for appellant in case No. S-19-932 at 10.

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do so.⁴¹ Rather than mandating a hearing, § 43-273 describes an informal fee application process which is administrative rather than adversarial. The court rule regarding application for fees accommodates that informal statutory procedure, while also recognizing that judges have discretion to set a hearing on a fee application if they determine one is required.⁴² The court rule also adds several administrative requirements to the statutory fee application process, including that the application must be written, must be positively verified by counsel, must include specific information, and must be filed with the clerk.⁴³ These requirements ensure both that a written record exists of any fee application that is allowed and that the court has positively verified information upon which to rely when fixing reasonable fees. In other words, the court rule is designed to reduce the need for courts to set an evidentiary hearing on fee applications, not to mandate hearings in every case, as the county contends.

[11] We hold as a matter of law that neither § 43-273 nor court rule § 6-1407 requires that the county must be notified when a fee application is filed by court-appointed counsel, nor does either require that an evidentiary hearing be routinely held on such an application. And while it is true that several courts have adopted local rules requiring fee applications to be styled as motions and served on the county attorney,⁴⁴ the county court for Washington County had no local court rule

⁴¹ See, e.g., Neb. Rev. Stat. § 29-3702 (Reissue 2016); Neb. Rev. Stat. § 29-3703 (Reissue 2016); Neb. Rev. Stat. § 43-104.05 (Reissue 2016); Neb. Rev. Stat. § 43-246.02 (Cum. Supp. 2018).

⁴² See § 6-1407 (“[i]f a hearing is required, the time and date of hearing shall be set by court order”).

⁴³ See *id.*

⁴⁴ See, e.g., Rules of Dist. Ct. of First Jud. Dist. 1-19; Rules of Dist. Ct. of Third Jud. Dist. 3-14; Rules of Dist. Ct. of Fifth Jud. Dist. 5-17; Rules of Dist. Ct. of Sixth Jud. Dist. 6-8; Rules of Dist. Ct. of 10th Jud. Dist. 10-23.

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requiring either notice to the county or an evidentiary hearing when appointed counsel files a fee application. We therefore find no merit to the county's claim that the juvenile court erred in allowing the July 2019 fee application without first providing the county with notice and a hearing.

We are aware the local practice in some jurisdictions has long been to provide the county with notice when fee applications are filed and to set such matters for hearing. Our opinion today does not condemn such practices, whether formalized through the adoption of local court rules or not. Indeed, appointed counsel in this case provided notice to the county of her February 2019 and April 2019 fee applications, and counsel set both for hearing. But the question before us is not whether it is the common practice, or even the best practice, to provide notice to the county and set fee applications for hearing. Rather, the question presented is whether notice and a hearing are required by the applicable statutes and court rules. They are not, and the county's arguments to the contrary are without merit.

(b) Sufficiency of Evidence

In all three appeals, Washington County assigns the juvenile court erred in allowing fees without first receiving evidence that Kilynn remained unable to afford an attorney at the time of the fee application. In making this argument, the county does not challenge the initial appointment of counsel for Kilynn, nor does it contend that after counsel was appointed, Kilynn became able to afford counsel. Instead, it is the county's position that each time Roberts applied for fees under § 43-273, she had the burden to prove that Kilynn was still unable to afford to hire private counsel. The county is incorrect.

The evidentiary requirements governing Roberts' fee application are set out in court rule § 6-1407. That rule requires that before appointed counsel's fees are allowed in a criminal or juvenile matter, counsel must file a written fee application with the clerk which is positively verified and which states

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counsel's time and expenses in the case.⁴⁵ It also requires the application must either state that counsel "has not received and has no contract for the payment of any compensation by [the client] or anyone in [the client's] behalf" or disclose "if counsel has received any fee or has a contract for the payment of same . . . so that the proper credit may be taken on counsel's application."⁴⁶

Because Washington County does not assign or argue that any of Roberts' fee applications failed to meet the evidentiary requirements of court rule § 6-1407, we express no opinion in that regard. We do, however, reject as unfounded the county's contention that before fees can be allowed under § 43-273, appointed counsel is required to affirmatively prove that his or her client remains unable to afford an attorney.

(c) Reasonableness of Allowed Fees

[12] When attorney fees are authorized by statute, the court exercises its discretion in setting the amount of the fee, which ruling an appellate court will not disturb absent an abuse of discretion.⁴⁷ We have recognized that when a trial court appoints counsel in either a criminal or a postconviction action, Nebraska statutes require the court to fix reasonable fees and expenses.⁴⁸ As such, we have found it amounts to an abuse

⁴⁵ § 6-1407.

⁴⁶ *Id.*

⁴⁷ See *Rice*, *supra* note 7.

⁴⁸ See, e.g., *Rice*, *supra* note 7 (holding that once counsel is appointed in postconviction case, Neb. Rev. Stat. § 29-3004 (Reissue 2016) requires court to fix reasonable fees and expenses); *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015) (recognizing that once counsel is appointed to represent defendant in criminal matter, Neb. Rev. Stat. § 29-3905 (Reissue 2016) requires appointing court to fix reasonable fees and expenses); *State v. Ryan*, 233 Neb. 151, 154, 444 N.W.2d 656, 659 (1989) (holding appointed counsel in criminal cases must be paid reasonable fees and expenses and finding an abuse of discretion in refusing to pay counsel for "substantial hours" devoted to such representation).

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of discretion to refuse to allow any fees⁴⁹ or to refuse to compensate court-appointed counsel for services necessarily performed in representing the defendant.⁵⁰ Moreover, when a statute requires the court to fix reasonable fees for appointed counsel, the trial court has a duty to determine whether the requested fees are in fact reasonable, even if there is no objection to the application or no contrary evidence presented.⁵¹ These same principles apply when a court appoints counsel in a juvenile proceeding.

[13,14] Here, once the juvenile court appointed Roberts to represent Kilynn in the juvenile proceedings, it had a duty under § 43-273 to “fix reasonable fees” for the necessary legal services Roberts performed in those proceedings. When fixing reasonable fees, a court considers several factors: the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.⁵²

In these consolidated appeals, Washington County does not contend the juvenile court failed to consider any of these factors when fixing fees. Instead, it argues the fees allowed in 2019 were excessive and unreasonable, because Roberts already has been paid significant fees, because some of the billed time related to defending the county’s objection to her fee applications, and because some of the billed time pertained to activities on appeal. We address each of these arguments in turn.

⁴⁹ See *Rice*, *supra* note 7.

⁵⁰ See, *Ryan*, *supra* note 48; *Rehm*, *supra* note 19.

⁵¹ See *Rice*, *supra* note 7.

⁵² *Id.*

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(i) *Prior Fee Orders*

The juvenile proceeding involving Kilynn has been pending since 2016. Washington County's primary opposition to Roberts' 2019 fee applications has been that considering the total amount of fees allowed since the inception of the case, the additional fees allowed in 2019 were excessive and unreasonable. The record generally shows that before the 2019 fee orders at issue in these consolidated appeals, Roberts applied for and was paid a total of \$23,788.40 in fees for legal services performed in the juvenile proceeding since 2016.

[15] In arguing the fees allowed in 2019 were unreasonable and excessive, the county does not directly challenge the reasonableness of any earlier fee orders, nor could it. In the absence of an appeal, a court's order fixing court-appointed counsel fees is conclusive upon both appointed counsel and the county as to the amount allowed,⁵³ and courts have no power to extend the time for appeal, either directly or indirectly.⁵⁴ Nor, for the most part, does the county argue that any particular time billed by Roberts in 2019 was unnecessary. Instead, the county complains that the fees allowed in 2019, when considered "in conjunction with"⁵⁵ the fees allowed since the inception of the case in 2016, amount to excessive compensation for a "simple"⁵⁶ abuse/neglect case. The county's primary argument is that Roberts has "essentially been billing the county for working on the case nearly daily for three years"⁵⁷ without offering any "explanation of why it was reasonable and necessary."⁵⁸

⁵³ See, generally, *Rehm*, *supra* note 19.

⁵⁴ See *Bryson L. v. Izabella L.*, 302 Neb. 145, 921 N.W.2d 829 (2019).

⁵⁵ Brief for appellant in case No. S-19-378 at 18.

⁵⁶ *Id.* at 17.

⁵⁷ *Id.* at 18.

⁵⁸ *Id.* at 17.

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Roberts counters that this has not been a simple juvenile case, and in response to the county's suggestion that she regularly billed time in this case, her brief cites the practice guidelines applicable to attorneys in juvenile court, which require "high quality legal representation by all attorneys appearing before the juvenile court."⁵⁹ Roberts highlights that in 2019, she successfully defended Kilynn in a 4-day parental rights termination trial, and Roberts adds that while her representation of Kilynn has been continuous since 2016, these appeals have effectively prevented her from being paid for any legal services in the case since September 2018.

We agree with the county that the total amount of fees allowed in this juvenile proceeding since 2016 has been significant. But we cannot find, on that basis alone, that the juvenile court abused its discretion in allowing Roberts' fee applications in 2019.

[16,17] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.⁶⁰ While both trial courts and appellate courts are regarded as experts on the value of legal services, a trial court ordinarily has a better opportunity for practically appraising the situation, and an appellate court will interfere only to correct a patent injustice, where the allowance is clearly excessive, or insufficient.⁶¹

Here, the juvenile court was in the best position to determine whether the time billed in Roberts' 2019 fee applications was reasonable and necessary for the services performed in the case, and we find ample support in the record for the court's

⁵⁹ See §§ 6-1470 and 6-1706 (practice guidelines for attorneys practicing in juvenile court). See, also, Neb. Rev. Stat. § 43-272(5) (Reissue 2016) (requiring Supreme Court to provide guidelines for standards of all attorneys practicing in juvenile court).

⁶⁰ *State v. Edwards*, 294 Neb. 1, 880 N.W.2d 642 (2016).

⁶¹ See *Omaha Paper Stock Co. v. California Union Ins. Co.*, 200 Neb. 31, 262 N.W.2d 175 (1978).

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findings in that regard. Moreover, we soundly reject the county's suggestion that the court should have refused to allow any fees at all for necessary legal services in 2019 simply because prior fee allowances were significant. The juvenile court was correct in concluding it would have been an abuse of discretion either to refuse to fix any fees⁶² or to refuse to reasonably compensate Roberts for services necessarily performed.⁶³

We therefore reject the county's argument that the fees allowed in 2019 were unreasonable and excessive merely because significant fees had previously been allowed.

*(ii) Paying Appointed Counsel for Defending
Objections to Fee Application*

Collectively, the juvenile court's 2019 fee orders compensated Roberts for approximately 222 hours of time billed in the case; approximately 4 of those hours pertained to time billed to prepare for and attend the hearings on the county's objections to her fee applications. Roberts did not bill for preparing or filing her fee applications.

Washington County contends it was error to compensate Roberts for any time defending the fee applications, arguing such time pertained to litigating counsel's right to compensation and thus was not "for services performed" in the proceedings under § 43-273. Roberts responds that she is a solo practitioner and was required to take time away from other billable work to defend her statutory right to be reasonably compensated for services performed in the case. She suggests that if reasonable fees are never allowed for time spent defending meritless objections to fee applications, then appointed counsel will "be forced to take whatever the county attorney felt was appropriate"⁶⁴ and it would effectively be the county attorney, rather than the court, fixing appointed counsel fees.

⁶² See *Rice*, *supra* note 7.

⁶³ See, *Ryan*, *supra* note 48; *Rehm*, *supra* note 19.

⁶⁴ Brief for appellee in case No. S-19-533 at 15.

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On this record, where the juvenile court essentially concluded the county's objections to the fee applications had no basis in law or fact, we cannot find the trial court abused its discretion in concluding that the 4 hours billed by appointed counsel to defend against the county's meritless objections was compensable as "services performed" in the proceeding under § 43-273. We caution that in so holding, we are not suggesting that appointed counsel is always entitled to be paid for time defending an objection to a fee application, nor are we suggesting that it can never be an abuse of discretion to allow fees for defending against objections to fee applications. The reasonableness of allowing fees for defending an objection to a fee application is highly fact dependent and will vary from one case to the next. However, we reject the county's contention that appointed counsel can never be allowed fees under § 43-273 for defending an objection to a fee application, and to the extent the Court of Appeals' reasoning in *In re Interest of Antone C. et al.*⁶⁵ can be read to support such a contention, it is disapproved.

Here, the record shows the juvenile court found no merit to any of the county's objections to Roberts' fee applications, and it expressly found that Roberts' time defending her fee applications was reasonable and necessary. Because the trial court's reasons and rulings in that regard were not clearly untenable, we find no abuse of discretion and we reject the county's argument that the court erred in compensating appointed counsel for this time.

*(iii) Applying to Juvenile Court for Payment
of Legal Services Performed on Appeal*

Roberts' April 2019 fee application included approximately 1.2 hours billed for services performed on appeal, and her July 2019 fee application included approximately 20 hours of time billed for services on appeal. Washington County objected

⁶⁵ *In re Interest of Antone C. et al.*, 12 Neb. App. 152, 669 N.W.2d 69 (2003).

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to this time and took the position that if Roberts wanted to be paid for services performed on appeal, she needed to first seek appointment in the appellate court, and then needed to apply to the appellate court for payment once the appeal was concluded. The juvenile court rejected both of these arguments and allowed the fees.

We have not previously addressed whether appointed counsel in a juvenile proceeding should apply to the juvenile court, or to the appellate court, for payment of services performed on appeal. But before we discuss that issue, we find it necessary to correct the county's assertion that Roberts needed to seek reappointment in the appellate court once the county took an appeal. Our appellate rules make clear that "[t]he attorneys of record and guardians ad litem of the respective parties in the court below shall be deemed the attorneys and guardians ad litem of the same parties in [the appellate] court, until a withdrawal of appearance has been filed" and the procedure for withdrawal has been followed.⁶⁶ As such, there is no need for appointed counsel to seek reappointment in the appellate court when a case is appealed.

The question whether counsel appointed in a juvenile proceeding should apply to the juvenile court or to the appellate court for payment of services performed on appeal requires more discussion. We begin with the pertinent statutory language.

Section 43-273 provides that counsel appointed under the juvenile code "shall apply to the court before which the proceedings were had for fees for services performed" and that the court "shall fix reasonable fees." It also provides that once fees are fixed, "[t]he county board of the county wherein the proceedings were had shall allow [fees] in the amount determined by the court."⁶⁷

The language of § 43-273 is somewhat different from the statutory language governing payment of court-appointed

⁶⁶ Neb. Ct. R. App. P. § 2-101(F)(1) (rev. 2015).

⁶⁷ § 43-273.

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counsel in criminal cases, which expressly requires that appointed counsel “shall apply to the . . . court which appointed him or her . . . for fees for services performed pursuant to such appointment.”⁶⁸ Our appellate rules are clear that if a criminal case is appealed, court-appointed counsel may, “after issuance of a mandate by the appellate court, apply to the *appointing court* for an attorney fee regarding services in the appeal.”⁶⁹ Currently, there is no similar court rule addressing whether court-appointed counsel in a juvenile proceeding should apply to the juvenile court or to the appellate court for services performed when a juvenile proceeding is on appeal.

We understand Washington County to take the position that once a juvenile proceeding is appealed, the appellate court becomes “the court before which the proceedings were had”⁷⁰ and appointed counsel must apply to the appellate court for payment of fees for all services performed on appeal. However, were we to construe § 43-273 to require court-appointed counsel to apply to the appellate court, rather than the juvenile court, for payment of legal services performed on appeal, it would cause an absurd result.

Nebraska’s appellate courts are located in Lancaster County, and § 43-273 requires that once fees are fixed, “[t]he county board of the county wherein the proceedings were had” is required to allow the claim. As such, construing § 43-273 to require appointed counsel to apply to the appellate court for payment would make Lancaster County responsible for paying all fees fixed for services performed by court-appointed counsel on appeal. An appellate court should try to avoid, if possible, the construction of a statute that would lead to an absurd result.⁷¹

⁶⁸ § 29-3905.

⁶⁹ Neb. Ct. R. App. P. § 2-109(F) (rev. 2014) (emphasis supplied).

⁷⁰ § 43-273.

⁷¹ See *Hotz*, *supra* note 5.

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[18] The more sensible construction of § 43-273 is that “the court before which the proceedings were had” refers to the appointing juvenile court, even if an appeal is taken. We therefore hold that when a juvenile case is appealed, § 43-273 requires appointed counsel to apply to the juvenile court, not the appellate court, for payment of services performed on appeal. The juvenile court here was correct to reject Washington County’s suggestion that Roberts must apply to the appellate court for payment of her fees.

Ordinarily, a juvenile court will want to wait for issuance of the appellate mandate before fixing reasonable fees for services on appeal, because that will allow it to fully evaluate the various factors a court is to consider when fixing fees.⁷² But on this record, and absent a statute or court rule requiring appointed counsel to wait for the appellate mandate before applying for fees, we cannot find the juvenile court abused its discretion in fixing fees before the appellate mandate issued.

V. CONCLUSION

For the foregoing reasons, we affirm the fee orders of the juvenile court.

AFFIRMED.

⁷² See *Rice, supra* note 7 (when fixing fees for court-appointed counsel, courts should consider nature of litigation, time and labor required, novelty and difficulty of questions involved, skill required, responsibility assumed, diligence exhibited, result of suit, standing of attorney, and customary charges for similar services).

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

CONNIE S. YORI, APPELLEE, v.

KIRK P. HELMS, APPELLANT.

949 N.W.2d 325

Filed October 2, 2020. Nos. S-19-520, S-19-840.

1. **Contempt: Appeal and Error.** In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion.
2. **Parental Rights: Appeal and Error.** Whether relief entered in a proceeding to enforce a parent's rights is reasonably necessary to enforce such rights is reviewed for an abuse of discretion.
3. **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.
4. **Contempt.** Contempt proceedings may both compel obedience to orders and administer the remedies to which the court has found the parties to be entitled.
5. _____. In a civil contempt proceeding, for the sanction to retain its civil character, the contemnor must, at the time the sanction is imposed, have the ability to purge the contempt by compliance and either avert punishment or, at any time, bring it to an end.
6. **Courts: Jurisdiction: Divorce: Contempt.** A court's continuing jurisdiction over a dissolution decree includes the power to provide equitable relief in a contempt proceeding.
7. **Courts: Equity.** Where a situation exists that 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.
8. **Evidence: Appeal and Error.** Where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give

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weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.

9. **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.
10. ____: _____. Generally, once an appeal has been perfected, the trial court no longer has jurisdiction.
11. ____: _____. A trial court's jurisdiction under Neb. Rev. Stat. § 42-351(2) (Reissue 2016) during the pendency of an appeal is properly characterized as jurisdiction in aid of the appeal process.
12. **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.
13. **Judgments: Final Orders: Appeal and Error.** While all judgments not incorrectly designated as such are appealable, an order may be appealed only if a statute expressly makes the order appealable or the order falls within the statutory definition of a final order.
14. **Final Orders: Appeal and Error.** To be a final order subject to appellate review, the lower court's order must (1) affect a substantial right and determine the action and prevent a judgment, (2) affect a substantial right and be made during a special proceeding, (3) affect a substantial right and be made on summary application in an action after a judgment is rendered, or (4) deny a motion for summary judgment which was based on the assertion of sovereign immunity or the immunity of a government official.
15. **Final Orders.** The inquiry of whether a substantial right is affected focuses on whether the right at issue is substantial and whether the court's order has a substantial impact on that right.
16. _____. Whether an order affects a substantial right depends on whether it affects with finality the rights of the parties in the subject matter.
17. **Final Orders: Time.** The duration of an order is relevant to whether it affects a substantial right.

Appeals from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Judgment in No. S-19-520 affirmed. Appeal in No. S-19-840 dismissed.

Gregory D. Barton, of Barton Law, P.C., L.L.O., for appellant.

Amie C. Martinez and Megan M. Zobel, of Anderson, Creager & Wittstruck, P.C., L.L.O., for appellee.

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HEAVICAN, C.J., MILLER-LEMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

CASSEL, J.

INTRODUCTION

The district court found Kirk P. Helms in contempt of court for violating parenting provisions of a dissolution decree, imposed a suspended jail sentence, and modified terms of the parenting plan. Helms appealed, arguing that the modifications were punitive and not reasonably necessary (first appeal). While that appeal was pending, the district court entered an order of commitment and a purge order which contained a reduction in Helms' parenting time but set the matter for a review hearing in 4½ months. Helms appealed that order (second appeal). Because the modifications involved in the first appeal were part of the equitable relief that the court was authorized to provide, we find no abuse of discretion and affirm. We dismiss the second appeal for lack of a final order.

BACKGROUND

MARRIAGE AND DISSOLUTION

Helms married Connie S. Yori in 1996, and a child was born to the marriage in July 2004. The parties subsequently sought to dissolve their marriage and entered into a mediated agreement.

On March 1, 2017, the district court entered a decree of dissolution. The decree awarded the parties joint legal and physical custody of the child. The parenting plan attached to the decree contained the terms of the parties' mediated agreement and addressed topics such as day-to-day decisionmaking, alcohol consumption and testing, and parental responsibility and cooperation.

CONTEMPT PROCEEDINGS

Yori claimed that Helms violated provisions of the parenting plan and mediated agreement. She filed an application for an order to show cause in October 2017 and thereafter filed

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several amended applications. The operative pleading, filed in September 2018, alleged over 60 violations by Helms of the mediated agreement and decree of dissolution. In particular, Yori alleged that Helms violated the provisions regarding payment of expenses for the child, medical appointments for the child, cooperation between the parents, and Helms' consumption of alcohol and compliance with alcohol testing.

Trial began in October 2018 but needed to be continued to December. In November, Helms moved to continue the hearing. The court sustained the motion, subject to provisions contained in a temporary order. Trial resumed in March 2019.

The December 2018 temporary order addressed transportation of the child and also gave Yori "final say on matters relating to the minor child's sports and athletics." It ordered that during the pendency of the proceedings, Yori or her designated representative be allowed to provide the child's transportation to and from all religious confirmation or youth group activities, educational meetings or events relating to an educational action plan, athletic practices, and athletic tournaments or games.

During a February 2019 hearing, the court clarified its intent with respect to the December 2018 temporary order. The court explained that its intent was for Yori to transport the child to the various activities, even if the activities occurred during Helms' parenting time. The court stated that Yori "either is to return the child or, if . . . Helms is present at that activity, I don't think there was any objection to him taking the child home from that activity, at least, from an email here it says you can take him home afterwards." The court repeated, "The purpose and intent of this is to make sure the child makes it to all the activities"

During the hearings on Yori's application for an order to show cause, a number of witnesses testified on Yori's behalf. Tim McGovern, who coached the child's basketball team with Yori, testified that during a meeting with the players' parents, Helms said that Yori was bullying the children and should not be trusted to be in charge of their sons. It appeared to

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McGovern that “trying to make [Yori] look bad was the goal.” McGovern testified that he observed Helms at the child’s basketball tournaments and had concerns that Helms was under the influence of alcohol.

Other witnesses echoed McGovern’s testimony. Jennifer Cramer, who attended the meeting mentioned by McGovern, testified that Helms told the parents that Yori was abusive to the players and to him during their marriage. Cramer complained to Helms at that meeting about his failure to bring the child to practices or games. At a May 2018 basketball tournament, Cramer observed Helms exhibiting abnormal behavior, including “flip[ping her] off” in the presence of parents and children. Another parent testified about her concerns that Helms was under the influence of alcohol at the child’s basketball tournaments. She testified that she smelled alcohol on him and that she observed him “walk across the court, flipping off . . . towards our area.” Helms denied standing in the middle of a basketball court and flipping off the crowd. He also denied attending any of the child’s basketball games or events while under the influence of alcohol. But in February 2019, Helms was arrested for driving under the influence on his way home from attending the child’s basketball event. At the time of the hearing, Helms did not have a driver’s license and relied on transportation by bicycle or bus or as provided by his family.

Yori testified about difficulties in obtaining reimbursement from Helms for the child’s medical expenses. She sent numerous emails to Helms, requesting reimbursement and including itemizations of expenses and copies of each billing statement. Helms did not reimburse Yori because she did not send him the insurer’s explanation of benefits and instead sent handwritten information and amounts. He also asked Yori to sign a release so that he could talk with the healthcare provider, but she did not do so.

The parties testified regarding issues with alcohol monitoring through Soberlink. The decree required Helms to keep Soberlink in place and to test during his parenting time at

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8 a.m., 2 p.m., and 10 p.m. Six weeks after entry of the decree, Helms submitted a change request form to Soberlink, directing that Yori not be listed as a concerned party. Although a Soberlink form showed a change in the concerned party name to Helms' sister, Helms testified that he just intended to add his sister as a contact. The same page of the form identified Yori as someone who is to receive test results. Helms testified that Yori never informed him that she was not timely receiving Soberlink reports and that he did not recall her complaining about not being listed as a concerned party.

Helms also reduced the Soberlink monitoring from "Level 2" to "Level 1" monitoring. With Level 1 monitoring, in contrast with Level 2 monitoring, Yori does not receive missed tests alerts and Helms does not have scheduled testing. Helms testified that he switched from Level 2 to Level 1 because it was his understanding that dates and times for testing could not be changed on Level 2. He felt that Level 1 would work better under the parenting agreement, because dates when the child would be with him would not stay the same all year long.

Yori testified that through the summers of 2017 and 2018, Helms routinely missed Soberlink testing at 2 p.m. on Fridays. According to Helms, he tested at all required times when the child was with him. But if his parenting time ended at 3 p.m., he would not take the 2 p.m. test unless he had to pick the child up for some reason. He admitted there was no language in the decree excusing him from taking a test at 2 p.m. on Fridays.

The decree gave Yori "final say" regarding educational and religious issues. Yori informed Helms that she wanted the child to participate in religious confirmation preparation, but she testified that Helms expressed unwillingness to allow the child to participate. Yori testified that because the child was struggling in school, his counselor and teacher devised a plan to help him which included arriving at school 30 minutes early. But of the 11 sessions during Helms' parenting time, the child attended only 3. Yori testified that in April 2018, during Helms' parenting time, the child was suspended from school

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and Helms did not inform her of a meeting with the principal and vice principal. Helms did not respond to Yori's request inquiring of the consequences for the child.

Yori had concerns about the child's attendance at athletic events. She testified that in the summer of 2017, Helms took the child to only 3 of 18 practices. She felt that Helms acted in a retaliatory fashion when he removed the child from an athletic team. Even after the court entered the temporary order allowing Yori to transport the child to and from events, Helms attempted to transport the child.

ORDER OF CONTEMPT

On May 1, 2019, the court entered an order of contempt. The court found that Helms willfully, intentionally, and contumaciously violated multiple provisions of the decree, including the obligation to not consume alcohol, to continue with Soberlink as ordered, and to comply with the parenting responsibilities and cooperation language. It also found that it had the authority to modify the decree as it related to the child in order to remedy the contempt. The court committed Helms to jail for 21 days, but suspended execution of the sentence as long as Helms complied with several terms of the order. Among others, the terms included:

- refraining from consuming alcohol through December 31, 2022;
- refraining from attending any practices for the child;
- allowing Yori or her designee to pick the child up from Helms' house for various specified reasons and return the child following the event; and
- giving Yori "final say" on "all athletic issues and sports participation, religious activities, school activities, medical issues, and all other issues regarding the minor child's participation, education and development."

The court ordered that Helms comply with the purge plan for 36 months.

On May 29, 2019, Helms filed a notice of appeal. The first appeal is docketed as case No. S-19-520.

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MOTION FOR COMMITMENT

In July 2019, while the first appeal was pending, Yori moved for Helms' commitment pursuant to the order of contempt. An amended motion additionally requested attorney fees and "such further and equitable relief as this Court deems just and equitable including, but not limited to, a modification of [Helms'] parenting time."

Yori alleged that Helms violated the decree of dissolution in numerous ways. She alleged Helms failed to timely reimburse her for the child's health care expenses, disparaged her in the child's presence, failed to promptly notify her of orthodontic appointments scheduled for the child, scheduled the child's orthodontic appointments during times that conflict with the child's other activities, and scheduled an appointment for the child regarding an ankle injury without informing Yori of the time.

Yori also alleged that Helms failed to abide by multiple provisions of the order of contempt. Specifically, she alleged that Helms refused to allow Yori to transport the child to and from athletic events, refused to commence counseling to address the family dynamic, refused to allow Yori to speak with the child on the telephone, and failed to reimburse Yori for half of the cost of the child's athletic activities.

During a hearing, Yori testified that it was important that she transport the child after events because Helms had removed the child from events early. Yori testified that a recurring problem was Helms' demanding to transport the child. On one occasion, Yori arrived at Helms' residence to pick the child up for a weightlifting session, but the child was still sleeping even though Yori communicated with Helms about the session earlier that morning.

Yori also presented evidence concerning Helms' failure to pay his share of expenses. Despite Yori's sending Helms a request for payment with attachments, including the explanation of benefits, Helms had not paid. Helms testified that he notified Yori that the explanation of benefits was not attached,

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but that she did not respond. He said he would pay his share if he received those documents. Yori also requested payment for athletic expenses, including hotel charges for out-of-state tournaments. But she had not received payment for anything sent in a July 8, 2019, email. Helms did not have any evidence that he paid Yori for any expenses she had incurred since May 1, 2019.

On May 14, 2019, Yori sent Helms a copy of the court's order requiring him to immediately commence counseling with a mutually agreed-upon provider and included the names of three counselors. On May 28, she sent another email stating that she had not received any communication regarding which counselor Helms had selected. Helms testified that he made an appointment but had not seen a counselor yet.

Yori claimed that Helms refused to allow her to speak to the child on May 1 and 12, 2019. According to Helms, Yori called to say that the child did not answer and to ask Helms to have the child call her. Helms was not home at the time, so he sent the child a text, told him to call Yori, and "left it at that." On one occasion, Helms spoke with the child on the telephone for 38 minutes, exceeding his 20-minute telephone call limit, but he did not realize he had done so because he "usually do[es]n't keep track" when speaking to the child.

ORDER OF COMMITMENT

On August 1, 2019, the court entered an order of commitment. It committed Helms to the Lancaster County Department of Corrections for 21 days.

The next day, the court entered a purge order. It ordered Helms to serve his 21-day commitment, but stated that he shall be released from custody so long as he met the following terms: paid \$513.74 for past-due athletic expenses, paid \$537.34 for past-due medical expenses, and paid \$5,000 in attorney fees.

The purge order contained additional terms. The court ordered that Helms immediately commence counseling per the May 1, 2019, order of contempt. It declared that Yori "shall

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have initial and final say on all medical, dental and orthodontic appointments for the minor child.” The order stated that Helms

is allowed to attend such appointments but shall not schedule such appointments nor transport the minor child to or from such appointments. [Yori] shall be contacted in the event [Helms] believes any medical, dental or orthodontic issue has arisen. [Yori] will be responsible for making any decision as to whether an appointment is necessary. [Helms] is granted authority only to take the minor child for emergent situations to the emergency room or Urgent Care during his parenting time. In the event he does so, he shall immediately notify [Yori] of the same including the reason for the emergent visit, and the location to which he will be taking the minor child.

The court reduced Helms’ parenting time from a “7/7” schedule to a “10/4” schedule, which it stated it was doing “[t]emporarily” until December 19 or until further order of the court. The court ordered Helms to not denigrate Yori in the child’s presence, to direct the child to do as Yori has decided, to support Yori’s decisions related to the child, and to “not sit silently with regard to those decisions.”

The court set the matter for a review hearing on December 19, 2019. The court explained that the purpose of the review hearing would be to allow Helms to prove his compliance with the court’s orders and to “adduce evidence as to the best interest of the minor child to support [Helms’] request for reinstatement of the original parenting time schedule.” The court stated that it would then address whether changes should be made to the 10/4 parenting time schedule. During the hearing, the court stated that if Helms was in compliance, the parenting schedule would “likely” go back to the 7/7 schedule. The court ordered that all provisions of prior court orders, except those specifically modified, shall remain in full force and effect. The court ordered Helms to comply with the purge plan for 36 months and provided that if he failed to do so, “he

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shall be immediately detained for a period of 21 days in the Lancaster County jail.”

On September 3, 2019, Helms filed a notice of appeal, stating his intent to appeal from the August 2 purge order. The second appeal is docketed as case No. S-19-840.

ASSIGNMENTS OF ERROR

In the first appeal, Helms assigns several errors to the district court’s parenting plan modifications which he claims went beyond what was reasonably necessary and were punitive and therefore contrary to the law and the evidence. Specifically, he challenges (1) the “transportation provisions” of the original mediated parenting plan, (2) the modifications banning him from attending the child’s athletic and piano practices, and (3) the “final say provisions” of the original mediated parenting plan.

In the second appeal, Helms assigns that the court erred by (1) reducing his parenting time by 43 percent, (2) making parenting plan modifications that were not reasonably necessary to enforce Yori’s rights, and (3) finding he was in arrears on his obligation to pay half of the child’s athletic expenses.

STANDARD OF REVIEW

[1] In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court’s resolution of issues of law is reviewed de novo, (2) the trial court’s factual findings are reviewed for clear error, and (3) the trial court’s determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion.¹

[2] Whether relief entered in a proceeding to enforce a parent’s rights is reasonably necessary to enforce such rights is reviewed for an abuse of discretion.²

¹ *Braun v. Braun*, 306 Neb. 890, 947 N.W.2d 694 (2020).

² See *Martin v. Martin*, 294 Neb. 106, 881 N.W.2d 174 (2016).

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[3] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.³

ANALYSIS

FIRST APPEAL

The court modified the parenting plan after finding Helms to be in contempt. Helms does not contest the finding of contempt. Nor does he dispute the court's authority to modify the decree and parenting plan. Rather, he challenges particular modifications included in the order of contempt and purge plan. He claims that those modifications were punitive and were not reasonably necessary.

[4,5] Contempt proceedings may both compel obedience to orders and administer the remedies to which the court has found the parties to be entitled.⁴ The sanction in a civil contempt proceeding is both remedial and coercive.⁵ In a civil contempt proceeding, for the sanction to retain its civil character, the contemnor must, at the time the sanction is imposed, have the ability to purge the contempt by compliance and either avert punishment or, at any time, bring it to an end.⁶

[6] A court's continuing jurisdiction over a dissolution decree includes the power to provide equitable relief in a contempt proceeding.⁷ Neb. Rev. Stat. § 42-364.15(1) (Reissue 2016) explicitly authorizes a court to "enter such orders as are reasonably necessary to enforce rights of either parent including the modification of previous court orders relating to parenting time, visitation, or other access" and to "use contempt powers to enforce its court orders relating to parenting time, visitation, or other access."

³ *Picard v. P & C Group I*, 306 Neb. 292, 945 N.W.2d 183 (2020).

⁴ *Martin v. Martin*, *supra* note 2.

⁵ See *Braun v. Braun*, *supra* note 1.

⁶ *Id.*

⁷ *Martin v. Martin*, *supra* note 2.

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Helms argues that certain modifications were punitive rather than coercive and that they were not reasonably necessary to protect Yori's rights under the parenting plan. He challenges as punitive the transportation provisions, the ban on his attendance at athletic and piano practices, and the final say provisions. He argues that the transportation provisions were punitive because the purpose was to ensure that the child make it to all of his activities; thus, it was unnecessary to give Yori control over transportation from the event. He also argues that they are punitive because there is nothing he can do to avoid them through his conduct—they are unconditional. Helms argues that there was no factual or remedial justification to ban him from attending the child's athletic and musical practices or to deprive him of final say over the child's participation in musical activities or any say regarding participation in athletic events. He contends that the alcohol and Soberlink testing provisions were not reasonably necessary to protect Yori's rights under the parenting plan.

In characterizing the modifications as punitive, Helms appears to be trying to impose a "least remedial measure" rule. But that is not consistent with statute. Section 42-364.15(1) empowers the court to solve the problem. Rather than a sanction, the modifications here were remedial measures to gain compliance. While it is possible that a modification could be so extreme that it qualifies as a sanction, the modifications here do not rise to that level.

[7] Where a situation exists that 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.⁸ Here, the court had the equitable authority, within the contempt proceeding, to modify the decree and parenting plan to remedy issues that led to contempt.

[8] The evidence showed that the remedial modifications were reasonably related to behavior prompting the contempt

⁸ *Id.*

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proceeding. Yori adduced evidence that Helms violated the parenting plan on numerous occasions and in numerous ways. Where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.⁹ There was evidence that Helms expressed an unwillingness to allow the child to participate in some events, failed to transport him to educational meetings and practices, and had him depart early from other events. The court also heard testimony about Helms' intoxication and inappropriate behavior at the child's athletic games and practices. And Yori testified that he had been confrontational. We conclude the modifications about which Helms complains were part of the equitable relief that the court is authorized to provide.¹⁰ We find no abuse of discretion.

SECOND APPEAL

[9] 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.¹¹ This appeal presents two distinct jurisdictional issues: whether the district court possessed jurisdiction to further modify aspects of the parenting plan and whether Helms has appealed from a final order.

[10,11] Helms argues that the district court did not have jurisdiction to further modify the final say provisions of the parenting plan while an appeal concerning the final say provisions was pending. Generally, once an appeal has been perfected, the trial court no longer has jurisdiction.¹² But under Neb. Rev. Stat. § 42-351(2) (Reissue 2016), a trial court retains jurisdiction for certain matters. Section 42-351(2) provides:

⁹ *Id.*

¹⁰ *See id.*

¹¹ *Cullinane v. Beverly Enters. - Neb.*, 300 Neb. 210, 912 N.W.2d 774 (2018).

¹² *Burns v. Burns*, 293 Neb. 633, 879 N.W.2d 375 (2016).

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When final orders relating to proceedings governed by sections 42-347 to 42-381 are on appeal and such appeal is pending, the court that issued such orders shall retain jurisdiction to provide for such orders regarding support, custody, parenting time, visitation, or other access . . . or other appropriate orders in aid of the appeal process. Such orders shall not be construed to prejudice any party on appeal.

A trial court's jurisdiction under § 42-351(2) during the pendency of an appeal is properly characterized as jurisdiction in aid of the appeal process.¹³

A trial court's jurisdiction to modify a decree regarding an issue which is pending appeal is not unlimited. Section 42-351(2) does not grant a trial court authority to hear and determine anew the very issues then pending on appeal and to enter permanent orders addressing these issues during the appeal process.¹⁴ In the first appeal, Helms opposed modifications to provisions regarding transportation, the ban on his attendance at athletic and piano practices, the final say provisions, and his alcohol use and testing. Following the filing of the notice of appeal, the district court held further hearings, but it did not make new determinations about the identical issues being appealed. Rather, in the August 2019 purge order, the court set forth terms for Helms to comply with in order to be released from jail. This falls within the court's continuing jurisdiction to provide for such orders regarding parenting time or other access.

[12,13] Yori contends that the August 2019 order is not a final, appealable order. For an appellate court to acquire jurisdiction of an appeal, the party must be appealing from a final order or a judgment.¹⁵ A judgment is the final determination

¹³ See *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016).

¹⁴ *Burns v. Burns*, *supra* note 12.

¹⁵ *State v. Fredrickson*, 306 Neb. 81, 943 N.W.2d 701 (2020).

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of the rights of the parties in an action.¹⁶ Every direction of the court made or entered in writing and not included in a judgment is an order.¹⁷ While all judgments¹⁸ not incorrectly designated as such¹⁹ are appealable, an order may be appealed only if a statute expressly makes the order appealable or the order falls within the statutory definition of a final order.²⁰

[14] Under our final order statute,²¹ to be a final order subject to appellate review, the lower court's order must (1) affect a substantial right and determine the action and prevent a judgment, (2) affect a substantial right and be made during a special proceeding, (3) affect a substantial right and be made on summary application in an action after a judgment is rendered, or (4) deny a motion for summary judgment which was based on the assertion of sovereign immunity or the immunity of a government official.²² Proceedings regarding modification of a marital dissolution are special proceedings.²³ And we have described a contempt order as one made upon a summary application in an action after judgment.²⁴ Here, our focus is not upon the procedural classification under § 25-1902, but, rather, whether the order affected a substantial right of one or more parties.²⁵

[15,16] The inquiry of whether a substantial right is affected focuses on whether the right at issue is substantial and whether the court's order has a substantial impact on that

¹⁶ Neb. Rev. Stat. § 25-1301(1) (Cum. Supp. 2018).

¹⁷ *State v. Fredrickson*, *supra* note 15.

¹⁸ See § 25-1301(1) (defining judgment).

¹⁹ See Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

²⁰ See *State v. Fredrickson*, *supra* note 15.

²¹ See Neb. Rev. Stat. § 25-1902 (Supp. 2019).

²² See *State v. Fredrickson*, *supra* note 15.

²³ *Tilson v. Tilson*, 299 Neb. 64, 907 N.W.2d 31 (2018).

²⁴ See *McCullough v. McCullough*, 299 Neb. 719, 910 N.W.2d 515 (2018).

²⁵ See *State v. Fredrickson*, *supra* note 15.

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right.²⁶ Whether an order affects a substantial right depends on whether it affects with finality the rights of the parties in the subject matter.²⁷ An order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review.²⁸

[17] The duration of an order is relevant to whether it affects a substantial right.²⁹ In several cases, we have determined that orders temporarily affecting a parent's custodial, visitation, or educational rights were not final.³⁰ With respect to a visitation order in a guardianship proceeding, we stated that where a final guardianship hearing was scheduled for 3 weeks later, an order that effectively denied visitation until that hearing did not affect a substantial right because "the length of time that [the mother's] relationship with [the child] was to be disturbed was brief, and the order was not a permanent disposition."³¹

Here, the court did not intend its order to be a permanent disposition. The order stated in part:

IT IS FURTHER ORDERED that this matter be set for review hearing on **Thursday, December 19, 2019 at 1:30 p.m.** At such hearing, [Helms] shall be allowed 45 minutes to present evidence. [Yori] shall be awarded a like amount of time. The purpose of the review hearing shall be to allow [Helms] to prove his compliance with the Court's orders and adduce evidence as to the best interest of the minor child to support [Helms'] request for reinstatement of the original parenting time schedule.

²⁶ See *id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Tilson v. Tilson*, *supra* note 23.

³⁰ See, *id.*; *In re Interest of Danaisha W. et al.*, 287 Neb. 27, 840 N.W.2d 533 (2013); *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009); *Gerber v. Gerber*, 218 Neb. 228, 353 N.W.2d 4 (1984).

³¹ *In re Guardianship of Sophia M.*, 271 Neb. 133, 139, 710 N.W.2d 312, 317 (2006).

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The Court notes it is specifically interested in [Helms'] compliance with the Court's orders and the information from Dr. Williams. The Court will address what changes, if any, should be made to the 10/4 parenting time schedule as in the best interest of the minor child.

And the court orally advised that it was changing Helms' parenting time "[t]emporarily" and that the "temporary order" would be in effect until December 19, 2019. The court anticipated that the parenting schedule would "likely" revert to the 7/7 schedule if Helms complied with the purge order.

That the court planned to revisit the parenting time schedule in 4½ months demonstrates the temporary nature of the order. We recognize that the length of time involved here is perhaps on the outer edge of what would be considered a temporary disturbance, but we cannot say the reduction in parenting time from a 7/7 schedule to a 10/4 schedule for 4½ months affects a substantial right.

Because the order did not affect a substantial right of Helms, it is not a final order that may be appealed under § 25-1902. We dismiss the second appeal for lack of jurisdiction.

CONCLUSION

In the first appeal, we conclude that the court's modifications were part of the equitable relief that it had the authority to provide to remedy issues that led to contempt. We find no abuse of discretion and affirm the district court's judgment. Because the second appeal was not taken from a final order, we dismiss it for lack of jurisdiction.

JUDGMENT IN NO. S-19-520 AFFIRMED.

APPEAL IN NO. S-19-840 DISMISSED.

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

STATE OF NEBRASKA, APPELLEE, V.

KENNETH E. HURD, APPELLANT.

949 N.W.2d 339

Filed October 2, 2020. No. S-19-919.

1. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
2. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court.
4. ____: _____. An appellate court will not resort to interpretation to ascertain the meaning of statutory words that are plain, direct, and unambiguous.
5. **Courts: Sentences.** A sentencing court has wide latitude and discretion to impose any sentence within the statutory limits.

Appeal from the District Court for Seward County: JAMES C. STECKER, Judge. Affirmed.

Jim K. McGough and Nathan S. Lab, of McGough Law, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

HEAVICAN, C.J., MILLER-LEMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

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HEAVICAN, C.J.

INTRODUCTION

Kenneth E. Hurd pled no contest to a misdemeanor charge of child abuse. He was sentenced to 1 year's imprisonment. He appealed, and we moved this case to our docket to answer the question of whether, under Neb. Rev. Stat. § 81-1848 (Cum. Supp. 2018), a victim may both fill out a victim impact statement to be included in the presentence investigation report and also write and read a separate letter to be offered at the defendant's sentencing hearing. We conclude that the plain language of § 81-1848 allows both a victim impact statement and a written letter and that Hurd's sentence was not excessive. We accordingly affirm.

FACTUAL BACKGROUND

Hurd was charged by information with incest. Pursuant to a plea agreement, Hurd subsequently pled no contest to one count of misdemeanor child abuse. In return for Hurd's no contest plea, the State agreed to recommend probation.

A presentence investigation report was completed. The victim included a victim impact statement, consisting of responses to a questionnaire drafted by the probation office, and suggested that she believed probation would be appropriate. The probation officer completing the report indicated the same.

At the sentencing hearing, the State offered a factual basis alleging that Hurd resided with his wife and the alleged victim in this case and that Hurd subjected the victim to emotional trauma and physical abuse. The State also requested that the victim be permitted to read aloud a separate letter that she had written to Hurd. That request was granted over Hurd's objection. The contents of the letter were read into the record, and the letter itself was entered into evidence. Hurd was subsequently sentenced to 1 year's imprisonment.

Hurd appeals.

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ASSIGNMENTS OF ERROR

Hurd assigns, renumbered, that the district court abused its discretion by (1) allowing the victim to submit a statement to be included in the presentence investigation report and allowing her to also read a separate letter that was then offered into evidence for purposes of sentencing and (2) relying on statements suggesting that Hurd had committed first degree sexual assault in sentencing him to the maximum 1-year sentence of imprisonment allowable for his conviction for misdemeanor child abuse.

STANDARD OF REVIEW

[1,2] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.¹ 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.²

[3] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court.³

ANALYSIS

Interpretation of § 81-1848(1)(d).

In his first assignment of error, Hurd argues that the district court erred in allowing the victim to provide a victim impact statement for the presentence investigation report and to also read and offer to the court a separate, written statement.

As relevant, § 81-1848 provides:

(1) Victims as defined in section 29-119 shall have the
. . . right[]:

. . . .

¹ *State v. Price*, 306 Neb. 38, 944 N.W.2d 279 (2020).

² *Id.*

³ *State v. Galvan*, 305 Neb. 513, 941 N.W.2d 183 (2020).

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(d) To be notified by the county attorney by any means reasonably calculated to give prompt actual notice of the following:

.....
(iv) The victim's right to make a written or oral impact statement to be used in the probation officer's preparation of a presentence investigation report concerning the defendant;

.....
(vii) The victim's right to submit a written impact statement at the sentencing proceeding or to read his or her impact statement submitted pursuant to subdivision (1)(d)(iv) of this section at the sentencing proceeding.

We held in *State v. Galindo*,⁴ and reiterated in *State v. Thieszen*,⁵ that § 81-1848 of the Nebraska Crime Victim's Reparations Act provides a list of baseline rights and that the act "does not seek to limit the sentencing court's traditional discretion to consider evidence from a variety of sources."

Hurd's assignment of error presents two issues—whether the victim was entitled to submit both a victim impact statement under § 81-1848(1)(d)(iv) and a written impact statement under § 81-1848(1)(d)(vii) and whether the district court erred in allowing the victim to read the second impact statement at sentencing before making the written version part of the record. These issues require this court to consider the language of § 81-1848. There is no allegation on appeal that the State violated the plea agreement.

[4] An appellate court will not resort to interpretation to ascertain the meaning of statutory words that are plain, direct, and unambiguous.⁶

In this case, the language of § 81-1848 plainly states that the victim had both the right to offer a written statement for

⁴ *State v. Galindo*, 278 Neb. 599, 670, 774 N.W.2d 190, 245 (2009).

⁵ See *State v. Thieszen*, 300 Neb. 112, 912 N.W.2d 696 (2018).

⁶ *State v. Montoya*, 305 Neb. 581, 941 N.W.2d 474 (2020).

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the presentence investigation report under subsection (1)(d)(iv) and to also offer a written impact statement at the time of sentencing under subsection (1)(d)(vii). As the State notes, the ability to do so seems to be a “peculiar quirk” of that section, but the language is nevertheless plain in allowing both.⁷ The victim here did both, as was permitted by statute, and we find no error in the district court’s allowing both to be considered at sentencing.

We note that Hurd objected to the written letter offered at sentencing on the ground that the victim had offered a written statement for inclusion in the presentence investigation report. We also note that Hurd further objected to facts relating to a sexual assault included in the report. But Hurd did not seek a continuance as a result of the reading or offering of the victim’s letter, nor did he argue that the information alleged in the letter read and offered at sentencing was unknown to him.

We also observe that the same plain language set forth above does not explicitly reserve to a victim the right to read aloud a separate victim impact statement drafted for purposes of sentencing, as occurred in this case. But as we have previously noted, the rights set forth in § 81-1848 are baseline rights and do not limit a sentencing court’s discretion to consider evidence from a variety of sources. Where Hurd has failed to demonstrate that he was prejudiced by the victim’s reading her letter, a written version was, in any case, made available to the court.⁸

The district court has discretion to consider many things in determining a sentence, as will be discussed below. Allowing this letter to be read, rather than simply offered, is consistent with this discretion. Hurd’s first assignment of error is without merit.

⁷ Brief for appellee at 11.

⁸ See *State v. Scott*, 284 Neb. 703, 824 N.W.2d 668 (2012).

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*Consideration of Charges Dropped
Pursuant to Plea Agreement.*

In his second assignment of error, Hurd assigns that the district court erred in relying on allegations originally charged, but ultimately dismissed, in order to sentence him to the maximum sentence allowed for his conviction.

The State relied on *State v. Janis*⁹ to support its position that it was not an abuse of discretion for the district court to consider dismissed charges when sentencing a defendant:

“It must be assumed, we think, that a trial judge knows the difference between information that is pertinent to the issue before him and that which is unfounded rumor. The law invests a trial judge with a wide discretion as to the sources and types of information used to assist him in determining the sentence to be imposed within statutory limits.” It is hard for us to understand how a trial court may properly consider information of the appellant’s behavior if no charges are filed, but may not consider the *underlying facts* if a charge is filed and later dismissed, not because the facts are untrue, but due to a plea bargain. While we do not mean to suggest . . . that a trial court is free to consider any matter having no relevance or basis, we do mean to say that a trial court is, indeed, given wide discretion and where it appears that a sentence imposed is within statutory and constitutional limitations, it will not be disturbed on appeal in the absence of an abuse of discretion on the part of the trial court.

Hurd argues that his case is distinguishable from *Janis* because “the district court in this matter improperly concluded that [Hurd] was guilty of a more serious and dismissed charge and abused its discretion by excluding consideration of a probationary sentence because the court believed that [Hurd] would not admit to the more serious charge.”¹⁰ Having

⁹ *State v. Janis*, 207 Neb. 491, 495, 299 N.W.2d 447, 449-50 (1980) (quoting *State v. Rapp*, 184 Neb. 156, 165 N.W.2d 715 (1969)).

¹⁰ Brief for appellant at 12.

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reviewed the district court's comments made at sentencing, we disagree with this characterization.

[5] As noted above, we have observed that a sentencing court has wide latitude and discretion to impose any sentence within the statutory limits:

"It is a long accepted practice in this state that before sentencing a defendant after conviction a trial judge has a broad discretion in the source and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. Highly relevant, if not essential, to his determination of an appropriate sentence is the gaining of knowledge concerning defendant's life, character, and previous conduct. In gaining this information, the trial court may consider reports of probation officers, police reports, affidavits, and other information including his own observations of the defendant. A presentence investigation has nothing to do with the issue of guilt. The rules governing due process with respect to the admissibility of evidence are not the same in a presentence hearing as in a trial in which guilt or innocence is the issue. The latitude allowed a sentencing judge at a presentence hearing to determine the nature and length of punishment, other than in recidivist cases, is almost without limitation as long as it is relevant to the issue."¹¹

The sentence imposed was supported by the facts of this case and the victim's statement, and it was within the district court's discretion. Hurd's second assignment of error is without merit.

CONCLUSION

We affirm the judgment of conviction and the sentence of the district court.

AFFIRMED.

¹¹ *Rapp, supra* note 9, 184 Neb. at 157-58, 165 N.W.2d at 716.

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Nebraska Supreme Court

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STATE OF NEBRASKA, APPELLEE, v.

ELIJAH W. DENTON, APPELLANT.

949 N.W.2d 344

Filed October 2, 2020. No. S-19-939.

1. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
2. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute presents a question of law, which an appellate court independently reviews.
3. **Constitutional Law: Rules of the Supreme Court: Statutes: Appeal and Error.** An appellant challenging the constitutionality of a statute must strictly comply with Neb. Ct. R. App. P. § 2-109(E) (rev. 2014).
4. **Constitutional Law: Rules of the Supreme Court: Statutes: Notice: Appeal and Error.** Neb. Ct. R. App. P. § 2-109(E) (rev. 2014) requires that a party presenting a case involving the federal or state constitutionality of a statute must file and serve notice thereof with the Supreme Court Clerk by separate written notice or in a petition to bypass at the time of filing such party's brief.
5. **Constitutional Law: Rules of the Supreme Court: Statutes: Appeal and Error.** Strict compliance with Neb. Ct. R. App. P. § 2-109(E) (rev. 2014) is necessary whenever a litigant challenges the constitutionality of a statute, regardless of how that constitutional challenge may be characterized.

Appeal from the District Court for Lancaster County, JODI L. NELSON, Judge, on appeal thereto from the County Court for Lancaster County, JOSEPH E. DALTON, Judge. Judgment of District Court affirmed.

David Tarrell, of Berry Law Firm, for appellant.

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Robert E. Caples, Assistant Lincoln City Prosecutor, for appellee.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

CASSEL, J.

INTRODUCTION

Elijah W. Denton implicitly attacks the constitutionality of a state statute¹ prohibiting jury trials for criminal cases arising under city ordinances. Denton was denied a jury trial for the alleged violation of a municipal ordinance prohibiting battery,² despite a separate ordinance³ imposing a 10-year ban upon possession of firearms by a person convicted of violating the battery ordinance. On appeal to this court from his conviction and sentence under the battery ordinance, Denton failed to comply with the procedural rule governing constitutional challenges to statutes.⁴ Because we strictly apply the rule, we affirm the judgment.

BACKGROUND

Denton's legal challenge does not rely upon any facts underlying his conviction. Thus, we need not summarize them.

Instead, Denton relies upon three city ordinances. The battery ordinance⁵ defined the crime of which he was convicted. For a conviction under the battery ordinance, a penalty ordinance⁶ prescribed a maximum penalty of 6 months' imprisonment, a \$500 fine, or both,⁷ and directed that the

¹ Neb. Rev. Stat. § 25-2705 (Reissue 2016).

² Lincoln Mun. Code § 9.12.010(b) (1997) (battery ordinance).

³ See Lincoln Mun. Code § 9.36.100 (2008) (firearm ban ordinance).

⁴ See Neb. Ct. R. App. P. § 2-109(E) (rev. 2014).

⁵ See § 9.12.010(b) (“[i]t shall be unlawful for any person intentionally, knowingly, or recklessly to: 1. Cause bodily injury to another person; or 2. Strike another person”).

⁶ Lincoln Mun. Code § 1.24.010 (2006) (penalty ordinance).

⁷ § 1.24.010(a).

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penalty be “cumulative with and in addition to . . . any other penalty, punishment, or sentence specified by this code.”⁸ The firearm ban ordinance stated in relevant part: “It shall be unlawful for any person to possess any firearm within the corporate limits or on any property of the City of Lincoln outside the corporate limits when that person has been convicted of any one of the following offenses within the last ten years: . . . the [battery ordinance].”⁹

Prior to trial, Denton filed a written motion for jury trial. After a hearing, the county court pronounced a denial of the motion. The court’s written order overruled the motion, because “any possible collateral consequences under the Lincoln Municipal Code does not make the instant offense a serious offense thus entitling [Denton] to a trial by jury under either the U.S. or Nebraska Constitutions.”

Following a bench trial, the county court convicted Denton of violating the battery ordinance. The court imposed only a \$250 fine.

Denton timely appealed the county court judgment to the district court. The district court relied in part upon § 25-2705, which states in pertinent part that “[e]ither party to any case in county court, except criminal cases arising under city . . . ordinances, . . . may demand a trial by jury.” The district court affirmed the county court’s judgment.

Denton filed a timely appeal to the Nebraska Court of Appeals. At the time he filed his appellate brief, he did not file or serve either “a separate written notice or [a] notice in a Petition to Bypass” regarding “the federal or state constitutionality” of § 25-2705.¹⁰ We moved Denton’s appeal to our docket.¹¹

⁸ § 1.24.010(c).

⁹ § 9.36.100.

¹⁰ See § 2-109(E).

¹¹ Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 2018).

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ASSIGNMENT OF ERROR

Denton’s brief on appeal assigns only one error: The district court erred in affirming the county court’s denial of his motion for a jury trial.

[1] Prior to filing his brief in the Court of Appeals, Denton filed a “Notice of Errors.” In that document, Denton also assigned that the district court erred in affirming the county court’s denial of his disclosure motion. But to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.¹² Denton does not assign nor argue the alleged disclosure motion error in his brief, and therefore, we will not address it.

STANDARD OF REVIEW

[2] The constitutionality of a statute presents a question of law, which an appellate court independently reviews.¹³

ANALYSIS

[3,4] An appellant challenging the constitutionality of a statute must strictly comply with § 2-109(E).¹⁴ Section 2-109(E) requires that a party presenting a case involving the federal or state constitutionality of a statute must file and serve notice thereof with the Supreme Court Clerk by separate written notice or in a petition to bypass at the time of filing such party’s brief.¹⁵ The party must also provide the Attorney General with a copy of its brief.¹⁶ Without strict compliance with

¹² *State v. Dixon*, 306 Neb. 853, 947 N.W.2d 563 (2020).

¹³ *State v. Jenkins*, 303 Neb. 676, 931 N.W.2d 851 (2019), *cert. denied* ___ U.S. ___, 140 S. Ct. 2704, 206 L. Ed. 2d 844 (2020).

¹⁴ See, *State v. Epp*, 299 Neb. 703, 910 N.W.2d 91 (2018); *State v. Boche*, 294 Neb. 912, 885 N.W.2d 523 (2016).

¹⁵ *Epp*, *supra* note 14.

¹⁶ See *Boche*, *supra* note 14.

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§ 2-109(E), this court will not address a constitutional challenge to a statute.¹⁷

Section 2-109(E) ensures that this court has notice of a constitutional challenge.¹⁸ As the Nebraska Constitution empowers this court to declare a legislative act unconstitutional only by a supermajority of at least five judges, the court must secure a full court to hear an appeal regarding the constitutionality of a statute.¹⁹ Section 2-109(E) assists the court to do so.

Section 2-109(E) also guarantees that notice of a constitutional challenge to a statute is provided to the Attorney General. The statutes may not precisely articulate the Attorney General's duty to defend the constitutionality of state statutes.²⁰ But in *State v. Douglas*,²¹ we recognized that the Attorney General has some duties which are not purely statutory and are sometimes referred to as the "common-law duties of the office." There, we cited a treatise which articulates the common-law duties of the Attorney General, including that he or she must defend duly adopted statutory enactments that are not unconstitutional.²² Because the Attorney General cannot defend the constitutionality of a statute if the Attorney General has not been notified of the challenge, strict compliance with § 2-109(E) is necessary to ensure that the appeal may be staffed and handled accordingly.²³

[5] Because notice is needed, strict compliance with § 2-109(E) is necessary whenever a litigant challenges the

¹⁷ See, *Epp*, *supra* note 14; *Boche*, *supra* note 14.

¹⁸ See *Boche*, *supra* note 14.

¹⁹ See *id.* See, generally, Neb. Const. art. V, § 2.

²⁰ See, Neb. Rev. Stat. § 84-203 (Reissue 2014) ("authorized to . . . defend . . . any . . . matter . . . in which the state may be . . . interested"); Neb. Rev. Stat. § 84-205(10) (Reissue 2014).

²¹ *State v. Douglas*, 217 Neb. 199, 349 N.W.2d 870 (1984).

²² See, *id.*; 7 Am. Jur. 2d *Attorney General* § 5 (2017) (citing *Com. ex rel. Beshear v. Com. ex rel. Bevin*, 498 S.W.3d 355 (Ky. 2016)).

²³ See *Boche*, *supra* note 14.

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constitutionality of a statute, regardless of how that constitutional challenge may be characterized.²⁴ It does not matter if the litigant explicitly challenges a statute, as this court remains bound to the requirements of article V of the Nebraska Constitution.²⁵ Therefore, as long as this court must determine the constitutionality of a statute in deciding an appeal, § 2-109(E) applies.²⁶

Here, Denton implicitly challenges the constitutionality of § 25-2705, which precludes a defendant from obtaining a jury trial for the criminal prosecution of an ordinance.²⁷ Denton argues that § 25-2705 cannot apply to him because his constitutional right to a jury trial was triggered by the additional penalties he will suffer from being convicted of violating the assault ordinance.²⁸ Even if we agree with Denton, we cannot provide him a jury trial without declaring § 25-2705 unconstitutional as applied in his case, because the statute leaves no discretion for a court to grant a jury trial for the criminal prosecution of a city ordinance violation.²⁹

Because Denton implicitly challenged the constitutionality of § 25-2705, he needed to comply with § 2-109(E). Denton did not provide a separate notice or a petition to bypass to the Supreme Court Clerk.³⁰ On appeal to this court, the State is represented by an assistant city attorney. Our record does not show that the Attorney General received a copy of Denton's brief.³¹ Consequently, Denton failed to provide notice to this court and the Attorney General. He did not strictly comply

²⁴ See *Smith v. Wedekind*, 302 Neb. 387, 923 N.W.2d 392 (2019).

²⁵ See *id.* See, generally, Neb. Const. art. V, § 2.

²⁶ See *Wedekind*, *supra* note 24.

²⁷ See *State v. Cozzens*, 241 Neb. 565, 490 N.W.2d 184 (1992).

²⁸ See § 9.36.100(a).

²⁹ See *Cozzens*, *supra* note 27.

³⁰ See § 2-109(E).

³¹ See *id.*

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with § 2-109(E), and therefore, we cannot consider Denton's only assigned error.

CONCLUSION

Denton implicitly challenged the constitutionality of a statute, but he failed to provide notice as required by § 2-109(E). Because we are unable to reach the merits of his appeal, we affirm the judgment of the district court.

AFFIRMED.

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Nebraska Supreme Court

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STATE OF NEBRASKA, APPELLEE, V.

CLINT C. CANADAY, APPELLANT.

949 N.W.2d 348

Filed October 2, 2020. Nos. S-19-1102, S-19-1103.

1. **Pleas: Appeal and Error.** An appellate court will not disturb the trial court's ruling on a presentencing motion to withdraw a guilty or no contest plea absent an abuse of discretion.
2. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
3. **Pleas.** The right to withdraw a plea previously entered is not absolute.
4. **Pleas: Proof.** When a defendant moves to withdraw his or her plea before sentencing, a court, in its discretion, may sustain the motion for any fair and just reason, provided that such withdrawal would not substantially prejudice the prosecution. The defendant has the burden to show the grounds for withdrawal by clear and convincing evidence.
5. **Appeal and Error.** Appellate courts do not ordinarily consider arguments and theories raised for the first time on appeal.
6. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
7. **Convicted Sex Offender.** Because registration duties under the Sex Offender Registration Act are not punitive, a trial court may inform a defendant of the registration duties before accepting pleas of guilty or no contest, but it is not required to do so.
8. **Sentences.** In determining a sentence to be imposed, relevant factors customarily considered and applied are the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct,

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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.

9. _____. 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.
10. _____. Generally, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively.

Appeals from the District Court for Dawes County: TRAVIS P. O'GORMAN, Judge. Affirmed.

Justin J. Cook, of Lincoln Law, L.L.C., for appellant.

Douglas J. Peterson, Attorney General, and Jordan Osborne for appellee.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

STACY, J.

Pursuant to a plea agreement, Clint C. Canaday entered no contest pleas to felony charges in two separate cases. At the sentencing hearing, he made an oral motion to withdraw one of the pleas. The court overruled the motion and proceeded with sentencing in both cases. Canaday appeals his convictions and sentences in both cases, which we have consolidated for appellate review. Finding no error, we affirm.

I. BACKGROUND

On October 12, 2018, Canaday was charged in the district court for Dawes County with three Class II felonies: intentional child abuse resulting in serious bodily injury,¹ first degree assault,² and use of a deadly weapon to commit a felony.³

¹ Neb. Rev. Stat. § 28-707 (Reissue 2016).

² Neb. Rev. Stat. § 28-308 (Reissue 2016).

³ Neb. Rev. Stat. § 28-1205 (Reissue 2016).

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The information also alleged Canaday was a habitual criminal.⁴ Canaday entered “not guilty” pleas to all counts.

About 8 months later, on June 6, 2019, a second felony information was filed against Canaday, charging him with two counts of first degree sexual assault of a child,⁵ both Class IB felonies.⁶ Canaday entered “not guilty” pleas to both counts.

1. PLEA AGREEMENT

In July 2019, Canaday and the State entered into a written plea agreement involving both cases. In the first case, Canaday agreed to plead guilty or no contest to an amended information charging one count of intentional child abuse resulting in serious bodily injury and one count of child abuse not resulting in serious bodily injury. In return, the State agreed to dismiss the charges of first degree assault and use of a deadly weapon to commit a felony, and it further agreed to dismiss the habitual criminal allegation.

In the second case, Canaday agreed to plead guilty or no contest to an amended information charging one count of first degree sexual assault of a child. In return, the State agreed to dismiss the second count of first degree sexual assault of a child. And in both cases, the State also agreed not to file additional charges against Canaday for offenses involving three specific juveniles occurring prior to the date of his arrest.

A change of plea hearing in both cases was held July 22, 2019. At the hearing, Canaday’s counsel recited the terms of the plea agreement on the record. The court asked Canaday whether the terms, as stated, reflected his understanding of the agreement, and Canaday answered, “Yes.”

During the plea colloquy, the court explained each charge in the amended informations and the possible penalties, including an advisement that the sentences imposed could be ordered to be served concurrently or consecutively. Canaday

⁴ Neb. Rev. Stat. § 29-2221 (Reissue 2016).

⁵ Neb. Rev. Stat. § 28-319.01 (Reissue 2016).

⁶ § 28-319.01(2).

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stated he understood. The court also informed Canaday that on the charge of first degree sexual assault of a child, he “can be ordered to comply with” the Nebraska Sex Offender Registration Act (SORA). Canaday stated he understood. The court advised Canaday of the various rights he would be waiving by entering his pleas, and Canaday stated he understood. Canaday told the court he did not have any questions about his rights or the possible penalties, and when asked whether he had enough time to think about his pleas and discuss them with his attorney, Canaday replied, “Yes.”

Canaday entered pleas of no contest in both cases, after which the State provided a factual basis for the charges. The charges related to Canaday’s treatment of his girlfriend’s three children. In the first case, concerning the charge of intentional child abuse resulting in serious bodily injury, Canaday threw a metal tape measure at his girlfriend’s then 5-year-old son, causing the child’s lip to split so severely he needed plastic surgery to correct it. The event was recorded on video cameras the girlfriend had installed in the home. On the charge of child abuse not resulting in serious bodily injury, Canaday used a cattle prod to shock his girlfriend’s then 14-year-old son when Canaday felt the child had misbehaved.

In the second case, concerning the charge of first degree sexual assault of a child, the then 11-year-old daughter of Canaday’s girlfriend told her mother that Canaday had been sexually assaulting her, and the child’s mother told her she needed “proof.” The child used her cell phone to make an audio recording of two incidents in which Canaday anally and vaginally penetrated her while she pleaded with him to stop. A transcript of the audio recording was admitted into evidence at the plea hearing.

After making appropriate findings, the district court accepted Canaday’s pleas in both cases. In the first case, Canaday was found guilty of intentional child abuse resulting in serious bodily injury, a Class II felony,⁷ and intentional child abuse

⁷ § 28-707(1) and (7).

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not resulting in serious bodily injury, a Class IIIA felony.⁸ In the second case, Canaday was found guilty of first degree sexual assault of a child, a Class IB felony.⁹ A presentence investigation report (PSR) was ordered and sentencing was scheduled for October 22, 2019.

2. SENTENCING HEARING

When the sentencing hearing began, defense counsel advised the court:

Mr. Canaday tells me that at the time that he entered into the plea it was his understanding he wasn't going to have to do the registration as outlined in the SORA.

I've been through it with him. He refuses to sign it; does not want to be registered. Says that he would rather withdraw his plea if registration is part of it because he's not going to sign it. He tells me that he — and I knew that he was somewhat disabled as far as reading and writing. He says he can't read or write and just doesn't understand any part of it.

So for those reasons Mr. Canaday is requesting today that he be allowed to withdraw his plea.

No exhibits were offered in support of the motion, and Canaday offered no testimony. The State opposed the motion, arguing Canaday had been properly advised of the consequences of his plea in the second case and there was no basis for allowing withdrawal. The court agreed with the State, stating: “[T]he motion is denied. I told you when you entered your plea you'd be required to comply with [SORA]. I don't care if you sign [the SORA form] or not. I really don't. I'm still going to order you to be a lifetime registrant [under SORA].”

The sentencing hearing proceeded. The State generally requested consecutive sentences in the maximum range. It argued that throwing the tape measure at the 5-year-old child was senseless and brutal, that using a cattle prod on the

⁸ § 28-707(1) and (4).

⁹ § 28-319.01(1)(a).

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14-year-old child was essentially torture, and that the audio recording of the sexual assault on the 11-year-old child graphically depicted how vulnerable and helpless she was while Canaday assaulted her.

Defense counsel did not request specific sentences, but he argued that Canaday had taken responsibility for some of his actions. Counsel also suggested that Canaday's inability to read and write complicated some of the testing included in the PSR. Defense counsel confirmed he had discussed the PSR with Canaday, and counsel also clarified the record regarding some of the statements contained in the PSR.

Canaday was given an opportunity for allocution, but he declined. The court then addressed Canaday directly:

I've listened to and considered the remarks of your attorney as well as the county attorney. I've carefully considered the [PSR].

In arriving at your sentence I've considered your age, your mentality, your education, your experience, your social and cultural background, as well as your past criminal record.

I've also considered the motivation for your offenses, the amount of violence involved, as well as any letters that I received.

You know, I will say this is one of the toughest sets of [PSR's] I've ever had to go through. And, you know, I felt — if going through a [PSR] has bugged me like it did, I can't imagine what these children have been through. And they will never be the same. . . .

You know, the Legislature gives a maximum sentence on a sexual assault of a child as a life sentence, and, you know, if there's ever one that deserved a life sentence it's this one.

And you take absolutely no responsibility. You [claim you] weren't even there, despite the fact that there's video, there's recordings. It's just — you're a monster and you deserve to spend the rest of your life locked in a cage. And I can't say it any more nice[ly] than that.

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The court then sentenced Canaday to consecutive terms of imprisonment as follows:

- 20 to 30 years on the conviction of intentional child abuse resulting in serious bodily injury;
- 2 to 2 years on the conviction of intentional child abuse not resulting in serious bodily injury; and
- 50 years to life on the conviction of first degree sexual assault of a child.

Canaday was given credit for 453 days previously served, and speaking from the bench, the court ordered Canaday to comply with SORA.

Canaday filed a timely notice of appeal in both cases. We consolidated the appeals and now resolve them in a single opinion.

II. ASSIGNMENTS OF ERROR

Canaday assigns, renumbered, that the district court erred in (1) not allowing him to withdraw his plea prior to sentencing and (2) imposing excessive sentences.

III. STANDARD OF REVIEW

[1] A trial court has discretion to allow defendants to withdraw their guilty or no contest pleas before sentencing.¹⁰ An appellate court will not disturb the trial court's ruling on a presentencing motion to withdraw a guilty or no contest plea absent an abuse of discretion.¹¹

[2] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.¹²

¹⁰ *State v. Carr*, 294 Neb. 185, 881 N.W.2d 192 (2016).

¹¹ *Id.*

¹² *State v. Becker*, 304 Neb. 693, 936 N.W.2d 505 (2019).

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IV. ANALYSIS

1. WITHDRAWAL OF PLEA

[3,4] The right to withdraw a plea previously entered is not absolute.¹³ When a defendant moves to withdraw his or her plea before sentencing, a court, in its discretion, may sustain the motion for any fair and just reason, provided that such withdrawal would not substantially prejudice the prosecution.¹⁴ The defendant has the burden to show the grounds for withdrawal by clear and convincing evidence.¹⁵

(a) Grounds for Withdrawal

Before the district court, Canaday's counsel offered just two reasons for seeking to withdraw his plea. First, he stated that "at the time that [Canaday] entered into the plea it was his understanding he wasn't going to have to do the registration as outlined in the SORA." Second, Canaday's counsel stated he had been through the SORA advisement form with Canaday, but he "refuse[d] to sign it; does not want to be registered." Counsel continued: "He says he can't read or write and just doesn't understand any part of it. So for those reasons [he] is requesting today that he be allowed to withdraw his plea."

Both of these reasons pertained exclusively to the SORA consequences of Canaday's plea to the charge of first degree sexual assault of a child. Consequently, it appears the district court treated Canaday's oral motion to withdraw his plea as confined only to the conviction for sexual assault of a child.

In his briefing on appeal, Canaday argues for the first time that his difficulty reading and writing affected his ability to understand the entire plea agreement and that he should have been allowed to withdraw all of his pleas on that basis. But Canaday did not convey such a request in the district court. Rather, at the sentencing hearing, Canaday requested to

¹³ *Carr*, *supra* note 10.

¹⁴ *Id.*

¹⁵ *Id.*

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withdraw his “plea” and the only grounds given for this request were counsel’s representations that Canaday did not understand he would be subject to SORA and that Canaday’s illiteracy prevented him from understanding the SORA advisement form.

[5] During oral argument before this court, Canaday conceded that the district court was not presented with a request to withdraw all of the pleas based on a claim that Canaday’s inability to read and write made him unable to understand the written plea agreement. Because appellate courts do not ordinarily consider arguments and theories raised for the first time on appeal,¹⁶ we will not entertain Canaday’s arguments seeking to expand the grounds presented to the district court. Thus, in considering whether the district court abused its discretion in overruling Canaday’s motion to withdraw his plea, we limit our analysis to those grounds expressly presented to the district court.

(b) No Abuse of Discretion

[6] For the reasons explained below, we find no abuse of discretion in overruling Canaday’s motion to withdraw his plea based on the claim he did not understand the SORA consequences. An abuse of discretion occurs when a trial court’s decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.¹⁷

The record directly refutes Canaday’s claim that he did not understand that a conviction for first degree sexual assault of a child would subject him to SORA registration requirements. During both his arraignment and his change of plea hearing, the court advised Canaday that he could be ordered to comply with SORA and Canaday affirmatively stated he understood.

[7] But even an incorrect or incomplete advisement on SORA would not have entitled Canaday to withdraw his plea.

¹⁶ See *State v. Uhing*, 301 Neb. 768, 919 N.W.2d 909 (2018).

¹⁷ *State v. Montoya*, 304 Neb. 96, 933 N.W.2d 558 (2019).

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In *State v. Lane*,¹⁸ we explained that a defendant's duty to register under SORA is not a criminal penalty, but, rather, it is a collateral civil consequence of a conviction. Because registration duties under SORA are not punitive, a trial court may inform a defendant of the registration duties imposed under SORA before accepting pleas of guilty or no contest, but it is not required to do so.¹⁹ And in *Lane*, we expressly rejected the claim that a plea is rendered involuntary or unintelligent because a defendant was not aware of his or her registration duties under SORA.²⁰

On this record, we find no abuse of discretion in the district court's decision to overrule Canaday's motion to withdraw his plea.

2. EXCESSIVE SENTENCES

In both his appellate briefing and at oral argument before this court, Canaday concedes the sentences imposed by the district court were within statutory limits. Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.²¹

[8,9] In determining a sentence to be imposed, relevant factors customarily considered and applied are the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.²² The appropriateness of a sentence is necessarily a subjective

¹⁸ *State v. Lane*, 299 Neb. 170, 907 N.W.2d 737 (2018).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Becker*, *supra* note 12.

²² *Id.*

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judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.²³

Canaday argues the district court failed to consider these sentencing factors, but our review of the record affirmatively refutes this argument. At the sentencing hearing, the district court stated it had carefully considered the remarks of counsel and the information in the PSR, which the judge described as "one of the toughest" he had ever read. The court stated it had considered Canaday's age, mentality, education, experience, and social and cultural background, as well as his past criminal record. The court also stated it had considered Canaday's motivation for the offenses and the amount of violence involved, including the fact that his victims were children who "will never be the same." The record shows the district court considered and applied the relevant sentencing factors when determining Canaday's sentences, and we find no abuse of discretion in that regard.

[10] Finally, Canaday argues it was an abuse of discretion to impose consecutive sentences. He generally characterizes his crimes as "related" and argues the court should have imposed concurrent sentences. We soundly reject any suggestion that because Canaday's victims were related, his crimes were related. Canaday's convictions involved different offenses against different children on different dates. Generally, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively.²⁴ We find no abuse of discretion in the district court's imposition of consecutive sentences.

V. CONCLUSION

For the foregoing reasons, the convictions and sentences are affirmed.

AFFIRMED.

²³ *Id.*

²⁴ *State v. Leahy*, 301 Neb. 228, 917 N.W.2d 895 (2018).

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Nebraska Supreme Court

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STATE OF NEBRASKA, APPELLEE, V.

NELAND T. GRAY, JR., APPELLANT.

949 N.W.2d 320

Filed October 2, 2020. No. S-19-1173.

1. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
3. **Appeal and Error.** For an alleged error to be considered by an appellate court, an appellant must both assign and specifically argue the alleged error in the party's initial brief.
4. _____. Where an appellant's brief contains conclusory assertions unsupported by an analytical argument, the appellant fails to satisfy this requirement.
5. **Sentences: Appeal and Error.** When sentences imposed within statutory limits are alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering well-established factors and any applicable legal principles.
6. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.
7. _____. The sentencing court is not limited to any mathematically applied set of factors, but the appropriateness of the sentence is necessarily a subjective judgment that includes the sentencing judge's observations of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

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STATE v. GRAY

Cite as 307 Neb. 418

Appeal from the District Court for Lancaster County: JODI L. NELSON, Judge. Affirmed.

Nancy K. Peterson for appellant.

Douglas J. Peterson, Attorney General, and Jordan Osborne for appellee.

HEAVICAN, C.J., MILLER-LEMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

FREUDENBERG, J.

NATURE OF CASE

In an appeal from a second degree murder conviction, the appellant challenges the district court's imposition of a life sentence to run consecutively with a sentence of 25 to 35 years' imprisonment for use of a deadly weapon to commit a felony. According to the appellant, the district court abused its discretion by imposing an excessive sentence.

BACKGROUND

Pursuant to a plea agreement, Neland T. Gray, Jr., was convicted of second degree murder, in violation of Neb. Rev. Stat. § 28-304 (Reissue 2016), a Class IB felony, and use of a deadly weapon to commit a felony, in violation of Neb. Rev. Stat. § 28-1205(1)(a) and (b) (Reissue 2016), a Class II felony. The district court imposed on Gray a life sentence for the second degree murder conviction and a consecutive sentence of 25 to 35 years' imprisonment for the use of a deadly weapon to commit a felony conviction.

The convictions and sentences at issue arise out of events that occurred on December 31, 2018. Gray killed his ex-girlfriend, Dijah Ybarra, who was the mother of their two young children, by stabbing her at least 15 times. That evening, Ybarra took the children to Gray's mother's home, where Gray was living. Gray previously agreed to watch the children while Ybarra went out to celebrate New Year's Eve. But when Ybarra arrived, Gray informed her that he had decided to go

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out as well and had arranged for his aunt to watch the children instead. Gray rode with Ybarra to his aunt's house where they dropped the children off. Ybarra then took Gray to another location where she had agreed to drop him off.

After arriving, Ybarra discussed with Gray that she was moving on and had been dating another man. This discussion upset Gray. Gray pulled out a kitchen knife that he had taken from his mother's house and began stabbing Ybarra. Gray initially prevented Ybarra from exiting the car by grabbing her hair, but she was eventually able to get out and attempted to run away. Gray pursued Ybarra, continuing to stab her. Gray then left Ybarra bleeding and dying on the curb while he took her car and fled the scene. Gray called his mother and told her he was going to jail.

According to the information in the presentence investigation report, Gray had been physically and emotionally abusive to Ybarra throughout their relationship and had been in jail the previous year for assaulting her. During that prior altercation, Gray also assaulted another woman who had attempted to intervene on Ybarra's behalf. Gray then threatened the intervening woman's fiance with a knife when the fiance verbally confronted Gray.

While in jail after this incident and despite a protection order, Gray continued to contact Ybarra numerous times, threatening and verbally abusing her. Gray also assaulted other inmates while incarcerated.

Gray was released from jail in early December 2018. Gray and Ybarra resumed their sexual relationship upon his release. Gray had wanted to reestablish a relationship. However, Ybarra was apparently involved with both Gray and another man during this time, which Gray reported caused him severe feelings of jealousy. According to interviews with Gray's family and friends contained within the presentence investigation report, a couple of days before the murder, Ybarra and her new boyfriend had taunted Gray about their new relationship. The family and friends asserted that Ybarra's boyfriend sent Gray

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pictures of himself with Gray's children and Ybarra, claiming he was replacing Gray in Ybarra's and his children's lives.

At sentencing, Gray's counsel requested that Gray's sentence allow for a release date early enough to allow Gray to still become a productive member of society. Defense counsel also argued that Gray's sentence should take into account Gray's age of 22 years, remorse, history of psychological issues, substance abuse, and childhood exposure to domestic violence. The presentence investigation report sets forth that Gray was raised in an abusive household, struggled with his temper from a young age, consistently experienced domestic violence at home, and failed to learn any coping skills.

Gray had been suspended multiple times from school for fighting, eventually being expelled. Gray ultimately obtained his diploma through the GED program and held multiple jobs, but never for longer than 7 months at a time.

Gray has engaged in heavy alcohol and marijuana use since age 14, smoking marijuana six to eight times per day up until his incarceration in 2017. He also reported consuming a pint of hard liquor per day. Gray admitted that he was using alcohol heavily in the time following his release in December 2018 and that he had been drinking throughout the afternoon on the day of the murder.

Gray has a significant criminal history, both as a juvenile and as an adult. Gray abused Ybarra physically, verbally, and emotionally throughout their tumultuous relationship. Multiple family members and friends had told Gray to move on and leave Ybarra alone.

At the sentencing hearing, the district court stated that it had "carefully and thoughtfully considered [Gray's early release] request, particularly in light of [Gray's] age," but reasoned that it was not appropriate in light of Gray's history of violent criminal conduct, character, and flagrant violations of court orders. The district court observed that Gray had been "abusive, controlling, demeaning, possessive, and selfish" and had "shown a complete unwillingness to follow orders of the Court."

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The court pointed out that Gray had contacted Ybarra multiple times while incarcerated in “flagrant violation[]” of the protection order in place. The court further recognized that Gray’s postrelease supervision order prohibited Gray from having any contact with Ybarra; using, possessing, or consuming alcoholic beverages or controlled substances; possessing any weapons; and engaging in unlawful acts or acts injurious to others, and yet, Gray “demonstrated no regard whatsoever for that order.”

The district court concluded that it was “impossible . . . to find that [Gray] at some time in the future will be amenable to the same type of supervision he was on at the time of this brutal murder” and that he is “a violent and dangerous man who has demonstrated an inability through incarceration or otherwise to co-exist with others without violence.”

ASSIGNMENT OF ERROR

Gray assigns that the district court abused its discretion in imposing an excessive sentence.

STANDARD OF REVIEW

[1,2] A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.¹ A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.²

ANALYSIS

[3-5] Gray alleges the life sentence for his second degree murder conviction was excessive. He does not specifically challenge the weapons conviction of 25 to 35 years’ imprisonment. For an alleged error to be considered by an appellate court, an appellant must both assign and specifically argue the

¹ *State v. Smith*, 240 Neb. 97, 480 N.W.2d 705 (1992).

² *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004).

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alleged error in the party's initial brief.³ Where an appellant's brief contains conclusory assertions unsupported by an analytical argument, the appellant fails to satisfy this requirement.⁴ Gray's conviction for second degree murder was punishable by a minimum of 20 years' imprisonment and a maximum of life imprisonment.⁵ When sentences imposed within statutory limits are alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering well-established factors and any applicable legal principles.⁶

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

Gray was 21 years old at the time of the murder and 22 years old when he was sentenced. He argues that, in light of his age, a minimum sentence of life that would never allow for his parole eligibility is excessive. Gray relies on cases like *State v. Iromuanya*,⁹ where we have reduced life sentences

³ See *State v. Smith*, 292 Neb. 434, 873 N.W.2d 169 (2016).

⁴ See *id.*

⁵ See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2018).

⁶ See *State v. Lassek*, 272 Neb. 523, 723 N.W.2d 320 (2006).

⁷ *Id.* See *State v. Thieszen*, 300 Neb. 112, 912 N.W.2d 696 (2018).

⁸ See *State v. Lassek*, *supra* note 6. See, also, *State v. Thieszen*, *supra* note 7.

⁹ *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

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based on the characteristics and history of the defendant. The defendant in *Iromuanya* was 23 years old when he committed second degree murder and had no significant criminal history. The defendant had fired a single shot, while at a party, which wounded one victim and killed another. We noted that by setting a minimum of life imprisonment, the court could not have imposed a more severe minimum term for second degree murder on a hardened criminal with a lengthy history of violent felony convictions.¹⁰ We reiterated that a sentence should fit the offender and not merely the crime.¹¹

Both Gray's criminal history and the nature of his killing of Ybarra differ significantly from *Iromuanya*. Although Gray pleaded to a lesser charge, premeditation is indicated by the fact that Gray took a kitchen knife from his mother's house, had it on his person when he entered Ybarra's car, and manipulated the situation so that Ybarra would end up alone with him, where he used the knife to stab Ybarra over 15 times while in the car and as she attempted to flee.

Gray has a long criminal history, including multiple convictions of violent conduct with others and with Ybarra specifically, including Gray's being incarcerated for a year for assaulting Ybarra—his release being only weeks before this killing occurred. During that prior assault incident, Gray also assaulted another woman who attempted to intervene on Ybarra's behalf and threatened the intervening woman's fiancé with a knife when he verbally confronted Gray.

As the district court noted, Gray has shown no interest or effort to abide by court orders. Despite a protection order in place while Gray was incarcerated, Gray still contacted Ybarra numerous times, threatening and verbally abusing her. Gray repeatedly violated the prohibitions of his postrelease supervision by possessing the kitchen knife from his mother's

¹⁰ *Id.*

¹¹ *Id.*

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house, consuming alcohol, and having multiple contacts with Ybarra that evening that led to her death.

The district court recognized the appropriate factors when imposing Gray's life sentence despite his relatively young age. Further, the sentence properly reflected the seriousness of the crimes committed and Gray's past criminal conduct. As the district court observed, Gray is a "violent and dangerous man who has demonstrated an inability through incarceration or otherwise to co-exist with others without violence."

A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.¹² We find the district court did not abuse its discretion in imposing a life sentence in this matter.

CONCLUSION

The district court carefully considered all the relevant facts when it imposed the life sentence. Considering the totality of the circumstances, we cannot say that the sentence imposed by the district court was untenable. Gray's assignment of error regarding the imposition of an excessive sentence is without merit. For the foregoing reasons, we affirm.

AFFIRMED.

¹² *State v. Weaver*, *supra* note 2.

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DYCUS v. DYCUS

Cite as 307 Neb. 426



Nebraska Supreme Court

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-- Nebraska Reporter of Decisions

DEBRA A. DYCUS, APPELLEE, v.
MICHAEL E. DYCUS, APPELLANT.

949 N.W.2d 357

Filed October 9, 2020. No. S-19-853.

1. **Constitutional Law: Statutes.** The constitutionality of a statute is a question of law.
2. **Constitutional Law: Due Process.** The determination of whether the procedures afforded to an individual comport with constitutional requirements for procedural due process presents a question of law.
3. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In a marital dissolution action, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
5. **Appeal and Error.** In order to be considered by an appellate court, the party asserting the alleged error must both specifically assign and specifically argue it in the party's initial brief.
6. _____. Where an appellant's brief contains conclusory assertions unsupported by a coherent analytical argument, the appellant fails to satisfy the requirement to specifically assign and specifically argue the alleged error.
7. **Marriage.** The State has plenary power to fix the conditions under which the marital status may be created or terminated.
8. **Divorce.** To dissolve a marriage, a court need only find that a marriage is irretrievably broken.
9. **Constitutional Law: Due Process.** The U.S. and Nebraska Constitutions provide that no person shall be deprived of life, liberty, or property without due process of law.

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10. **Due Process.** Due process does not guarantee an individual any particular form of state procedure.
11. **Due Process: Notice.** Due process requires that parties at risk of the deprivation of liberty interests be provided adequate notice and an opportunity to be heard, which are appropriate to the nature of the proceeding and the character of the rights that might be affected.
12. **Divorce.** The court's finding as to whether a marriage is irretrievably broken does not depend only on the will and deliberation of the plaintiff spouse.
13. _____. Defendants in dissolution actions in Nebraska are given their "day in court" to litigate the question of whether the marriage is irretrievably broken.
14. **Constitutional Law: Due Process: Divorce.** Neb. Rev. Stat. § 42-347(3) (Reissue 2016) does not violate the procedural due process provisions of the U.S. and Nebraska Constitutions.
15. **Constitutional Law: Legislature: Divorce.** The prohibition in Neb. Const. art. III, § 18, against the Legislature granting divorces is not implicated by a statutory scheme of general application to all persons seeking dissolution decrees.
16. **Attorney Fees.** Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.
17. **Divorce: Attorney Fees.** A uniform course of procedure exists in Nebraska for the award of attorney fees in dissolution cases.
18. _____. In awarding attorney fees in a dissolution action, a court shall consider the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services.
19. **Attorney Fees: Appeal and Error.** 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 in its award of attorney fees.
20. **Attorney Fees: Proof: Records: Appeal and Error.** If the contents of the record show the allowed attorney fees are not unreasonable, then those fees are not untenable or an abuse of discretion.

Appeal from the District Court for Adams County: STEPHEN R. ILLINGWORTH and TERRI S. HARDER, Judges. Affirmed.

Robert M. Sullivan, of Sullivan Shoemaker, P.C., L.L.O., for appellant.

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No appearance for appellee.

Michael McHale and Matthew F. Heffron, of Thomas More Society, for amicus curiae Donald Paul Sullins.

HEAVICAN, C.J., MILLER-LEMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

FREUDENBERG, J.

I. NATURE OF CASE

In an appeal from a dissolution decree, the defendant challenges the constitutionality of Neb. Rev. Stat. § 42-361 (Reissue 2016), through which in 1972 the Legislature eliminated the conceptual structure of fault as a requisite for a divorce.¹ The defendant asserts that § 42-361 deprives all defendants in dissolution actions of procedural due process and that § 42-361 constitutes special legislation in favor of plaintiffs for dissolution. According to the defendant, the district court lacked subject matter jurisdiction over the proceedings below that resulted in the dissolution decree because it was exercising jurisdiction allegedly conferred by such unconstitutional legislation. We affirm the decree.

II. BACKGROUND

Debra A. Dycus filed a complaint in district court for dissolution of her marriage to Michael E. Dycus. In her complaint, Debra alleged there had been a breakdown in the marital relationship of the parties to the extent that the marriage was irretrievably broken. She alleged that efforts by the parties at reconciliation had wholly failed and that further attempts at reconciliation would be fruitless. There are four adult children of the marriage. There are no minor children.

Debra also sought an ex parte temporary order restraining and enjoining Michael from disposing of marital property except in the usual course of business or for the necessities of life, for an order restraining Michael from disturbing the

¹ See *Else v. Else*, 219 Neb. 878, 367 N.W.2d 701 (1985).

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peace wherever Debra resided, and for attorney fees. Debra filed an affidavit in support of the motion. Michael filed an affidavit contesting Debra's averments, and Debra filed a rebuttal affidavit.

1. MOTION TO DISMISS

Michael, through counsel, responded with a four-page motion to dismiss. He alleged insufficient service of process, deprivation of a constitutional right to adversarial proceedings, lack of a case or controversy, and lack of standing. He further alleged that "[t]he divorce statute," later identified by the court as Neb. Rev. Stat. § 42-347 (Reissue 2016), was unconstitutional on its face because it allegedly violated, among other things, the prohibition against special legislation found in article III, § 18, of the Nebraska Constitution and procedural due process under the U.S. Constitution.

2. OVERRULING OF MOTION TO DISMISS
AND ISSUANCE OF TEMPORARY ORDERS

The court held a hearing on Debra's motion for temporary orders and on Michael's motion to dismiss. There is no record of the hearing other than the notation that four exhibits were entered into evidence. Following the hearing, the court ordered temporary alimony, issued a mutual restraining order against transferring or concealing property, and awarded \$1,000 in temporary attorney fees. The court overruled Michael's motion to dismiss and denied Debra's motion to exclude Michael from the marital residence.

3. ANSWER

In his answer, Michael denied that the marriage was valid. Alternatively, if valid, Michael denied that the marriage was irretrievably broken. Further, he denied there had been any meaningful attempts to reconcile and denied "the implication that the logical, appropriate, and default conclusion to marital struggles is divorce."

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Michael alleged as affirmative defenses violations of the provisions of the U.S. Constitution relating to due process, equal protection, the Establishment Clause, bills of attainder, and takings of private property for public use. He alleged violations of both article III, § 18, and article 1, §§ 17 and 21, of the Nebraska Constitution. And he alleged that the Nebraska statutes governing no-fault divorce “implicate the separation of powers doctrine, nondelegation doctrine, the establishment clause, free exercise of religion clause, due process clause, and equal protection clause of the Nebraska and U.S. Constitutions by interfering with the fundamental rights of conscious, marriage, privacy, religious belief and religious exercise without a compelling State interest.” He asserted that the court lacked subject matter jurisdiction.

4. DISCOVERY

During the course of discovery, Debra moved to compel Michael to respond to her first set of interrogatories and first set of requests for production of documents, due to the fact that more than 30 days had passed without a response, and Michael’s counsel had informed Debra’s counsel that Michael would not be responding to discovery requests. In an attached email, Michael’s counsel stated that he would “try to work with you the best I can, but without Mike’s cooperation, it is going to be messy if you insist on formal responses to the discovery.” Debra moved for costs and attorney fees.

Subsequently, Michael responded to the discovery requests. For many of the requests, however, Michael simply stated:

[Debra] has access to all of the files in our home, and she has full access to all of our bank accounts, both personal and business. I know that Debra has been in our house while I’m not there, so she may already have this information. I also know that Debra keeps an eye on our bank accounts, therefore, she can continue to gather such information as she deems necessary. I have done little or no bookkeeping personally or with the painting business,

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and I do not know where any of these items are or what they might look like.

Debra, in her affidavit in support of the motion to compel, stated that Michael was residing in the marital residence and that she did not have access to the files or the safe located inside. She denied that Michael was uninvolved and ignorant of the business' bookkeeping. She also stated that she lacked access to certain bank accounts. Michael did not conduct any discovery.

Following a hearing, the court sustained in part the motion to compel. The court ordered that Michael vacate the marital home on a specific date and time to allow Debra access and retrieval of documents. The court also ordered Michael to make an accounting of all business equipment and assets and to produce his tax returns.

5. DECREE OF DISSOLUTION

After a final hearing, the court entered a decree of dissolution. Michael did not attend the hearing but was represented by his counsel.

Debra testified at the hearing that over the course of their 30-year marriage, she and Michael had seen five or six counselors and various pastors and priests in order to address their marital difficulties. On cross-examination, Debra classified the marital difficulties as abuse and described that the abuse included "name calling" and demeaning statements. She testified without further elaboration that Michael had threatened her. Debra testified that in her opinion the marriage was irretrievably broken.

The court found that the marriage was irretrievably broken and that efforts at reconciliation would not be beneficial. The court concluded that Michael had failed to sustain his burden to show that § 42-347 is unconstitutional.

The court found that Debra had demonstrated she had incurred \$8,216.81 in attorney fees. In evidence was the affidavit of Debra's attorney and a supporting billing statement

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showing the number of hours worked and describing in detail what was worked on for each of those hours, as well as the hourly rates. Michael had not presented any evidence of attorney fees, the court noting that Michael’s “only focus has been to have the Dissolution of Marriage Statute declared unconstitutional.” The court awarded Debra \$4,000 in attorney fees, to be credited off her payment obligation for equalizing the property division. Michael appealed the decree.

III. ASSIGNMENTS OF ERROR

Michael assigns that the trial court erred in (1) denying his motion to dismiss, (2) applying an unconstitutional statute, (3) finding that the marriage was irretrievably broken, (4) dividing the parties’ property and granting Debra sole ownership of the marital residence, and (5) ordering attorney fees.

IV. STANDARD OF REVIEW

[1] The constitutionality of a statute is a question of law.²

[2] The determination of whether the procedures afforded to an individual comport with constitutional requirements for procedural due process presents a question of law.³

[3] In a marital dissolution action, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court’s determinations regarding custody, child support, division of property, alimony, and attorney fees.⁴

[4] A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.⁵

² *Bryan M. v. Anne B.*, 292 Neb. 725, 874 N.W.2d 824 (2016).

³ *In re Application No. OP-0003*, 303 Neb. 872, 932 N.W.2d 653 (2019).

⁴ *Doerr v. Doerr*, 306 Neb. 350, 945 N.W.2d 137 (2020).

⁵ *Id.*

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V. ANALYSIS

[5,6] Michael asks this court to vacate the dissolution decree on the ground that it was rendered under authority conferred by a statute he claims is unconstitutional on its face. In the event we disagree, Michael's only challenge to the decree specifically assigned and argued is the amount of attorney fees awarded to Debra. Michael does not specifically argue his assigned error concerning the court's division of the parties' property; therefore, we do not address it. In order to be considered by an appellate court, the party asserting the alleged error must both specifically assign and specifically argue it in the party's initial brief.⁶ Where an appellant's brief contains conclusory assertions unsupported by a coherent analytical argument, the appellant fails to satisfy this requirement.⁷

1. FACIAL CONSTITUTIONAL
CHALLENGES TO § 42-361

Michael asserts that by virtue of establishing no-fault divorce, § 42-361 deprives defendants in dissolution actions of procedural due process and that, for the same reason, § 42-361 is special legislation “granting divorces.”⁸ We note that we need not address his conclusory statement, insufficiently argued, that § 42-361 violates the Equal Protection Clauses of the U.S. and Nebraska Constitutions.

[7,8] The State has plenary power to fix the conditions under which the marital status may be created or terminated.⁹ Section 42-347(3) provides in relevant part that “[d]issolution of marriage means the termination of a marriage by decree of a court of competent jurisdiction upon a finding that the

⁶ See *U.S. Pipeline v. Northern Natural Gas Co.*, 303 Neb. 444, 930 N.W.2d 460 (2019).

⁷ See, e.g., *Hauptman, O'Brien v. Turco*, 277 Neb. 604, 764 N.W.2d 393 (2009); *State v. Sanders*, 190 Neb. 625, 211 N.W.2d 412 (1973).

⁸ Brief for appellant at 15, quoting Neb. Const. art. III, § 18.

⁹ See *Buchholz v. Buchholz*, 197 Neb. 180, 248 N.W.2d 21 (1976).

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marriage is irretrievably broken.” This language was adopted in 1972 to eliminate “the entire conceptual structure of fault as a requisite for a divorce” by eliminating the requirement that plaintiffs make specific complaint about the other spouse’s misconduct.¹⁰ Instead, the allegation that a marriage is irretrievably broken is the sole allegation necessary for dissolution of a marriage.¹¹ To dissolve a marriage, a court need only find that a marriage is irretrievably broken.¹²

Michael asserts that by eliminating the conceptual structure of fault, defendants in dissolution actions are necessarily precluded from any defense to the dissolution itself, as the outcome “depends only on the will and deliberation of the petitioning spouse.”¹³ Michael claims that “[l]ittle or no procedural protections exist” for defendants in dissolution actions, because “there are no facts to examine other than the fact that one party wanted the divorce and the other party did not.”¹⁴ This allegedly deprives defendants of their “day in court,” in violation of procedural due process protections of the Nebraska and U.S. Constitutions.¹⁵ This also allegedly “confers an exclusive privilege and immunity to the plaintiff, a private individual,”¹⁶ in violation of the prohibition against special legislation “granting divorces” found in Neb. Const. art. III, § 18.

(i) Procedural Due Process

[9-11] We find no merit to Michael’s assertion that under Nebraska’s no-fault dissolution statutes, unwilling defendants in dissolution actions are being deprived, without due

¹⁰ *Else v. Else*, *supra* note 1, 219 Neb. at 880, 367 N.W.2d at 703.

¹¹ See *id.*

¹² See *id.*

¹³ Brief for appellant at 15.

¹⁴ *Id.* at 11.

¹⁵ *Id.* at 13.

¹⁶ *Id.* at 15.

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process of law, of a liberty interest in marriage. The U.S. and Nebraska Constitutions provide that no person shall be deprived of life, liberty, or property without due process of law.¹⁷ Due process does not guarantee an individual any particular form of state procedure.¹⁸ Instead, due process requires that parties at risk of the deprivation of liberty interests be provided adequate notice and an opportunity to be heard, which are appropriate to the nature of the proceeding and the character of the rights that might be affected.¹⁹ This has been referred to as the people's right to their "day in court."²⁰

Michael's appeal to a "strict scrutiny" analysis of the no-fault divorce procedure is misplaced.²¹ Substantive due process forbids the government from infringing upon a fundamental liberty interest—no matter what process is involved—unless the infringement is narrowly tailored to serve a compelling state interest.²² But Michael does not refer specifically in his appellate brief to substantive due process. Nor does he argue that defendants cannot be deprived of a fundamental liberty interest in remaining married, regardless of the process involved, in dissolution actions brought by plaintiffs no longer wishing to remain married to defendants. Instead, Michael's argument is that § 42-347(3) deprives defendants of adversarial procedures essential to procedural due process.

A similar procedural due process argument was recently addressed in *Pankoe v. Pankoe*.²³ The husband argued that no-fault divorce deprived him of due process because it was

¹⁷ U.S. Const. amends. V and XIV; Neb. Const. art. I, § 3.

¹⁸ *Fetherkile v. Fetherkile*, 299 Neb. 76, 907 N.W.2d 275 (2018).

¹⁹ See *id.* See, also, e.g., *State v. Norman*, 282 Neb. 990, 808 N.W.2d 48 (2012).

²⁰ See, e.g., *McGavock v. City of Omaha*, 40 Neb. 64, 58 N.W. 543 (1894).

²¹ Brief for appellant at 10.

²² See, e.g., *Citizens for Eq. Ed. v. Lyons-Decatur Sch. Dist.*, 274 Neb. 278, 739 N.W.2d 742 (2007).

²³ *Pankoe v. Pankoe*, 222 A.3d 443 (Pa. Super. 2019).

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based solely on the wife's "viewpoint" that the marriage was irretrievably broken, without actionable fault, thereby making the decree merely a ministerial act.²⁴ The court disagreed.

The court in *Pankoe* observed that the legislature had enacted its no-fault provisions "for good reason: to avoid, where possible, a contested divorce, the raw searing battle that some commentators have likened to guerrilla warfare."²⁵ It rejected any contention that courts, under the no-fault statutory scheme, simply accept in a ministerial manner a plaintiff's position that the marriage is irretrievably broken. The court explained that defendants in no-fault divorce actions are given opportunities to object and present contrary evidence, and the court makes a factual determination that the marriage is irretrievably broken upon consideration of the evidence presented by both parties.²⁶

Other courts have likewise held that no-fault divorce statutes satisfy the procedural due process requirements of notice and a hearing, and they have rejected arguments that a finding of an irretrievable breakdown of the marriage is merely perfunctory.²⁷ The courts in *In re Marriage of Franks*²⁸ and *Ryan v. Ryan*²⁹ noted that a finding of irretrievable breakdown is no more perfunctory, vague, or incapable of definition than those states' prior fault grounds for divorce. In *In re Marriage of Franks*, the grounds included having committed "extreme cruelty,"³⁰ and in *Ryan*, the grounds included having become

²⁴ *Id.* at 447.

²⁵ *Id.* at 449.

²⁶ See *id.* See, also, e.g., *In re Marriage of Franks*, 189 Colo. 499, 542 P.2d 845 (1975).

²⁷ See, *In re Marriage of Franks*, *supra* note 26; *Dickson v. Dickson*, 238 Ga. 672, 235 S.E.2d 479 (1977); *Saltarelli v. Saltarelli*, 670 S.W.2d 785 (Tex. App. 1984).

²⁸ *In re Marriage of Franks*, *supra* note 26.

²⁹ *Ryan v. Ryan*, 277 So. 2d 266 (Fla. 1973).

³⁰ *Id.* at 270.

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“‘extremely and repeatedly cruel,’” a “‘habitual drunkard,’” or “‘impotent through immoral conduct.’”³¹

The statutory scheme governing dissolution, Neb. Rev. Stat. §§ 42-347 to 42-381 (Reissue 2016 & Cum. Supp. 2018), provides for notice to the defendant, both by providing that certain matters must be contained in the complaint and by requiring that a summons be served by either personal service or substitute service under the conditions specified in Neb. Rev. Stat. § 25-517.02 (Reissue 2016).³² Section 42-356 provides for hearings in open court upon the oral testimony of witnesses or upon the depositions of such witnesses. Section 42-363 provides for a waiting period such that no suit for divorce shall be heard or tried until 60 days after perfection of service of process.

The determinative question of whether the marriage is irretrievably broken is decided after a hearing in which evidence may be adduced by both parties, and § 42-361(2) specifically provides:

If one of the parties has denied under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to the filing of the complaint and the prospect of reconciliation, and shall make a finding whether the marriage is irretrievably broken.

In sum, the court is not called upon to simply determine whether one of the parties wants a divorce.

[12,13] The court’s finding as to whether a marriage is irretrievably broken does not depend only on the will and deliberation of the plaintiff spouse. Defendants in dissolution actions in Nebraska are given their “day in court” to litigate the question of whether the marriage is irretrievably broken.

³¹ *In re Marriage of Franks*, *supra* note 26, 189 Colo. at 507, 542 P.2d at 851.

³² §§ 42-352 and 42-353. See, also, § 42-355.

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[14] We hold that § 42-347(3) does not violate the procedural due process provisions of the U.S. and Nebraska Constitutions. The recent U.S. Supreme Court decisions in *Obergefell v. Hodges*³³ and *United States v. Windsor*³⁴ do not, as Michael asserts, change this result.

Michael argues that in *Obergefell* and *Windsor*, the U.S. Supreme Court identified new property interests in marriage.³⁵ He does not elaborate on what those property interests are, merely repeating the conclusory statement that no-fault divorce is “an illegal taking.”³⁶ We observe that an illegal taking is a concept falling under the Fifth Amendment to the U.S. Constitution and article 1, § 21, of the Nebraska Constitution, and neither of these constitutional provisions are specifically raised in this appeal.

In any event, we have already held, in *Buchholz v. Buchholz*³⁷ that the Nebraska no-fault divorce statutes do not deprive defendants of a substantial vested property interest, as “marriage is not an ordinary civil contract.”³⁸ We explained that marriage is, instead, “a personal relationship subject to dissolution on terms fixed by state law.”³⁹ In other words, one’s status as a married person is not property within the purview of the Due Process Clause of the 14th Amendment to the U.S. Constitution. After *Buchholz*, we stated in *Roberts v. Roberts*⁴⁰ that the spouse’s challenge to Nebraska’s no-fault

³³ *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).

³⁴ *United States v. Windsor*, 570 U.S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013).

³⁵ *Obergefell v. Hodges*, *supra* note 33; *United States v. Windsor*, *supra* note 34.

³⁶ Brief for appellant at 11.

³⁷ *Buchholz v. Buchholz*, *supra* note 9, 197 Neb. at 182, 248 N.W.2d at 22.

³⁸ See, also, *Roberts v. Roberts*, 200 Neb. 256, 263 N.W.2d 449 (1978).

³⁹ *Buchholz v. Buchholz*, *supra* note 9, 197 Neb. at 183, 248 N.W.2d at 23.

⁴⁰ *Roberts v. Roberts*, *supra* note 38, 200 Neb. at 258, 263 N.W.2d at 450.

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divorce statutes under the Due Process and Equal Protection Clauses of the U.S. and Nebraska Constitutions “border[ed] on the frivolous” and “merit[ed] little discussion.” We find nothing referring to property interests in *Obergefell* or *Windsor* that changes our holdings in *Buchholz* or *Roberts*. Notably, neither U.S. Supreme Court case redefines the contract of marriage as a property interest.

Michael’s procedural due process argument rests primarily on the liberty interest in choice of identity discussed by the U.S. Supreme Court in *Obergefell* before it held that the fundamental “right to marry”⁴¹ is held equally by same-sex and opposite-sex couples. Michael specifically relies on the Court’s statements in *Obergefell* that the liberties protected by the Due Process Clause of the 14th Amendment include “intimate choices that define personal identity and beliefs”⁴² and “certain specific rights that allow persons, within a lawful realm, to define and express their identity.”⁴³ Michael asserts that he “has defined and expressed his identity as the spouse of [Debra],” which is therefore a liberty interest protected by the 14th Amendment.⁴⁴

Michael fails to acknowledge that by bringing this action, Debra expressed her own intimate choice to identify herself as a person who is not married to Michael. There is nothing in the recent U.S. Supreme Court decisions on the “right to marry” suggesting a liberty interest in forcing a plaintiff to stay in a broken marriage because the defendant was not at “fault.” Nor did the Court suggest that such compulsion would be “within a lawful realm.” To the contrary, the Court in *Obergefell* pointed out that its holding was limited to “the rights of two *consenting* adults.”⁴⁵

⁴¹ *Obergefell v. Hodges*, *supra* note 33, 576 U.S. at 665.

⁴² *Id.*, 576 U.S. at 663.

⁴³ *Id.*, 576 U.S. at 651-52.

⁴⁴ Brief for appellant at 8.

⁴⁵ *Obergefell v. Hodges*, *supra* note 33, 576 U.S. at 679 (emphasis supplied).

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While the notice and opportunity to be heard must, under procedural due process, be appropriate to both the nature of the proceeding and the character of the rights that might be affected, we find no merit to Michael's argument that the liberty interests recognized in *Obergefell* and *Windsor* require something procedurally different than what is provided under the Nebraska no-fault divorce statutes.

(ii) *Special Legislation*

We also disagree with Michael's argument that § 42-347(3) constitutes special legislation granting divorces. Neb. Const. art. III, § 18, states in relevant part: "The Legislature shall not pass local or special laws in any of the following cases, that is to say: For granting divorces."

[15] Michael asserts that § 42-347(3) is a law "granting divorces," because the decisive question of whether the marriage is irretrievably broken "depends only on the will and deliberation of the petitioning spouse."⁴⁶ We have already discussed that Michael's premise that a court does not truly adjudicate whether the marriage is irretrievably broken is groundless. Furthermore, the constitutional prohibition against special laws granting divorces refers to the legislative act of granting divorces to specific persons.⁴⁷ The prohibition in Neb. Const. art. III, § 18, against the Legislature granting divorces is not implicated by a statutory scheme of general application to all persons seeking dissolution decrees.

2. ATTORNEY FEES

[16,17] Lastly, we address Michael's challenge to the award of attorney fees. Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow

⁴⁶ Brief for appellant at 15.

⁴⁷ See, e.g., *Jones v. Jones*, 95 Ala. 443, 11 So. 11 (1892); *State v. Duket*, 90 Wis. 272, 63 N.W. 83 (1895); Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 Clev. St. L. Rev. 719 (2012).

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recovery of attorney fees.⁴⁸ A uniform course of procedure exists in Nebraska for the award of attorney fees in dissolution cases.⁴⁹

[18,19] In awarding attorney fees in a dissolution action, a court shall consider the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services.⁵⁰ We review the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge in its award of attorney fees.⁵¹

[20] 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.⁵² If the contents of the record show the allowed fees are not unreasonable, then those fees are not untenable or an abuse of discretion.⁵³ We find no abuse of discretion in the court's award.

Michael asserts he gave Debra full access to their financial information and did not file frivolous motions or pleadings that caused unnecessary work, while Debra's counsel unnecessarily sought a restraining order when Michael allegedly had "never harassed or bothered [Debra] at any time before or during the pendency of the case."⁵⁴ Michael concludes that if these things had been properly considered, the trial court would have noted the amount involved in the controversy was slight and the services actually performed were

⁴⁸ *Moore v. Moore*, 302 Neb. 588, 924 N.W.2d 314 (2019).

⁴⁹ *Id.*

⁵⁰ *Garza v. Garza*, 288 Neb. 213, 846 N.W.2d 626 (2014).

⁵¹ See *Doerr v. Doerr*, *supra* note 4.

⁵² *Id.*

⁵³ See *Garza v. Garza*, *supra* note 50.

⁵⁴ Brief for appellant at 14.

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minimal. According to Michael, the length of time required for preparation and presentation of the case was little more than necessary for the typical uncontested divorce, since the court never “showed any indication that it was going to consider [Michael’s] constitutional questions.”⁵⁵

The affidavit admitted below in support of attorney fees reflected the time Debra’s legal team actually spent on the litigation. The affidavit described in detail the nature of the legal work performed and also set forth hourly rates. In our de novo review, we find that the amount of time spent and rates charged are not unreasonable. Even if we were to accept Michael’s characterization that he had never harassed Debra, we find no evidence that this contested portion of Debra’s motion for temporary orders took more than a nominal amount of her attorney’s time. The court granted other requests in the motion, and we do not find that it was frivolous.

VI. CONCLUSION

For the foregoing reasons, we decline to find the no-fault divorce statutory scheme found at §§ 42-347 to 42-381 unconstitutional based upon the challenges made in this appeal. We affirm the dissolution decree.

AFFIRMED.

⁵⁵ *Id.* at 15.

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Nebraska Supreme Court

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STATE OF NEBRASKA, APPELLEE, V.

ELLIS CHAPMAN, APPELLANT.

949 N.W.2d 490

Filed October 9, 2020. No. S-19-1065.

1. **Judgments: Speedy Trial: Appeal and Error.** Generally, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Speedy Trial: Final Orders: Appeal and Error.** An order denying an accused criminal's nonfrivolous motion for absolute discharge on statutory speedy trial grounds is a ruling affecting a substantial right in a special proceeding and is therefore final and appealable under Neb. Rev. Stat. § 25-1902(1)(b) (Supp. 2019).
3. **Speedy Trial: Indictments and Informations: Complaints.** Although Nebraska's speedy trial statutes, Neb. Rev. Stat. § 29-1201 et seq. (Reissue 2016), expressly refer to indictments and informations, they also apply to prosecutions commenced by the filing of a complaint in county court.
4. **Speedy Trial.** To calculate the time for speedy trial purposes, a court must exclude the day the complaint was filed, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 2016) to determine the last day the defendant can be tried.
5. **Speedy Trial: Proof.** The burden of proof is upon the State to show that one or more of the excluded time periods under Neb. Rev. Stat. § 29-1207(4) (Reissue 2016) are applicable when the defendant is not tried within 6 months.
6. ____: _____. To overcome a defendant's motion for discharge on speedy trial grounds, the State must prove the existence of excluded time by a preponderance of the evidence.
7. **Speedy Trial.** Under Neb. Rev. Stat. § 29-1208 (Reissue 2016), if a defendant is not brought to trial before the running of the time for trial as provided for in Neb. Rev. Stat. § 29-1207 (Reissue 2016), as

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extended by any excluded periods, he or she is entitled to absolute discharge from the offense charged and for any other offense required by law to be joined with that offense.

Appeal from the District Court for Hall County, JOHN H. MARSH, Judge, on appeal thereto from the County Court for Hall County, ARTHUR S. WETZEL, Judge. Judgment of District Court reversed and remanded with directions.

Jerrold P. Jaeger, Deputy Hall County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Jordan Osborne for appellee.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE, and PAPIK, JJ.

PAPIK, J.

On March 29, 2017, the State filed theft charges against Ellis Chapman. Chapman did not appear for a scheduled arraignment approximately 2 weeks later, and the county court for Hall County issued a warrant for his arrest. Chapman was eventually arrested over 2 years later on April 24, 2019. Chapman later moved for absolute discharge under Nebraska's speedy trial statutes. The county court overruled Chapman's motion, finding that the time during which the arrest warrant was pending was excluded under the speedy trial statutes. The district court affirmed. Chapman now appeals to us, and we reverse, and remand. Because Chapman was not brought to trial within 6 months of the filing of charges and the State failed to carry its burden to show that any time was excluded for speedy trial purposes, Chapman was entitled to absolute discharge under the speedy trial statutes.

BACKGROUND

Charge and Arrest.

On March 29, 2017, Chapman was charged by complaint in Hall County Court with one count of theft by unlawful

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taking, \$500 or less, second offense, a Class I misdemeanor. An arraignment was scheduled for April 12.

On the day of the scheduled arraignment, Chapman did not appear. During proceedings on the record, the State requested that the county court issue a warrant for his arrest. After finding probable cause that Chapman committed the offense, the county court issued an arrest warrant.

Chapman was eventually arrested, but not until April 24, 2019. One day later, he was brought before the county court where he pleaded not guilty to the pending charge. Then on July 1, Chapman filed a motion for absolute discharge. In it, Chapman asserted he was entitled to absolute discharge, because he had been denied his statutory right to a speedy trial guaranteed by Neb. Rev. Stat. §§ 29-1207 and 29-1208 (Reissue 2016).

Speedy Trial Proceedings.

At the hearing on Chapman's motion for absolute discharge, the State offered the arrest warrant and subsequent orders extending it. The State did not present any evidence regarding efforts to serve the arrest warrant. The State also offered and the county court received a copy of a letter from the Hall County Attorney addressed to Chapman at an address in Omaha, Nebraska. The letter was dated March 28, 2017, and directed Chapman to appear in the county court on April 12, 2017, to answer for the theft charge. The letter was introduced without any accompanying testimony. At the April 25, 2019, hearing, during an exchange with the county court regarding his failure to appear for the April 12, 2017, arraignment, Chapman stated that he lived at a different Omaha address.

The county court overruled Chapman's motion for absolute discharge from the bench and characterized it as "frivolous." The county court stated that the period of time during which the arrest warrant was pending was excluded under the speedy trial statutes. With that time excluded, it concluded that Chapman's speedy trial rights had not been denied when he filed his motion for absolute discharge.

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Chapman appealed the denial of his motion for absolute discharge to the district court. In his statement of errors, Chapman asserted that the county court erred by finding that the time during which the arrest warrant was pending did not count toward the statutory speedy trial deadline. He also asserted that the county court denied him a fair hearing and demonstrated bias and prejudice by finding his motion was frivolous.

Although the district court disagreed with the county court's finding that Chapman's motion was frivolous, it affirmed the denial of the motion for absolute discharge. The district court concluded that the county court did not demonstrate bias or prejudice and that it properly found that the time during which the arrest warrant was pending was excluded for speedy trial purposes.

Chapman now appeals the ruling of the district court.

ASSIGNMENTS OF ERROR

Chapman assigns two errors on appeal. He contends that the district court erred by (1) finding that the county court correctly determined that the time during which the arrest warrant was pending was excluded for statutory speedy trial purposes and (2) finding that the county court had not denied Chapman a fair hearing.

STANDARD OF REVIEW

[1] Generally, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Lovvorn*, 303 Neb. 844, 932 N.W.2d 64 (2019).

ANALYSIS

Jurisdiction.

[2] We begin by briefly addressing our jurisdiction to hear this appeal. We have held on a number of occasions that an order denying an accused criminal's nonfrivolous motion for absolute discharge on statutory speedy trial grounds is

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a ruling affecting a substantial right in a special proceeding and is therefore final and appealable under Neb. Rev. Stat. § 25-1902(1)(b) (Supp. 2019). See, e.g., *State v. Gill*, 297 Neb. 852, 901 N.W.2d 679 (2017). Here, the county court concluded that Chapman’s motion for absolute discharge was frivolous. If that were the case, we would lack jurisdiction and would be required to dismiss the appeal. We will not, however, dismiss the appeal, because, as we will explain, Chapman’s motion was not only not frivolous, it was meritorious.

Speedy Trial Background.

The statutory right to a speedy trial is set forth in §§ 29-1207 and 29-1208. *State v. Vela-Montes*, 287 Neb. 679, 844 N.W.2d 286 (2014). Section 29-1207(1) expressly refers to indictments and informations, requiring that those “indicted or informed against for any offense shall be brought to trial within six months,” adding that “such time shall be computed as provided in this section.” In this case, charges were commenced against Chapman not by indictment or information, but by the filing of a complaint in county court.

[3] Although the speedy trial statutes expressly refer to indictments and informations, in *State v. Stevens*, 189 Neb. 487, 203 N.W.2d 499 (1973), this court held that they also apply to prosecutions commenced by the filing of a complaint in county court. We have subsequently observed that *Stevens* did so based on “questionable reasoning,” but, in light of subsequent case law and the Legislature’s apparent acquiescence in our construction, we have continued to apply the speedy trial statutes to cases commenced by the filing of a complaint in county court. See *State v. Schanaman*, 286 Neb. 125, 133, 835 N.W.2d 66, 71 (2013). See, also, *State v. Lebeau*, 280 Neb. 238, 241, 784 N.W.2d 921, 925 (2010) (“it is well settled that the [speedy trial statutes] also appl[y] to prosecutions on complaint in county court”).

As noted above, the speedy trial statutes set a 6-month deadline in which a defendant must be brought to trial, but also provide that such time “shall be computed as provided

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in this section.” § 29-1207(1). Section 29-1207(4) goes on to provide a number of circumstances in which the 6-month clock to bring a defendant to trial is essentially stopped. See *State v. Liming*, 306 Neb. 475, 945 N.W.2d 882 (2020).

[4-7] To calculate the time for speedy trial purposes, a court must exclude the day the complaint was filed, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4) to determine the last day the defendant can be tried. *Lebeau, supra*. The burden of proof is upon the State to show that one or more of the excluded time periods under § 29-1207(4) are applicable when the defendant is not tried within 6 months. *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009). The State must prove the existence of excluded time by a preponderance of the evidence. See *id.* Under § 29-1208, if a defendant is not brought to trial before the 6-month deadline, as extended by any excluded periods, expires, he or she is entitled to absolute discharge from the offense charged and for any other offense required by law to be joined with that offense. See *Liming, supra*.

Speedy Trial Analysis.

Applying the speedy trial calculations in this case, the State had until September 29, 2017, to bring Chapman to trial unless it carried its burden to show the existence of excluded time. Section 29-1207(4)(d) does provide that a “period of delay resulting from the absence or unavailability of the defendant” is excluded. The county court and district court apparently believed that any time in which a defendant fails to appear and an arrest warrant is issued, the defendant is considered absent or unavailable under § 29-1207(4)(d) for all of the time during which the arrest warrant was pending. As we will explain, and as the State concedes, this conclusion is not supported by our precedent.

In *State v. Richter*, 240 Neb. 223, 481 N.W.2d 200 (1992), we addressed the circumstances under which the pendency of an arrest warrant may result in excluded time under § 29-1207(4)(d). In *Richter*, we explained that, generally, no

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excluded time arises under § 29-1207(4)(d) if the defendant fails to appear at a court proceeding of which he or she was not provided notice. We recognized a possible exception to this rule, however, suggesting that the pendency of a warrant alone may result in excluded time if the State can prove that “diligent efforts to secure [the defendant’s] presence by the service of an arrest warrant have been tried and failed.” *Richter*, 240 Neb. at 230, 481 N.W.2d at 206. The State acknowledges that under *Richter*, the pendency of an arrest warrant can result in excluded time under § 29-1207(4)(d) only if the State also proves it used diligent efforts to serve that warrant. It also admits that it introduced no such proof in this case.

Although the State concedes that the county court and district court erred by finding that the pending warrant resulted in excluded time, it contends that this case should be remanded to the county court because it made incomplete factual findings. Specifically, the State asserts that we should direct the county court to make a finding as to whether Chapman received notice of the April 12, 2017, scheduled arraignment at which he did not appear.

The State’s position regarding the need for an additional factual finding apparently arises out of its understanding that *Richter* holds that if a defendant fails to appear at a proceeding of which he or she had actual notice, the defendant is absent or unavailable under § 29-1207(4)(d) and excluded time results. Chapman disputes this reading of *Richter*, contending that the case holds that a defendant is absent or unavailable under § 29-1207(4)(d) only if he or she fails to appear at a proceeding for which he or she was provided notice through a means of service prescribed by statute. He contends there is no proof of such service here.

In the end, it is not necessary for us to resolve the parties’ competing interpretations of *Richter*. Even if the State is correct that a defendant’s failure to appear at a proceeding of which he or she had actual notice results in excluded time, the State did not introduce any evidence that Chapman received actual notice of the April 12, 2017, scheduled arraignment.

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The county court did receive into evidence a copy of the letter from the county attorney addressed to Chapman referencing the arraignment scheduled for April 12. But the State introduced no evidence that would allow a reasonable finder of fact to conclude that Chapman, in fact, received this letter. There was no testimony or other evidence about how, when, or by whom the letter was sent; how the address listed on the letter was obtained; why Chapman could be expected to receive the letter at that address; or whether the State had any other reason to believe that Chapman received the letter. The State admitted at oral argument that it failed to introduce evidence by which the county court could have concluded that Chapman received notice of the arraignment scheduled for April 12.

Despite its concession at oral argument that there was no evidence in the record that would permit a finding that Chapman received notice of the arraignment scheduled for April 12, 2017, the State continued to maintain that the case should be remanded to the county court for additional factual findings. This was required, the State suggested, by our cases holding that appellate review of speedy trial calculations requires complete factual findings. See, e.g., *State v. Lintz*, 298 Neb. 103, 902 N.W.2d 683 (2017). We disagree that our cases compel that result. While we have said that we cannot review a trial court's factual determinations for clear error if no such determinations have been made, see *Lintz, supra*, that principle would justify remand for additional factual findings only when there is competent evidence in the record that would allow the trial court to reach more than one factual conclusion without committing clear error. In a case like this one, however, where all agree that there is no competent evidence that would allow the county court to reasonably conclude that Chapman received notice of the arraignment scheduled for April 12, remand would serve no purpose.

Because the State did not carry its burden to show that any time was excluded from the speedy trial calculation and because it did not bring Chapman to trial within 6 months of the filing of charges, Chapman was entitled to absolute

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discharge. Given our conclusion that Chapman was entitled to absolute discharge, there is no reason to address his second assignment of error, contending that he was denied a fair hearing in the county court.

CONCLUSION

The county court and district court erred by finding that the pendency of the warrant resulted in excluded time. And the State did not introduce sufficient evidence at the speedy trial hearing that could support any other basis for excluded time. Because there was no evidence that would support a finding of excluded time and because Chapman was not brought to trial within 6 months of the filing of charges, he was entitled to absolute discharge under the speedy trial statutes. We thus reverse the district court's order and remand the cause with directions for that court to reverse the county court's order and remand the cause with directions to grant Chapman absolute discharge and dismiss the complaint against him.

REVERSED AND REMANDED WITH DIRECTIONS.

FREUDENBERG, J., not participating.

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IN RE GUARDIANSHIP & CONSERVATORSHIP OF J.F.
Cite as 307 Neb. 452



Nebraska Supreme Court

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-- Nebraska Reporter of Decisions

IN RE GUARDIANSHIP AND CONSERVATORSHIP OF J.F.,
A CHILD UNDER 18 YEARS OF AGE.
GERALD F., APPELLANT, v. MISTY B., APPELLEE.
949 N.W.2d 496

Filed October 9, 2020. No. S-19-1123.

1. **Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
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. **Guardians Ad Litem: Fees: Appeal and Error.** In considering a trial court's order concerning the payment of guardian ad litem fees, the allowance, amount, and allocation of guardian ad litem fees is a matter within the initial discretion of a trial court, involves consideration of the equities and circumstances of each particular case, and will not be set aside on appeal in the absence of an abuse of discretion by the trial court.
4. **Judgments: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
5. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
6. **Costs.** Under Nebraska law, the costs of litigation and expenses incident to litigation may not be recovered unless provided for by statute or a uniform course of procedure.
7. _____. Whether costs and expenses are authorized by statute or by the court's recognition of a uniform course of procedure presents a question of law.

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8. **Statutes: Legislature: Intent.** In construing 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. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.
10. **Statutes: Legislature: Intent.** It is a court's duty to discover, if possible, legislative intent from the statute itself.
11. **Legislature: Intent.** The intent of the Legislature is expressed by omission as well as by inclusion.
12. **Statutes: Legislature: Intent.** Repeal by implication is strongly disfavored, unless made necessary by the evident intent of the Legislature.
13. **Statutes.** A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable.
14. **Statutes: Legislature: Intent.** In determining whether a new enactment is repugnant, a court looks at the new enactment for any indication of an evident legislative intent to repeal the former statute.
15. ____: ____: _____. In the absence of clear legislative intent, the construction of a statute will not be adopted which has the effect of nullifying or repealing another statute.
16. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
17. _____. In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.

Appeal from the County Court for Holt County: KALE B. BURDICK, Judge. Affirmed.

Charles W. Balsiger, of Carney Law, P.C., for appellant.

Brent M. Kelly, Holt County Attorney, for appellee.

HEAVICAN, C.J., MILLER-LEMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

FUNKE, J.

Gerald F. petitioned to be appointed guardian and conservator of a minor child. Gerald also moved for the appointment of a guardian ad litem (GAL) to represent the interests of the

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minor child, which motion was sustained by the county court. After trial, the court granted Gerald's petition to be appointed guardian and conservator. The court ordered Gerald to pay the GAL's reasonable fees and costs. Gerald appeals the order to pay fees and costs, arguing that the court's order was not statutorily authorized. Because the court had statutory authority to order the petitioner to pay a GAL's reasonable fees and costs in a proceeding to appoint a conservator, we affirm.

BACKGROUND

On July 18, 2018, Gerald filed a petition in the county court for Holt County seeking to be appointed temporary and permanent guardian and conservator of J.F., a minor child. Gerald alleged that J.F.'s biological mother, Misty B., is unable to properly care for him. Gerald stated that he believed he was J.F.'s biological father until a paternity test was completed in May 2018, showing he was not. He alleged that he raised J.F. as his son and has lived with him since birth and that he is concerned Misty will move him to Idaho to live with his grandmother. That day, the county court issued an order appointing Gerald as temporary guardian and conservator and setting the matter of permanent appointment for a hearing.

On July 24, 2018, Gerald filed a motion for the appointment of a GAL. Though Gerald's motion is not in our record, the court referenced the motion in its written order sustaining the motion and appointing an attorney as GAL.

The order stated that on July 16, 2018, unbeknownst to the court, Misty filed in the district court a petition and affidavit to obtain a domestic abuse protection order against Gerald. Gerald was personally served that same afternoon with Misty's petition and an order to show cause. On July 23, the district court held a hearing and entered a domestic abuse protection order against Gerald, under which Misty and J.F. were protected parties. Under the protection order, Gerald was prohibited from having contact with J.F.

The county court found that the granting of the protection order raised a conflict and vacated its order appointing

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Gerald as temporary guardian and conservator and issued a new order appointing Gerald as temporary conservator. The court stated that the competing cases appeared to present a custody dispute, and as a result, the court found that J.F.'s interests were inadequately represented and appointed the GAL pursuant to Neb. Rev. Stat. § 30-2222(4) (Reissue 2016).

On August 13, 2018, the district court issued a modified protection order removing J.F. as a protected party.

On August 14, 2018, in the county court, Misty filed an objection to guardianship and a motion to dismiss. After a hearing on Misty's objection and motion to dismiss, the court overruled both motions. The county court then held a trial on the merits on January 24 and 28, 2019. In February, the court granted Gerald's petition and appointed him as J.F.'s permanent guardian and conservator over Misty's objection.

On May 6, 2019, the GAL filed an application for payment of fees and costs, with an affidavit and itemized invoice stating that \$10,665.57 was incurred for services provided from July 25, 2018, to February 7, 2019. The court granted the GAL's application and ordered that pursuant to Neb. Rev. Stat. § 30-2620.01 (Reissue 2016), the GAL's fees in the amount of \$10,665.57 shall be paid by the ward's estate, if the ward possesses an estate: "If not, those fees shall be paid by the petitioner, as the petitioner requested the appointment of the GAL, and no evidence has been adduced to support a finding that the fees be paid by the county."

On June 13, 2019, Gerald moved to set aside the court's order, arguing that he was not made aware of the GAL's application or the hearing. On July 2, the court held a hearing where Gerald testified that he did not receive notice of the June 4 hearing. Gerald argued that because Misty contested the guardianship and conservatorship, she should be responsible for the GAL's fees. However, Gerald did not contest the amount of the GAL's fees or whether the fees were reasonable.

The court stated that it appointed the GAL at Gerald's request and that while it agreed that Misty should be held partially responsible, under the language of § 30-2620.01, only

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J.F., Holt County, or Gerald could be held responsible. The court denied Gerald's motion to set aside.

On September 6, 2019, the GAL moved to compel Gerald to comply with the order for payment of fees and costs. The GAL further moved for an order finding Gerald in contempt for failing to comply with the court's June 4 order. The court found the GAL's motions were premature and scheduled a hearing to determine whether J.F. possessed an estate and whether any such estate could pay the GAL's fees.

At the hearing, Gerald claimed that 2016 Neb. Laws, L.B. 934, repealed by implication § 30-2620.01 and Neb. Rev. Stat. § 30-2643 (Reissue 2016) and that therefore, Holt County should be responsible for the GAL's fees. Gerald argued that the matter is instead controlled by Neb. Rev. Stat. § 30-4210 (Reissue 2016), which allows for payment of fees by the county where the protective proceeding is brought, or by the person who is the subject of the protective proceeding, and does not allow for payment by the petitioner. Holt County objected, stating that it was not a party to the proceedings, that the case concerns a civil matter in which the county has no interest, and that the county had no opportunity to object to the appointment of a GAL.

Following the hearing, the court found that J.F. did not possess an estate from which the GAL's fees could be paid. The court also found that the issue was controlled by §§ 30-2620.01 and 30-2643 and that based on the terms of those provisions, the GAL's fees "shall be paid by the county in which the proceedings are brought or by the petitioner as costs of the action."

The court found that §§ 30-2620.01 and 30-2643 had not been repealed by implication or otherwise. The court further found that § 30-4210, which pertains to payments for court-ordered evaluations of the person who is the subject of the guardianship or conservatorship, did not apply to the services described in the GAL's application. The court stated that the case was a private custody dispute and that private parties should expect to pay the costs associated with their litigation,

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rather than the taxpayers of Holt County. The court found that because Gerald requested appointment of a GAL, and because Holt County did not have an interest and did not participate in the proceedings, Gerald, as the petitioner, must pay the GAL's fees and costs.

Gerald filed an appeal. Holt County filed a brief in opposition. We moved the case to our docket on our own motion.

ASSIGNMENT OF ERROR

Gerald assigns, restated, that the county court lacked statutory authority to order him to pay the GAL's fees and costs.

STANDARD OF REVIEW

[1,2] An appellate court reviews probate cases for error appearing on the record made in the county court.¹ When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.²

[3,4] In considering a trial court's order concerning the payment of GAL fees, the allowance, amount, and allocation of GAL fees is a matter within the initial discretion of a trial court, involves consideration of the equities and circumstances of each particular case, and will not be set aside on appeal in the absence of an abuse of discretion by the trial court.³ A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.⁴

¹ *In re Guardianship & Conservatorship of Karin P.*, 271 Neb. 917, 716 N.W.2d 681 (2006).

² *Id.*

³ *Id.*

⁴ *Id.*

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[5] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.⁵

ANALYSIS

[6,7] The narrow issue presented to us is whether the county court was authorized to order Gerald to pay the GAL's reasonable fees and costs. Under Nebraska law, the costs of litigation and expenses incident to litigation may not be recovered unless provided for by statute or a uniform course of procedure.⁶ Whether costs and expenses are authorized by statute or by the court's recognition of a uniform course of procedure presents a question of law.⁷

[8-11] In construing 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.⁸ It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.⁹ It is a court's duty to discover, if possible, legislative intent from the statute itself.¹⁰ The intent of the Legislature is expressed by omission as well as by inclusion.¹¹

Here, the court assessed the GAL's fees to Gerald pursuant to §§ 30-2620.01 and 30-2643 under the Nebraska Probate Code. Section 30-2620.01 provides in pertinent part:

The reasonable fees and costs of an attorney, a [GAL], a physician, and a visitor appointed by the court for *the person alleged to be incapacitated* shall be allowed,

⁵ *In re Estate of Hutton*, 306 Neb. 579, 946 N.W.2d 669 (2020).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *In re Adoption of Kailynn D.*, 273 Neb. 849, 733 N.W.2d 856 (2007).

¹¹ *In re Estate of Hutton*, *supra* note 5; *In re Adoption of Kailynn D.*, *supra* note 10.

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disallowed, or adjusted by the court and may be paid from the estate of the ward if the ward possesses an estate or, if not, shall be paid by the county in which the proceedings are brought or by the petitioner as costs of the action.

(Emphasis supplied.) Section 30-2643 provides in pertinent part:

The reasonable fees and costs of an attorney, a [GAL], a physician, a conservator, a special conservator, and a visitor appointed by the court for the person to be protected shall be allowed, disallowed, or adjusted by the court and may be paid from the estate of the protected person if the protected person possesses an estate or, if not, shall be paid by the county in which the proceedings are brought or by the petitioner as costs of the action.

The county court was incorrect to rely upon § 30-2620.01, because that provision does not apply to an award of fees and costs in a guardianship proceeding for a minor.¹² Under article 26 of the Nebraska Probate Code, there are three distinct sections of statutes that apply respectively to (1) a guardianship proceeding for a minor,¹³ (2) a guardianship proceeding for an incapacitated person,¹⁴ and (3) a conservatorship proceeding for a person under a disability or a minor.¹⁵ Section 30-2620.01 establishes a recognized uniform course of procedure for the assessment of fees and costs to pay a court-appointed GAL in a guardianship proceeding for an incapacitated person. An incapacitated person is defined as any

¹² See, e.g., *In re Guardianship & Conservatorship of Alice H.*, 303 Neb. 235, 927 N.W.2d 787 (2019); *In re Guardianship of Brydon P.*, 286 Neb. 661, 838 N.W.2d 262 (2013); *In re Guardianship & Conservatorship of Karin P.*, *supra* note 1.

¹³ Neb. Rev. Stat. §§ 30-2605 to 30-2616 (Reissue 2016 & Cum. Supp. 2018).

¹⁴ Neb. Rev. Stat. §§ 30-2617 to 30-2629 (Reissue 2016).

¹⁵ Neb. Rev. Stat. §§ 30-2630 to 30-2661 (Reissue 2016 & Cum. Supp. 2018).

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person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning himself or herself.¹⁶ Section 30-2620.01 is inapplicable based on the facts and circumstances of this case.

Here, the court was not authorized to assess the GAL's fees against Gerald pursuant to § 30-2620.01, because the GAL was appointed in a guardianship proceeding for J.F., who is a minor and not an incapacitated person. As we explained in *In re Guardianship of Brydon P.*,¹⁷ while the statutes governing a guardianship proceeding for a minor authorize a court to appoint an attorney and a GAL for a minor whose interests may be inadequately represented,¹⁸ there is no statute governing minor guardianship proceedings which explicitly authorizes a court to assess the fees and costs of appointed persons against the ward's estate, a petitioner, or a county.

In *In re Guardianship of Brydon P.*, we found that § 30-2643 authorizes a court to assess fees and costs for a court-appointed person in a conservatorship proceeding, but held that § 30-2643 does not provide for an award of fees and costs in a guardianship proceeding for a minor.¹⁹ Here, based on the plain and ordinary language of § 30-2620.01, we hold that § 30-2620.01 does not provide for an award of fees and costs in a guardianship proceeding for a minor.

However, the court made clear that it also relied upon § 30-2643 in assessing the GAL's fees against Gerald. Holt County contends that the court's order was authorized under § 30-2643. We agree.

¹⁶ Neb. Rev. Stat. § 30-2601(1) (Reissue 2016).

¹⁷ *In re Guardianship of Brydon P.*, *supra* note 12.

¹⁸ See, § 30-2222(4); § 30-2611(d).

¹⁹ *In re Guardianship of Brydon P.*, *supra* note 12.

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Section 30-2643 authorizes a court to allow, disallow, or adjust the payment of “reasonable fees and costs” of a GAL for a protected person in a conservatorship proceeding. “A protected person is a minor or other person for whom a conservator has been appointed or other protective order has been made.”²⁰ Section 30-2643 provides that if a protected person “possesses an estate,” the fees “may be paid from the estate.” Section 30-2643 also provides that if the protected person does not possess an estate, then the fees and costs “shall be paid by the county in which the proceedings are brought or by the petitioner as costs of the action.” Here, Gerald has not contested the court’s finding that J.F. does not possess an estate from which the GAL’s fees could be paid. As a result, the only issue is whether Gerald or the county should be required to pay the GAL’s fees.

The court found that the proceedings concerned a private domestic dispute in which Holt County was in no way involved. The court also found that the case did not concern an interest of Holt County or involve a juvenile under the jurisdiction of the juvenile court as defined by Neb. Rev. Stat. § 43-247 (Reissue 2016). The court went on to find that the county should not be ordered to pay the fees. In this situation, the language of § 30-2643 authorized the court to assess the fees of a court-appointed GAL in a conservatorship proceeding to the petitioner.

In *In re Guardianship & Conservatorship of Karin P.*,²¹ a father filed a petition seeking appointment as guardian and conservator for his adult child and the mother filed an objection and cross-petition seeking to be appointed as a limited guardian. On appeal, we held that the county court did not abuse its discretion in finding that both parties were petitioners and ordered the parties to split the GAL’s fees. Here, even though Misty contested Gerald’s appointment as guardian

²⁰ § 30-2601(3).

²¹ *In re Guardianship & Conservatorship of Karin P.*, *supra* note 1.

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and conservator, she did not seek to be appointed conservator. Also, as articulated by the county court, Gerald filed the petition for guardianship and conservatorship in this case. As such, the court correctly found that Gerald is a petitioner within the meaning of § 30-2643. Additionally, the court stated that Gerald should be responsible for the GAL's fees rather than the county, because Gerald moved for the appointment of the GAL. Further, under Neb. Rev. Stat. § 30-2602(b) (Reissue 2016), when both guardianship and protective proceedings as to the same person are commenced or pending in the same court, the proceedings may be consolidated. As such, Gerald's petition seeking both a guardianship and conservatorship gave the court authority to award fees under § 30-2643. On this record, we find that the court's order conforms to the law and is supported by competent evidence.

Gerald also argues that § 30-2643 was implicitly repealed and/or amended by § 30-4210. Gerald argues that § 30-2643 is irreconcilable with § 30-4210, which was enacted into law by 2016 Neb. Laws, L.B. 934. The portion of § 30-2643 at issue was enacted into law by 1993 Neb. Laws, L.B. 782. Gerald argues, as the most recent enactment, § 30-4210 should prevail over § 30-2643.

Section 30-4210 provides:

The court may order the cost of any evaluation as provided in section 30-4203 to be paid by the county where the guardianship, conservatorship, or other protective proceeding is brought, or the court may, after notice and a hearing, assess the cost of any such evaluation, in whole or in part, to the person who is the subject of the guardianship, conservatorship, or other protective proceeding. The court shall determine the ability of such person to pay and the amount of the payment.

[12-15] Repeal by implication is strongly disfavored, unless made necessary by the evident intent of the Legislature.²²

²² *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002).

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A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable.²³ In determining whether the new enactment is repugnant, we look at the new enactment for any indication of an evident legislative intent to repeal the former statute.²⁴ In the absence of clear legislative intent, the construction of a statute will not be adopted which has the effect of nullifying or repealing another statute.²⁵

We find no indication that the Legislature intended to repeal or amend § 30-2643 when it adopted 2016 Neb. Laws, L.B. 934, and codified § 23 at § 30-4210. Further, based on their plain and ordinary language, we find no repugnancy between § 30-4210 and § 30-2643, because they apply in distinct circumstances.

Section 30-4210 authorizes a court to assess against a county or protected person, but not the petitioner, the costs of a court-ordered evaluation conducted by a GAL under Neb. Rev. Stat. § 30-4203(2)(c) (Reissue 2016). Under § 30-4203(2)(c), evaluations are referred to as medical, psychological, geriatric, or any other evaluation of the person who is the subject of the guardianship, conservatorship, or other protective proceeding to determine the condition and extent of impairment, if any, of the person who is the subject of the guardianship, conservatorship, or other protective proceeding. Here, we have not been referred to any court-ordered evaluations in our record or any evidence that the GAL's fees included court-ordered evaluations. The court correctly found that the GAL did not request payment for any court-ordered evaluations and that § 30-4210 does not apply to the GAL's application for fees.

[16] Even though we conclude here that the court acted within its authority, it also seems clear that the outcome in

²³ *State v. Thompson*, 294 Neb. 197, 881 N.W.2d 609 (2016).

²⁴ *Id.*

²⁵ *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000).

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this case could lead to situations in which a person in need of protection is left without someone to initiate a proceeding on his or her behalf.²⁶ Although this case concerned a conservatorship for J.F., the vast majority of the dispute concerned Gerald's petition for guardianship of J.F. Had Gerald not also sought to be appointed conservator, he would not have been required to pay the GAL's \$10,665.57 in fees. This is so, even though the dispute was civil in nature. However, Gerald did not contest the amount of the GAL's fees or whether the GAL's fees were reasonable. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.²⁷

[17] Additionally, Gerald has not reasserted, on appeal, his objection from his motion to set aside that he was not provided notice of the GAL's application for fees and costs or the hearing on the application. In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.²⁸

CONCLUSION

In a guardianship proceeding for a minor, no statute or recognized uniform course of procedure permits a court to assess the fees of an appointed person against a ward's estate, a county, or a petitioner. In a conservatorship proceeding for a protected person, the court is statutorily authorized to assess the fees of an appointed person to the estate of the protected person if the protected person possesses an estate or, if not, the county in which the proceedings are brought or the petitioner.

AFFIRMED.

²⁶ *In re Guardianship of Brydon P.*, *supra* note 12, citing *In re Guardianship & Conservatorship of Donley*, 262 Neb. 282, 631 N.W.2d 839 (2001).

²⁷ *State v. Thomas*, 303 Neb. 964, 932 N.W.2d 713 (2019).

²⁸ *In re Guardianship & Conservatorship of Forster*, 22 Neb. App. 478, 856 N.W.2d 134 (2014).

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Cite as 307 Neb. 465



Nebraska Supreme Court

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STATE OF NEBRASKA, APPELLEE, V.
JOHN W. DALTON, JR., APPELLANT.

949 N.W.2d 752

Filed October 9, 2020. No. S-19-1192.

1. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
2. **Postconviction: Evidence.** In an evidentiary hearing on a motion for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in the evidence and questions of fact.
3. **Postconviction: Constitutional Law.** Postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations that render the judgment void or voidable.
4. **Postconviction: Effectiveness of Counsel: Appeal and Error.** To establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
5. **Postconviction: Effectiveness of Counsel: Presumptions: Appeal and Error.** After a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief.

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6. **Effectiveness of Counsel: Appeal and Error.** Failing to directly appeal when the defendant is silent after being informed of the right to appeal and the manner to communicate the desire to appeal is not analogous to the situation where counsel ignores an express directive by the client to file a direct appeal.
7. **Postconviction: Effectiveness of Counsel: New Trial: Appeal and Error.** When a postconviction motion alleges a claim of ineffective assistance based on counsel's failure to file a direct appeal, which has as its relief a new direct appeal, alongside other claims of ineffective assistance of counsel that request as relief a new trial, the district court must first address the claim that counsel was ineffective for failing to file a direct appeal, including holding an evidentiary hearing, if required.
8. **Effectiveness of Counsel: Final Orders: Appeal and Error.** Upon reaching its decision on a claim of ineffective assistance based on counsel's failure to file a direct appeal, the district court should enter a final order on that claim only; only after the resolution of an appeal from the order, or, alternatively, the expiration of the defendant's time to appeal, should the district court proceed to consider the remaining claims.
9. **Postconviction: Effectiveness of Counsel: Final Orders: Appeal and Error.** Addressing and waiting for a final mandate on any claims of ineffective assistance of counsel for failing to file a direct appeal before addressing other postconviction claims of ineffective assistance of counsel serve the interests of judicial economy by preventing the district court's determination of the nondirect appeal claims from being rendered meaningless.
10. **Postconviction: Final Orders: Appeal and Error.** When a district court disposes of other postconviction claims before there has been a final mandate on a disposition of the postconviction claim requesting a new direct appeal, the proper disposition in an appeal from the district court's order is to vacate the district court's disposition of the additional claims and remand the cause for further proceedings.
11. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and which were or could have been litigated on direct appeal.

Appeal from the District Court for Douglas County: LEIGH ANN RETELSDORF, Judge. Affirmed in part, and in part vacated and remanded for further proceedings.

Jerry M. Hug for appellant.

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Douglas J. Peterson, Attorney General, and Erin E. Tangeman
for appellee.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE,
PAPIK, and FREUDENBERG, JJ.

FREUDENBERG, J.

NATURE OF CASE

John W. Dalton, Jr., appeals from an order denying his motion for postconviction relief following an evidentiary hearing on his claim that trial counsel was ineffective for failing to file a direct appeal. In the same order, the district court denied without an evidentiary hearing Dalton's separate claim of ineffective assistance of trial counsel, challenging the voluntariness of his pleas. For the reasons set forth below, we affirm in part, and in part vacate and remand for further proceedings.

BACKGROUND

On January 31, 2018, Dalton was charged with seven felonies relating to the deaths of three people. On December 10, Dalton accepted a plea agreement whereby in exchange for the State's agreeing to not seek the death penalty, he pled guilty to three counts of first degree murder; three counts of using a firearm to commit a felony; and one count of possession of a firearm by a prohibited person, second offense. Dalton entered his pleas of guilty. He then waived his right to a presentence investigation and requested immediate sentencing. The court granted Dalton's request and sentenced him to three life sentences for the three counts of first degree murder; three terms of 49 to 50 years' imprisonment for the three counts of an illegal use of a firearm; and a term of 50 to 80 years' imprisonment for one count of possession of a firearm by a prohibited person, second offense. Each sentence was ordered to be served consecutively. No direct appeal was filed.

On April 8, 2019, Dalton filed a timely verified motion for postconviction relief in the district court. In his motion, Dalton alleged that counsel was ineffective for failing to file a

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direct appeal when Dalton requested that counsel do so following the imposition of his sentences. Dalton also made a claim of ineffective assistance of counsel based on trial counsel's failure to investigate the case. Dalton asserts that he would not have entered into the plea agreement if his attorney would have properly investigated his case. Dalton claimed that counsel failed to depose the lone eyewitness and failed to secure a mental health evaluation for the purposes of establishing a defense or mitigating evidence to be used in plea negotiations. In addition to the ineffective assistance of counsel claim, Dalton claimed in his postconviction motion that his sentences were excessive and constituted cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution.

The court ordered an evidentiary hearing on the first claim, regarding the failure to file a direct appeal. The court ordered that all other postconviction claims were to remain pending until after the evidentiary hearing. Depositions from Dalton and Cindy Tate, Dalton's trial counsel who was employed by the Douglas County public defender's office, were admitted into evidence at the evidentiary hearing.

Tate indicated in her deposition that during the 11 months between when Dalton was charged and his plea hearing, Dalton was very interested in the case and made multiple requests to pursue a plea agreement with the State. Tate testified that after the plea agreement was reached and Dalton was convicted and sentenced, she verbally advised Dalton of the opportunity to appeal. Tate testified that after the sentencing on December 10, 2018, Dalton did not request that a direct appeal be filed. She also sent him a standard form letter, which advised him of his right to appeal and how to contact her. This letter was admitted at the postconviction evidentiary hearing.

Tate testified that she did not receive any written communication from Dalton indicating a desire to appeal. Tate also testified that Dalton did not request a direct appeal during any of the conversations she had with him. Tate testified that 2 days after the sentencing, Dalton left a voicemail at the

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public defender's office. In the voicemail, Dalton complained about what the prosecutor's office had said when talking publicly about his convictions, but he did not indicate a desire to appeal.

Dalton testified in his deposition that he wrote a letter to Tate requesting a direct appeal. Dalton claims this letter was given to a guard to be placed in the mail at the Douglas County jail on the evening of December 12, 2018. Dalton did not proffer the alleged letter or the guard's testimony. Dalton indicated in his deposition that Tate had made him aware that if he entered pleas of guilty, he would be giving up many of the issues that could be raised on appeal. He also admitted that when verbally discussing the plea agreement with Tate, he did not indicate to her that he wanted to appeal.

Following the hearing, the district court entered an order denying Dalton's motion as to the direct appeal claim. In the same order, the court denied without an evidentiary hearing "any remaining issues in the postconviction." The court explained in this regard that "the motion fails to state sufficient facts regarding counsel being deficient or showing prejudice, which would require facts showing [Dalton] would have insisted on going to trial and not accept the plea offer." Dalton appeals.

ASSIGNMENTS OF ERROR

Dalton assigns that the district court erred in (1) determining that Dalton was not entitled to reinstatement of his direct appeal due to trial counsel's ineffective assistance and (2) failing to grant an evidentiary hearing on Dalton's claim that his pleas were not knowingly and voluntarily made where counsel was ineffective for failing to fully investigate the case prior to advising him to enter pleas of guilty.

STANDARD OF REVIEW

[1] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate

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court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,¹ an appellate court reviews such legal determinations independently of the lower court's decision.²

[2] In an evidentiary hearing on a motion for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in the evidence and questions of fact.³

ANALYSIS

The district court determined that Dalton was entitled to an evidentiary hearing on his postconviction claim that counsel was ineffective for failing to file a direct appeal.⁴ The court ultimately found that trial counsel was not deficient in failing to file a direct appeal that was not requested, and we hold that those findings were not clearly erroneous. However, the district court in the same order also addressed and disposed of the remaining postconviction claims on the ground that the motion alleged insufficient facts. In *State v. Determan*,⁵ we held that there must be a final mandate on the court's disposition of a postconviction claim of ineffective assistance for failing to file a direct appeal before the court addresses other postconviction ineffective assistance of counsel claims. In accordance with *Determan*, we vacate the part of the order denying Dalton's second ineffective assistance claim and remand the cause for further proceedings. We affirm the court's ruling as to Dalton's claim of excessive sentences for the reason that such claim, which was stated apart from any claim of ineffective assistance, is procedurally barred.

¹ *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

² *State v. Sierra*, 305 Neb. 249, 939 N.W.2d 808 (2020).

³ *State v. Beehn*, 303 Neb. 172, 927 N.W.2d 793 (2019).

⁴ See Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2016).

⁵ *State v. Determan*, 292 Neb. 557, 873 N.W.2d 390 (2016).

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[3-5] Postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations that render the judgment void or voidable.⁶ 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*,⁷ 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 After a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief.⁹

The evidentiary hearing provided Dalton with the opportunity to present evidence that he directed Tate to file an appeal. The court found that Dalton was informed of his right to appeal and had not directed Tate to file an appeal. Upon review of the record, we cannot say that the district court clearly erred in these findings.

Dalton testified in his deposition that he wrote a letter approximately 2 days after his sentencing and left it with a guard to be mailed to Tate. But Dalton was unable to provide any details or other evidence to corroborate that a letter was sent to Tate. Tate testified that no one at the public defender's office received a letter from Dalton.

Tate testified further that she was never instructed by Dalton to file an appeal, despite the fact that she clearly explained his opportunity to appeal and sent him a formal letter explaining that right and how to contact her. The letter was entered

⁶ *State v. Beehn*, *supra* note 3.

⁷ *Strickland v. Washington*, *supra* note 1.

⁸ *State v. Beehn*, *supra* note 3.

⁹ *State v. Hessler*, 295 Neb. 70, 886 N.W.2d 280 (2016); *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012).

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as an exhibit at the evidentiary hearing. Dalton claims that he had limited access to communicate with Tate, but he does not contest that he sent a voicemail to Tate approximately 2 days after sentencing and did not therein request a direct appeal. Dalton did not deny he had been informed by Tate of his right to appeal.

The district court indicated in its order that it found Tate to be the more credible witness. In an evidentiary hearing for postconviction relief, the postconviction trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and the weight to be given a witness' testimony.¹⁰

We agree with the district court that Tate was not ineffective for failing to file an appeal that was not requested. Dalton argues that it is deficient conduct for trial counsel to fail to obtain from the client an explicit directive as to the desire to pursue or not pursue a direct appeal and that under such circumstances, prejudice should be presumed and a new direct appeal ordered. According to Dalton, such a rule is appropriate in light of the often limited access of defendants to their counsel.

[6] We decline to place such a burden on counsel. It is simply not under defense counsel's power to force a client to provide an explicit response to inquiries regarding the client's right to appeal. Furthermore, we disagree that prejudice should be presumed in the same manner that it is presumed when counsel has been directed to file an appeal.¹¹ Failing to directly appeal when the defendant is silent after being informed of the right to appeal and the manner to communicate the desire to appeal is not analogous to the situation where counsel ignores an express directive by the client to file a direct appeal.¹²

¹⁰ *State v. Benzel*, 269 Neb. 1, 689 N.W.2d 852 (2004).

¹¹ See *State v. Hessler*, *supra* note 9.

¹² See, *id*; *State v. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006).

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The Sixth Amendment to the U.S. Constitution provides that in all criminal proceedings, the accused shall have the right to the assistance of counsel in his or her defense.¹³ The U.S. Supreme Court has also determined that a defendant has a fundamental due process right to access the courts and to communicate with his or her legal counsel.¹⁴ But Dalton did not make a postconviction claim based on an alleged deprivation of his right to access the court or to communicate with counsel. As found by the district court, Dalton had several opportunities after sentencing to communicate to Tate that he wanted an appeal, including a telephone call to the public defender's office.

We agree with the district court that Tate's failure to elicit an explicit directive from Dalton one way or the other was not ineffective assistance of counsel. We are unwilling to place an increased burden on trial counsel to go beyond informing a defendant of the right to appeal and how counsel may be contacted to request that an appeal be filed. The responsibility for requesting an appeal remains with the defendant. On Dalton's claim of ineffective assistance of counsel for failure to file a direct appeal, we affirm the district court's denial of postconviction relief.

[7,8] However, precedent requires we vacate that part of the district court's order disposing of Dalton's postconviction ineffective assistance claim that Tate provided ineffective assistance of counsel by failing to depose the lone eyewitness or secure a mental health evaluation for the purposes of establishing a defense or mitigating evidence to be used in plea negotiations. When a postconviction motion alleges a claim of ineffective assistance based on counsel's failure to file a direct appeal, which has as its relief a new direct appeal, alongside other claims of ineffective assistance of counsel

¹³ See *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds*, *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

¹⁴ See, *Lewis v. Casey*, 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996); *Ex parte Hull*, 312 U.S. 546, 61 S. Ct. 640, 85 L. Ed. 1034 (1941).

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that request as relief a new trial, the district court must first address the claim that counsel was ineffective for failing to file a direct appeal, including holding an evidentiary hearing, if required.¹⁵ Upon reaching its decision, the district court should enter a final order on that claim only.¹⁶ If the claim for a new direct appeal is denied, a defendant should be permitted to appeal that denial.¹⁷ Only after the resolution of that appeal, or, alternatively, the expiration of the defendant's time to appeal, should the district court proceed to consider the remaining claims.¹⁸

[9] As we explained in *Determan*, addressing and waiting for a final mandate on any claims of ineffective assistance of counsel for failing to file a direct appeal before addressing other postconviction claims of ineffective assistance of counsel serve the interests of judicial economy by preventing the district court's determination of the nondirect appeal claims from being rendered meaningless.¹⁹ For, if a new direct appeal were ultimately granted on the postconviction claims related to counsel's failure to timely file a direct appeal, then any other claims of ineffective assistance of counsel could be raised in the new direct appeal rather than through a postconviction procedure.²⁰

[10] We held in *Determan* that when a district court fails to follow this directive and disposes of other postconviction claims before there has been a final mandate on a disposition of the postconviction claim requesting a new direct appeal, the proper disposition in an appeal from the district court's order is to vacate the district court's disposition of the additional

¹⁵ See *State v. Determan*, *supra* note 5.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See *id.*

²⁰ See *id.*

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claims and remand the cause for further proceedings.²¹ Thus we do so here. Dalton's assignment of error regarding his second postconviction claim is thereby rendered moot. We do not address whether the trial court correctly found that Dalton had failed to allege sufficient facts to warrant an evidentiary hearing on this second claim.

Dalton does not assign as error the court's denial of his postconviction claim based on an alleged violation of the Eighth Amendment prohibition against cruel and unusual punishment, but we note for the sake of completeness that the court's order disposing of this claim does not fall under *Determan*. Thus, we do not vacate the court's order insofar as it denied the Eighth Amendment claim without an evidentiary hearing.

Dalton did not make such a claim as part of an allegation of ineffective assistance of counsel. *Determan* addresses only claims of ineffective assistance of counsel. Such claims, by virtue of the absence of a direct appeal with new counsel, are not procedurally barred. In such circumstances, it serves judicial economy to require that these claims be addressed in a new direct appeal if such a direct appeal is ultimately ordered. Vacating the order and remanding the cause for further proceedings on such ineffective assistance claims, to be held only if a final mandate denies a new direct appeal, serve judicial economy.

[11] A postconviction claim that the sentence was unconstitutionally excessive, however, is procedurally barred by the failure to directly appeal. A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and which were or could have been litigated on direct appeal.²² And while an excessive sentence claim could be raised in any new direct appeal ordered on an ineffective assistance claim based on a failure to appeal, this does not change the fact that as a stand-alone postconviction claim

²¹ See *id.*

²² *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006).

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where there has been no original direct appeal, an excessive sentence claim is procedurally barred. It would therefore not serve the interests of judicial economy to vacate the court's denial of such excessive sentence claim and remand the cause for further proceedings.

CONCLUSION

We affirm the district court's denial of Dalton's ineffective assistance claim concerning his direct appeal. The portion of the district court's order denying Dalton's claim of ineffective assistance of counsel related to ineffective assistance for failure to investigate is vacated and the cause is remanded for further proceedings.

AFFIRMED IN PART, AND IN PART VACATED AND
REMANDED FOR FURTHER PROCEEDINGS.

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

ROBERT H. CINATL, APPELLANT, v. KAREN R. PROSOSKI,
PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT
R. PROSOSKI, DECEASED, AND KAREN R. PROSOSKI,
INDIVIDUALLY AND AS BENEFICIARY OF THE ESTATE
OF ROBERT R. PROSOSKI, DECEASED, APPELLEE.

949 N.W.2d 505

Filed October 16, 2020. No. S-19-972.

1. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
2. **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. **Arbitration and Award: Appeal and Error.** In reviewing a decision to vacate, modify, or confirm an arbitration award, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law. However, the trial court's factual findings will not be set aside on appeal unless clearly erroneous.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
5. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, the party must be appealing from a final order or a judgment.
6. **Judgments: Final Orders: Words and Phrases.** A judgment is the final determination of the rights of the parties in an action.
7. **Judgments: Words and Phrases.** Every direction of the court made or entered in writing and not included in a judgment is an order.
8. **Judgments: Final Orders: Statutes: Appeal and Error.** While all judgments not incorrectly designated as such are appealable, an order may be appealed only if a statute expressly makes the order appealable or the order falls within the statutory definition of a final order.

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9. **Arbitration and Award: Final Orders: Appeal and Error.** When Neb. Rev. Stat. § 25-2620 (Reissue 2016) is silent regarding the appealability of an arbitration-related order, an appellate court looks to the general final order statute to determine whether the order is final and appealable.
10. **Final Orders: Appeal and Error.** To be a final order subject to appellate review, the lower court's order must (1) affect a substantial right and determine the action and prevent a judgment, (2) affect a substantial right and be made during a special proceeding, (3) affect a substantial right and be made on summary application in an action after a judgment is rendered, or (4) deny a motion for summary judgment which was based on the assertion of sovereign immunity or the immunity of a government official.
11. **Final Orders.** Whether an order affects a substantial right depends on whether it affects with finality the rights of the parties in the subject matter.
12. **Arbitration and Award: Motions to Vacate.** When arbitration has already occurred and a party seeks to vacate, modify, or confirm an award, an extraordinary level of deference is given to the underlying award itself.
13. **Contracts: Rescission: Parties.** The purpose of rescission is to place the parties in a status quo, that is, return the parties to their position which existed before the rescinded contract; hence, rescission may be unavailable unless the parties can be placed substantially in the status quo.
14. **Arbitration and Award.** The Uniform Arbitration Act does not allow for the exercise of discretion by a court when a request for confirmation is made and there is no pending application for vacation, modification, or correction.
15. **Statutes: Words and Phrases.** As a general rule, the word "shall" in a statute is considered mandatory and is inconsistent with the idea of discretion.
16. **Trial: Evidence: Appeal and Error.** In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.

Appeal from the District Court for Buffalo County: JOHN H. MARSH, Judge. Affirmed.

Michael J. Synek for appellant.

Patrick J. Nelson, of Law Office of Patrick J. Nelson, for appellee.

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HEAVICAN, C.J., MILLER-LEMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

CASSEL, J.

INTRODUCTION

An arbitration award rejected Robert H. Cinatl’s fraud-in-the-inducement claim seeking to rescind his contract to purchase an orthodontics practice. After the district court declined to vacate the arbitrator’s award, the court confirmed it. Cinatl appeals. Because the refusal to vacate the award remained interlocutory until the award was confirmed, we consider but reject Cinatl’s challenge to the first order. We conclude the court properly confirmed the award. Finding no merit to Cinatl’s other arguments, we affirm the court’s judgment.

BACKGROUND

In 1989, Robert R. Prososki (Dr. Prososki) began an orthodontics practice in Kearney, Nebraska. He ceased practicing in July 2013, upon being diagnosed with cancer. Dr. Prososki hired an agent to broker a sale of the practice. The broker prepared an investor prospectus for the practice and provided a copy to Cinatl, an orthodontist. Relying on representations in the prospectus, Cinatl entered into a written contract in October with Dr. Prososki for the purchase of the practice and entered into a lease with Dr. Prososki and his wife for the office building.

On October 29, 2013, Cinatl began operating the practice. Shortly thereafter, he discovered what he considered to be misrepresentations in the investor prospectus. In December, Cinatl notified Dr. Prososki and his wife, via their attorney, that Cinatl wanted to set aside the contract. He received no response.

In August 2015, Dr. Prososki died. At the end of October, Cinatl ceased operating at the practice’s location, though he rented space elsewhere for the next 14 months to “complete [his] patients.”

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PLEADINGS

In 2016, Cinatl sued Karen R. Prososki (Prososki), both as the personal representative of the estate of Dr. Prososki and individually. He sought rescission of the “Contract of Purchase and Sale of Dental Practice” and lease. Cinatl alleged that fraudulent misrepresentations were made, that he relied upon them, and that he suffered damages as a result of the false representations. Prososki’s answers (filed separately in her respective capacities) alleged that the complaint failed to state a claim upon which relief can be granted.

ARBITRATION

Because the contract contained a paragraph specifying mandatory arbitration “pursuant to the applicable arbitration laws of Nebraska,” Cinatl moved for appointment of an arbitrator. The district court found that the action was subject to arbitration and sustained a motion to compel arbitration.

The arbitrator conducted a hearing and received extensive evidence. Cinatl testified that by the first week of November 2013, he “knew there was something very wrong, but [he] couldn’t put [his] finger on it.” He later discovered that many files which had been represented to him as active files had “been finished.” Cinatl called the broker in early November and stated that something was “very, very wrong.” Cinatl testified a review of files conducted in December showed that the number of active patients would have been 345 but that the prospectus estimated 700 such patients. In December, Cinatl met with the attorney for Dr. Prososki and his wife to discuss perceived misrepresentations in the prospectus. Cinatl asked that Dr. Prososki and his wife “take the practice back, find somebody else.”

In September 2015, Cinatl engaged a forensic accounting firm to review the practice’s records. Justin Frauendorfer, one of the owners of the accounting firm, reviewed the investor prospectus to verify its accuracy for Cinatl.

Frauendorfer discovered that there were 311 active patient files on August 5, 2013, but that the prospectus represented

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that there were approximately 700 active files. According to Frauendorfer, “[f]or this to be over 50 percent off is why in my professional opinion I would say that it was potentially intentional or reckless.” Frauendorfer could not say that the number of active patients was intentionally misrepresented—partly because he had not spoken with the person who made the representation—but he could say it was reckless.

Frauendorfer discovered other discrepancies. The prospectus showed 200 patients in recall on August 5, 2013, but Frauendorfer found the number to be 228. The prospectus showed 1,400 total files, but Frauendorfer came up with “approximately, 600 plus files.” He believed the statement that 1,400 total files existed showed a reckless disregard for the truth. The investor prospectus indicated that the number of new patients per month was 10, but Frauendorfer found that it was 2. Frauendorfer opined that “this practice summary sheet was materially misstated.”

Frauendorfer testified that there were 72 active Medicaid patients on August 5, 2013, representing \$73,225 in Medicaid patient liability. He found there were 239 private pay patients on August 5, of which 39 had paid for services in advance, amounting to \$34,654.50. According to Frauendorfer, the amount of contracts receivable on August 5 was \$322,948.24, which changed to \$269,672.64 on the October 28 date of closing, a difference of \$53,275.60. Based on Frauendorfer’s experience, he would have expected that adjustment of the amount to be credited to Cinatl as the purchaser.

Cinatl testified that “[a]t a minimum,” he was seeking to have the contract to purchase and the lease rescinded. He asked to be put back in the position that he occupied before entering the contract and lease and for Prososki to be restored back to the extent possible.

On August 3, 2018, the arbitrator found in favor of Prososki on the issues pertaining to the sale of the practice and the lease. The arbitrator determined that Prososki had no role in the marketing and sale of the practice and made none of the

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representations about which Cinatl complained. The arbitrator found that at all times between October 28, 2013, and the end of October 2015, Cinatl operated the orthodontic practice and retained the benefits of all he had acquired under the contract.

The arbitrator concluded it was unnecessary to determine whether Prososki committed fraud in inducing Cinatl to enter into the contract. The arbitrator reasoned that Cinatl “did not rescind the contract but elected instead to receive the benefits of it for almost two years after he discovered the facts leading him to believe that he was defrauded.” Paragraph 13 of the arbitrator’s decision stated:

During the time he operated the practice, Cinatl’s ability to return Prososki to presale status quo diminished with each passing day. “The princip[al] relief effected by rescission is to place the parties in the same condition as they were in before the making of the contract sought to be rescinded.” Kraci v. Loseke, 236 Neb. 291, 303, 461 N.W. 2d 67, 76 (1990). “[T]he remedy of rescission involves more than cancellation of a contract, and includes a judicial effort to place the contractual parties in, as nearly as possible, substantially the same condition which existed when the contract was entered. ‘[One] who seeks equity must do equity.’” Id.

The arbitrator noted that while Cinatl expressed dissatisfaction in late 2013 with what he considered to be misrepresentations by Dr. Prososki, he did not pursue rescission until January 2016—“over a year and ten months later”—when he filed a statement of claim in the estate of Dr. Prososki. By that time, the status quo at the time of closing of the contract could not be restored, particularly because Dr. Prososki had died and Cinatl had left patients without an orthodontist. The arbitrator determined that “[b]y continuing to operate his orthodontic practice at the office for over a year and ten months after the December 7, 2013, meeting, Cinatl ratified the contract and waived any cause of action he might have had arising from his purchase of the practice.”

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DISTRICT COURT PROCEEDINGS

Within 90 days of the arbitrator's decision, Cinatl filed an application to vacate the award. He alleged that "[t]he arbitrator exceeded his authority by rendering a decision based upon issues and defenses which the parties had not raised in the pleadings, including but not limited to: estoppel, laches, statute of limitations, and waiver."

On January 28, 2019, the court entered an order denying the application to vacate. The court noted that it did not have the bill of exceptions from the arbitrator's hearing or the written arguments submitted by the parties to the arbitrator. But in reviewing the arbitrator's decision, the court did not "find a substantial, if any, reliance by the arbitrator on the equitable defenses alleged." The court reasoned:

Essentially, the arbitrator found that he did not need to address the issues of fraud or misrepresentation because it was impossible, given the passage of time, and circumstances to provide the remedy of rescission in that both parties could not be placed back in the status quo existing at the time the contracts were entered. This Court specifically refers to paragraph 13 of the arbitrator's decision.

Ten days later, Cinatl filed two motions. One motion, seeking a new trial, requested that the court "vacate the judgment and decision set forth in the Court's Order, filed January 28, 2019." Cinatl identified four grounds for a new trial under Neb. Rev. Stat. § 25-1142 (Reissue 2016). The other motion, which was later sustained, requested an order for preparation of the record from the arbitration hearing. The next day, Prososki filed a motion to confirm the arbitrator's award.

During a hearing on the motion for new trial, Cinatl's counsel argued that while the January 2019 order noted the absence of a bill of exceptions from the arbitrator's hearing, counsel did not believe a transcription was necessary, because he was making a legal argument. Counsel then had the record prepared, but he maintained that the court should not need

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the record to rule on the arguments made during the application to vacate.

On August 12, 2019, the court entered an order overruling the motion for new trial. The court reasoned that the arbitrator's decision was "not necessarily grounded in laches or estoppel, but rather cite[d] an equitable principle that the parties cannot be placed in the same condition as they were before making the contract."

On August 16, 2019, Prososki filed an amended motion to confirm the arbitrator's award. On September 10, the court entered an order doing so. In confirming the award, the court took judicial notice that no motion to modify or correct the arbitration award was pending.

Thirty days later, Cinatl filed a notice of appeal. We moved this case to our docket.¹

ASSIGNMENTS OF ERROR

Cinatl assigns, consolidated, restated, and reordered, that the district court erred by (1) failing to vacate the arbitrator's award and order a rehearing, (2) confirming the arbitrator's award, (3) depriving Cinatl of his right to procedural due process at the hearing by refusing to review the arbitration record, and (4) failing to rule upon the admissibility of an exhibit.

[1] Cinatl also assigns but fails to argue that the court erred by improperly suggesting with regard to Cinatl's application to vacate that the court needed to review a bill of exceptions from the arbitration hearing in order to consider the legal arguments presented by that application. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.² Because his brief did not argue this assignment, we do not consider it.

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

² *TNT Cattle Co. v. Fife*, 304 Neb. 890, 937 N.W.2d 811 (2020).

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STANDARD OF REVIEW

[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.³

[3] In reviewing a decision to vacate, modify, or confirm an arbitration award, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law. However, the trial court's factual findings will not be set aside on appeal unless clearly erroneous.⁴

ANALYSIS

JURISDICTION

[4-8] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.⁵ For an appellate court to acquire jurisdiction of an appeal, the party must be appealing from a final order or a judgment.⁶ A judgment is the final determination of the rights of the parties in an action.⁷ Every direction of the court made or entered in writing and not included in a judgment is an order.⁸ While all judgments⁹ not incorrectly designated as such¹⁰ are appealable, an order may be appealed only if a statute expressly makes the order appealable or the order falls within the statutory definition of a final order.¹¹

Cinatl's October 10, 2019, notice of appeal purported to appeal from three orders. He sought to appeal the January 28

³ *Picard v. P & C Group I*, 306 Neb. 292, 945 N.W.2d 183 (2020).

⁴ *Garlock v. 3DS Properties*, 303 Neb. 521, 930 N.W.2d 503 (2019).

⁵ *Cullinane v. Beverly Enters. - Neb.*, 300 Neb. 210, 912 N.W.2d 774 (2018).

⁶ *State v. Fredrickson*, 306 Neb. 81, 943 N.W.2d 701 (2020).

⁷ Neb. Rev. Stat. § 25-1301(1) (Cum. Supp. 2018).

⁸ *State v. Fredrickson*, *supra* note 6.

⁹ See § 25-1301(1) (defining judgment).

¹⁰ See Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

¹¹ See *State v. Fredrickson*, *supra* note 6.

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order denying his application to vacate the arbitrator's award, the August 12 order overruling his motion for new trial (in connection with the denial of the application to vacate), and the September 10 order confirming the arbitration award. Prososki challenges our jurisdiction of the first two of those orders.

To determine whether the orders are appealable, we first consider whether they are appealable orders under the Uniform Arbitration Act (UAA)¹² and, if not, whether they are final orders under Neb. Rev. Stat. § 25-1902 (Reissue 2016 & Supp. 2019).¹³ Both parties base their arguments on the UAA, seemingly treating the contract as having agreed to arbitration based upon that law. We see no reason to do otherwise.

The UAA contains a statute addressing appeals. Under § 25-2620(a), an appeal may be taken from the following:

(1) An order denying an application to compel arbitration made under section 25-2603;

(2) An order granting an application to stay arbitration made under subsection (b) of section 25-2603;

(3) An order confirming or denying confirmation of an award;

(4) An order modifying or correcting an award;

(5) An order vacating an award without directing a rehearing; or

(6) A judgment or decree entered pursuant to the provisions of the [UAA].

Section 25-2620(a)(3) identifies an order confirming an award as an appealable order. Cinatl filed an appeal within 30 days of the September 2019 order confirming the arbitration award, and there is no dispute we have jurisdiction to consider that order.

[9] Whether the January 2019 order denying Cinatl's application to vacate is appealable is not as clear cut. While the

¹² Neb. Rev. Stat. §§ 25-2601 to 25-2622 (Reissue 2016 & Cum. Supp. 2018).

¹³ See *Pearce v. Mutual of Omaha Ins. Co.*, 293 Neb. 277, 876 N.W.2d 899 (2016).

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UAA explicitly allows an appeal from an order vacating an arbitration award,¹⁴ it is silent as to whether a party may appeal an order *denying* an application to vacate. We have stated that when § 25-2620 is silent regarding the appealability of an arbitration-related order, we look to the general final order statute to determine whether the order is final and appealable.¹⁵

[10] Under our final order statute,¹⁶ to be a final order subject to appellate review, the lower court's order must (1) affect a substantial right and determine the action and prevent a judgment, (2) affect a substantial right and be made during a special proceeding, (3) affect a substantial right and be made on summary application in an action after a judgment is rendered, or (4) deny a motion for summary judgment which was based on the assertion of sovereign immunity or the immunity of a government official.¹⁷ Because this appeal clearly does not involve the last category, we first determine whether the order affected a substantial right of one or more parties.¹⁸

[11] The inquiry of whether a substantial right is affected focuses on whether the right at issue is substantial and whether the court's order has a substantial impact on that right.¹⁹ Whether an order affects a substantial right depends on whether it affects with finality the rights of the parties in the subject matter.²⁰ It also depends on whether the right could otherwise effectively be vindicated.²¹ An order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review.²²

¹⁴ § 25-2620(a)(5).

¹⁵ See *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010).

¹⁶ See § 25-1902.

¹⁷ See *State v. Fredrickson*, *supra* note 6.

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

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Prososki contends that Cinatl needed to file an appeal from the order denying the application to vacate the arbitrator's award. According to Prososki, the right to challenge the validity of an award through an application to vacate is an essential legal right, because without a possible modification or correction, the only right to challenge an award is to apply for an order vacating the award. But this argument overlooks the unquestionable appealability of an order confirming the award²³ and the intent behind limiting the types of appealable arbitration orders. Appellate review of an arbitrator's award is necessarily limited, because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation. Strong deference is due an arbitral tribunal; when parties agree to arbitration, they agree to accept whatever reasonable uncertainties might arise from the process.²⁴

Other state courts have determined that no appeal can be taken from an order denying an application to vacate and that such an order may be reviewed upon an appeal from an order confirming the award.²⁵ The Hawaii Supreme Court instructed that upon the denial of a motion to vacate, the unsuccessful movant's recourse would then be a motion to confirm the award.²⁶ It explained that because the trial court has already reviewed the award and decided no grounds exist for vacating it, a confirmation should follow.²⁷ The movant could then

²³ See § 25-2620(a)(3).

²⁴ *Hartman v. City of Grand Island*, 265 Neb. 433, 657 N.W.2d 641 (2003).

²⁵ See, e.g., *Mid-Wilshire Associates v. O'Leary*, 7 Cal. App. 4th 1450, 9 Cal. Rptr. 2d 862 (1992); *Salud v. Financial Sec. Ins. Co., Ltd.*, 69 Haw. 427, 745 P.2d 290 (1987); *Nelson Paving Co., Inc. v. Hjelle*, 207 N.W.2d 225 (N.D. 1973). See, also, *Ayers v. R.A. Murphy Co.*, 163 Ohio App. 3d 497, 839 N.E.2d 80 (2005).

²⁶ See *Salud v. Financial Sec. Ins. Co., Ltd.*, *supra* note 25.

²⁷ See *id.*

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perfect an appeal and obtain appellate review of the order confirming the award.²⁸

The purpose of confirming an arbitration award is to provide a judgment that can then be enforced through court proceedings.²⁹ “Upon the granting of an order confirming, modifying, or correcting an award, a judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree.”³⁰ Ideally, confirmation should occur swiftly, although the court has 60 days from a party’s application to do so.³¹ Thus, though not immediately appealable, an unsuccessful movant for judicial vacatur should not have to wait long to obtain appellate review.

We conclude the January 2019 order denying the application to vacate the arbitrator’s award did not affect a substantial right of Cinatl. For the same reasons, we conclude the August order overruling the motion for new trial (which asked the court to vacate the January 2019 order and which, because there was no trial in the district court, we treat as a motion to reconsider) did not affect a substantial right and was not a final order. The rights at issue in an interlocutory determination denying judicial vacatur of an arbitration award can be adequately vindicated through an appeal of the order confirming the award. Because these prior orders were interlocutory, Cinatl properly waited until entry of an appealable order—the order confirming the arbitration award—to challenge them.

FAILING TO VACATE AWARD
AND ORDER REHEARING

[12] Having determined that we have jurisdiction over the order denying Cinatl’s application to vacate, we consider

²⁸ *Id.*

²⁹ *Drummond v. State Farm Mut. Auto. Ins. Co.*, 280 Neb. 258, 785 N.W.2d 829 (2010), citing *Stewart Title Guar. Co. v. Tilden*, 64 P.3d 739 (Wyo. 2003).

³⁰ § 25-2615.

³¹ See § 25-2612.

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Cinatl's arguments that the district court erred by failing to vacate the award and order a rehearing. When arbitration has already occurred and a party seeks to vacate, modify, or confirm an award, an extraordinary level of deference is given to the underlying award itself.³²

The UAA sets forth grounds for vacating an award. Section 25-2613 provides in relevant part:

(a) Upon application of a party, the court shall vacate an award when:

(1) The award was procured by corruption, fraud, or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor, refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of section 25-2606, as to prejudice substantially the rights of a party;

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under section 25-2603, and the party did not participate in the arbitration hearing without raising the objection; or

(6) An arbitrator was subject to disqualification pursuant to section 25-2604.01 and failed, upon receipt of timely demand, to disqualify himself or herself as required by such section.

The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

Of these enumerated grounds, Cinatl asserted only that the arbitrator exceeded his or her powers. He argues on appeal that

³² *Seldin v. Estate of Silverman*, 305 Neb. 185, 939 N.W.2d 768 (2020).

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the arbitrator's decision should be vacated due to the absence of a finding on fraud, but that does not fit under his asserted ground for judicial vacatur.

Cinatl contends that the arbitrator exceeded his authority by rendering a decision based upon defenses not raised in the pleadings. Cinatl argues that because Prososki never asserted any affirmative defenses, the arbitrator should have rejected suggestions that Cinatl's cause of action may be time barred or barred by estoppel. Cinatl points to references in the arbitrator's conclusions of law concerning delay, estoppel, and waiver.

[13] The arbitrator's decision determined that rescission was unavailable due to the nature of the relief requested and the changed circumstances. The purpose of rescission is to place the parties in a status quo, that is, return the parties to their position which existed before the rescinded contract; hence, rescission may be unavailable unless the parties can be placed substantially in the status quo.³³ The arbitrator remarked on the inability to return the parties to the status quo. Its decision stated that "[d]uring the time he operated the practice, Cinatl's ability to return [Dr.] Prososki to pre-sale status quo diminished with each passing day." It further stated that Cinatl "took what was a going concern orthodontic practice and rendered it difficult if not impossible to return [Dr.] Prososki or his estate to status quo." The arbitrator observed that "[t]he practice closed, leaving patients without their orthodontist and having to find another—in effect, vanishing the practice" and that Dr. Prososki had passed away. The arbitrator determined that "Cinatl simply cannot restore the status quo at the time of closing of the contract." We find no merit to Cinatl's argument that the arbitrator decided the matter based on unpled defenses. Accordingly, even if we were to assume that the arbitrator would have exceeded his power by deciding the matter based on unpled defenses, the court did not err in overruling Cinatl's application to vacate and not ordering a rehearing.

³³ *Kraci v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990).

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CONFIRMATION OF AWARD

As mentioned, Cinatl appealed the court's confirmation of the award. He contends that the court approved the arbitrator's errors in failing to properly analyze or consider his fraud claim, failing to grant rescission, and failing to issue a just award.

[14,15] But under the circumstances, the district court had no option other than to confirm the award. The UAA does not allow for the exercise of discretion by the court when a request for confirmation is made and there is no pending application for vacation, modification, or correction.³⁴ Under § 25-2612, "the court *shall confirm* an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in sections 25-2613 [vacating an award] and 25-2614 [modifying or correcting an award]." (Emphasis supplied.) Here, Cinatl sought to vacate the award, but the court denied his request. "If the application to vacate is denied and no motion to modify or correct the award is pending, the court *shall confirm* the award."³⁵ As a general rule, the word "shall" in a statute is considered mandatory and is inconsistent with the idea of discretion.³⁶ Under the circumstances, the court properly confirmed the award.

FAILING TO REVIEW RECORD FROM
ARBITRATION HEARING

Cinatl argues that the court erred and violated his right to procedural due process by failing to review the record from the arbitration hearing, which he first offered during the hearing on Prososki's motion to confirm the arbitrator's award. But as discussed above, the court was obligated to confirm the award, because the court had already denied Cinatl's application to vacate and there was no pending motion to modify or correct

³⁴ See *Garlock v. 3DS Properties*, *supra* note 4.

³⁵ § 25-2613(d) (emphasis supplied).

³⁶ *Glasson v. Board of Equal. of City of Omaha*, 302 Neb. 869, 925 N.W.2d 672 (2019).

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the award. We find no error or due process violation by the district court.

FAILING TO RULE UPON ADMISSIBILITY
OF EXHIBIT 101

Finally, Cinatl argues that the court erred by failing to rule upon the admissibility of an exhibit. During a hearing on the application to vacate, Cinatl offered exhibit 101, his affidavit, in which he swore that the statements in the application to vacate were true to the best of his knowledge. He represented during the hearing that his affidavit was “merely intended to be a verification of the allegations set forth in his application to vacate award.” Cinatl attached two documents to the affidavit: (1) a copy of his application to vacate the arbitrator’s award and (2) a copy of the arbitrator’s decision. Prososki objected to the exhibit.

The court took the offer of exhibit 101 under advisement. The record contains no ruling on its admissibility. During a later hearing on the motion for new trial, Cinatl argued that the record was incomplete because it did not show whether the court received exhibit 101.

[16] We find no reversible error by the court in failing to rule on the admissibility of the exhibit. In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.³⁷ Before the court took the offer of the exhibit under advisement, it observed that the court file contained both the arbitrator’s decision and the application to vacate. At one time, every pleading of fact in a civil action had to be verified by the affidavit of the party, his or her agent, or attorney.³⁸ But such verification has not been required for half a century.³⁹ Because

³⁷ *In re Interest of Vladimir G.*, 306 Neb. 127, 944 N.W.2d 309 (2020).

³⁸ See, Neb. Rev. Stat. § 25-824 (1943); *AVG Partners I v. Genesis Health Clubs*, ante p. 47, 948 N.W.2d 212 (2020).

³⁹ See *AVG Partners I v. Genesis Health Clubs*, supra note 38, citing 1969 Neb. Laws, L.B. 375.

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the court's record contained the documents attached to Cinatl's affidavit and his verification of the statements in his application to vacate was unnecessary, he suffered no prejudice by the court's failure to rule on the exhibit's admissibility.

CONCLUSION

We have jurisdiction to consider Cinatl's challenge to the denial of his application to vacate, but his challenge lacks merit. Because the district court did not err in confirming the arbitration award, we affirm its judgment.

AFFIRMED.

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

STATE OF NEBRASKA, APPELLEE, v.
JEREMIAH L. CONNELLY, APPELLANT.

949 N.W.2d 519

Filed October 16, 2020. No. S-19-1139.

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. **Constitutional Law: Miranda Rights: Self-Incrimination.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), prohibits the use of statements derived during custodial interrogation unless the prosecution demonstrates the use of procedural safeguards that are effective to secure the privilege against self-incrimination.
3. **Miranda Rights: Police Officers and Sheriffs: Words and Phrases.** Under the *Miranda* rule, a "custodial interrogation" takes place when questioning is initiated by law enforcement after a person has been taken into custody or is otherwise deprived of his or her freedom of action in any significant way.
4. ____: ____: _____. The term "interrogation" under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), refers not only to express questioning, but also to any words or actions on the part of the police (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.

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5. ____: ____: _____. A police officer's course of inquiry related to and responsive to a volunteered remark by the accused is not "interrogation" for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).
6. **Confessions: Appeal and Error.** In making the determination of whether a statement is voluntary, a totality of the circumstances test is applied, and the determination reached by the trial court will not be disturbed on appeal unless clearly wrong.
7. **Confessions: Evidence: Proof.** To meet the requirement that a defendant's statement, admission, or confession was made freely and voluntarily, the evidence must show that such statement, admission, or confession was not the product of any promise or inducement—direct, indirect, or implied—no matter how slight.
8. **Confessions: Mental Competency.** Mental illness, like age, education, and intelligence, is a relevant factor in the totality test when evaluating the voluntariness of a statement.
9. ____: _____. No per se rule invalidates the volunteered statement of a mentally ill defendant. Instead, such statement is subject to the general rule that a statement freely and voluntarily given without any compelling influences is admissible.

Appeal from the District Court for Douglas County: SHELLY R. STRATMAN, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Leslie E. Cavanaugh for appellant.

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

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

FUNKE, J.

NATURE OF CASE

The appellant, Jeremiah L. Connelly, filed a motion to suppress in the district court for Douglas County, Nebraska, seeking to have statements he made to law enforcement suppressed in violation of his *Miranda* rights. The district court denied Connelly's motion, finding Connelly's pre-*Miranda* statements

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were not made in response to an interrogation and his post-*Miranda* statements were made voluntarily. We affirm.

BACKGROUND

INITIAL ARREST

On September 21, 2018, Omaha police officers Kirk Weidner and Mark Pruett were on routine patrol in the area of 90th Street and Bedford Avenue in Omaha, Nebraska. While patrolling the area, Weidner and Pruett observed a car exit a parking lot, cross two lanes of traffic, and run a stoplight. Upon pursuing the car, the officers observed the car parked in an alleyway and saw the driver exit the vehicle and head north. As Weidner and Pruett approached the vehicle, they received information from Omaha police dispatch of a report of a stolen car matching the description of the car they were observing. The officers gave chase on foot and apprehended the fleeing driver, later identified as Connelly.

Sgt. Tammy Mitchell, with the Omaha police's auto theft unit, instructed Weidner and Pruett to transport Connelly to the police station for an interview. Connelly was placed in handcuffs and put in the back of the cruiser, but was not read his *Miranda* rights.

Once Weidner, Pruett, and Connelly arrived at the police station, they waited in the lobby because all of the interview rooms were occupied. In the lobby, Connelly voluntarily provided the officers with information about the auto theft. He told Weidner, "You guys are worried about this petty auto theft when you should be worried about her life." When Weidner asked, "Whose life?" Connelly responded with a name that Weidner did not recognize. Connelly was then turned over to Mitchell for an interview.

MITCHELL INTERVIEW

Mitchell and a detective entered the interview room where Connelly was seated. Mitchell noticed that Connelly had his jeans rolled up to his knees and that his legs were red and swollen. The interview proceeded as follows:

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5:43:19 P.M.

Mitchell: Are you having an allergic reaction, you think?

Connelly: I don't know. It started Monday.

Pruett: He said it was from a sunburn, being outside all day yesterday, and then he said he had (inaudible) in the knees from running, so.

Connelly: No, it's not from running.

Mitchell: Okay, what happened?

5:43:34 P.M.

Connelly: It's from dumping her body in Fremont, that's what it's fucking from. "Mister-I-nearly-record-everything," piece of shit (referring to Pruett, one of the arresting officers). Hero of the fucking day out there, he don't listen to a damn word.

Mitchell: Well, tell me, I'll listen.

Connelly: He wants to give a shit about fucking cars all day dude, who cares about fucking cars?

Mitchell: Nobody does.

Connelly: Jeanna Wilcoxen. J-E-A-N-N-A, dude.

Mitchell: How do you know her?

Connelly: She's in Fremont, that's how I know her.

Mitchell: Okay, what's she doing in Fremont? Is she in danger?

Connelly: You can't help her no more.

Mitchell: What do you mean?

Connelly: She's laying out there. You can fly over and find . . . (interrupted by Mitchell).

Mitchell: What do you mean? She—how do you spell "Jeanna?" J-E-A-N-N-A? Is that right?

Connelly: Wilcoxen.

Mitchell: Is she missing? Do we need to go help somebody—

Connelly: Don't nobody even know dude?

Mitchell: Nobody knows she's missing?

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Connelly: That's the fucked up part. . . . They don't even know she's fucking gone.

Mitchell: What do you mean by gone?

Connelly: Like I ain't never getting out of here and just want this shit to stop. I don't know . . . I'll tell you whatever you want to know.

Mitchell: I gotta know if she's safe.

Connelly: I'll tell you whatever you want to know.

. . . .

Connelly: No, it ain't what he said, dude. It's her, dude. It's what I did to her.

Mitchell: Alright, it looks like it. What did you do to her?

Connelly: It's coming back threefold.

Mitchell: What happened?

Connelly: Sunday night. From the laundromat on Q

. . . .

Mitchell: Yeah. Tell me.

Connelly: She just wouldn't listen man.

Connelly: Whatever I do comes back on me three times. (Connelly looks at his swollen legs and says, "Dude, look at that. You ever seen that shit?")

Mitchell: Tell me about Jeanna.

Connelly: She's in Fremont. She's laying there at the end of the road. I don't do drugs.

Mitchell: Alright.

. . . .

Connelly: Half, bunch of her stuff is in Columbus.

Mitchell: Half of her stuff is in Columbus?

Connelly: Just laying out in the truckstop. Some more of it is in South Omaha. Laying in an alley.

Mitchell: So you mean she was moving out? You were helping her move out?

Connelly: That's where I threw it.

Mitchell: Oh, that's where you threw it. Why'd you throw her stuff in an alley?

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Connelly: Why'd I burn the van up the other day?

Mitchell: I don't know. I don't know anything about a van. Tell me about that.

Connelly: My '87 G20 van.

Mitchell: Yeah.

Connelly: That they found (inaudible) torched over there in South Omaha.

Mitchell: Yeah.

Connelly: They seen me running from it with whatever I could carry.

Mitchell: Why did that happen?

Connelly: Because it had her in it. It had her in it.

....

Mitchell: What do you mean you had her? You gave her a ride?

Connelly: I had her in it for 3 or 4 hours. Gave her a ride to Fremont. Dumped her in the fucking ditch. Don't nobody care about that girl, dude?

Mitchell: Is she alive?

Connelly: No, she's not.

At about 5½ minutes into the interview, Mitchell sent the detective out of the interview room. Connelly then stated that his legs were sunburned because he was outside for 2 hours the day before, contemplating jumping off a bridge to his death. The following exchange occurred:

Mitchell: Why's that? Why would you do that?

Connelly: . . . If I smothered her . . . if I smothered her and told her that's the best way to go out of all the ways to get killed, I oughta be able to man up and do it to myself right after.

Mitchell: So is that what happened to her?

Connelly: She got a duct-taped mask and she's laying in Fremont at the end of a road in a ditch.

....

Mitchell: What? Do you know what road you were driving on?

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Connelly: It ain't covered. She's not covered up . . . that's the fucked up part.

Mitchell: What is she wearing?

Connelly: Duct tape.

Connelly starts to cry as he recounts how he "duct-taped" her, told her he was not going to rape her, and explained he just wanted to take "her money and her dope," but that things got out of hand. Approximately 45 minutes into the interview, a homicide unit detective, David Preston, took over and led the remainder of the interview.

PRESTON INTERVIEW

Preston obtained Connelly's date of birth and address, and for the first time, he read Connelly his *Miranda* rights and asked if, having been informed of his rights, he would still be willing to speak with him. Connelly answered yes, and Preston filled out a rights advisory form, which Connelly did not sign. Preston showed Connelly a map of Fremont, Nebraska, to assist in finding Jeanna Wilcoxon's location. Preston then asked Connelly to "start back from the beginning" and to explain "what happened actually." While recounting his story, Connelly made reference to a "beast" and hearing voices:

6:49:18 P.M.

Connelly: All this shit she's been through. It was just perfect . . . I told her either way, the beast gets her or I get her, this is perfect (inaudible) right here.

Preston: A beast, what are you referring to?

Connelly: Just like, I don't know, the beast, the hunger.

Preston: Your hunger?

Connelly: Doesn't feel like me. It doesn't feel like me at all. It feels like two or three versions of people (inaudible) that I pissed off somehow. I don't really realize how I pissed them off but it felt like them when the actual incident happened, when I'm giving verbal directions and telling her all this shit, being aggressive to maintain control of the situation but staying calm. The staying calm

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part was me, that was like, so it was like one, two, three . . . three driving forces, dude, just like dominating.

Preston: It wasn't emotionally you, it physically was you?

Connelly: It was me, emotionally, I'm not trying to make it deeper than it is. It was my buddy Chicken Bone and my buddy Kona, are floating around in my head, every time I spoke, I sounded like them. It was distinctive. It's like knowing the names to the voices you hear. Not crazy people who don't know the names. I wronged both these guys and I don't remember how or why they got so mad at me when we were such good buds in the beginning and what they're doing here and now involved in this and then my stay calmness on top of that was the end of her, it's what destroyed her. It's simple. I'm not trying to get all psychological and shit.

Connelly then went on to explain how he killed Wilcoxen. At the conclusion of Connelly's interview, because the location of Wilcoxen's body still could not be determined, Weidner, Pruett, and Preston took Connelly to Fremont in an attempt to locate Wilcoxen. Wilcoxen's body was eventually discovered in an area very close to what Connelly had described. Connelly also directed the officers to 53rd & Y Streets in Omaha, advising that was the location where the murder had occurred. He then took them to an alley at 34th & K in Omaha where they found a tablet computer belonging to Wilcoxen that Connelly had discarded. Connelly then led Preston to Council Bluffs, Iowa, and to Columbus, Nebraska, to look for Wilcoxen's cell phone and his cell phone, but attempts to locate the cell phones were unsuccessful. The State later charged Connelly with first degree murder and tampering with physical evidence.

MOTION TO SUPPRESS

Connelly filed a motion to suppress the statements he made to law enforcement. Connelly argued in support of his motion that (1) the statements were obtained without Connelly's

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being properly advised of his right to counsel and his right against compulsory self-incrimination; (2) the statements were obtained without a knowing, intelligent, and voluntary waiver of his right to counsel and his right against compulsory self-incrimination; (3) the statements were not voluntary in that they were the product of threats, coercion, or inducements of leniency practiced upon him by law enforcement; and (4) the statements were the fruit of an unlawful arrest.

In a written order, the district court denied Connelly's motion to suppress. First, the district court found that probable cause existed to support a warrantless arrest of Connelly. Second, the district court found Connelly's pre-*Miranda* statements made to law enforcement were voluntary and not the result of an interrogation. The court determined the overall demeanor of Connelly's interview indicated that Connelly was voluntarily providing information to law enforcement and that thus, Mitchell was not interrogating Connelly. Further, the court pointed out that when Mitchell inquired about Connelly's swollen legs, he responded that he had sustained the injuries from "dumping her body in Fremont." The court noted there was no reason that Mitchell should have reasonably expected that her question would likely elicit an incriminating response. The district court further found that Connelly's pre-*Miranda* statements were admissible under the public safety exception, also referred to as the "rescue doctrine," to the *Miranda* requirements.¹

Third, for the sake of completeness, the district court found that even if Mitchell's pre-*Miranda* interview amounted to an interrogation, Connelly's post-*Miranda* interview would still be admissible because it did not rise to the level of a two-step interrogation. Fourth, the district court found that under the totality of the circumstances, Connelly knowingly and voluntarily waived his *Miranda* rights. Fifth, the district court found

¹ See *New York v. Quarles*, 467 U.S. 649, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984).

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that the State met its burden in proving, by a preponderance of the evidence, that Connelly's confession was voluntary. The court determined there was no evidence presented to suggest Connelly's confession was the product of threats, coercion, or inducements of leniency. The court noted that instead, Connelly was cooperative with law enforcement and often volunteered information beyond what was requested.

TRIAL AND SENTENCING

A jury found Connelly guilty of first degree murder and tampering with physical evidence. The court sentenced Connelly to consecutive terms of life imprisonment without the possibility of parole for the first degree murder conviction and of 2 to 2 years' imprisonment for the tampering with physical evidence conviction. Connelly appeals.

ASSIGNMENTS OF ERROR

Connelly assigns, consolidated and restated, that (1) the district court erred in overruling the motion to suppress both his pre-*Miranda* and post-*Miranda* statements and (2) there was insufficient evidence to prove, beyond a reasonable doubt, Connelly's statements were made voluntarily.

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*,² 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.³

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

³ *State v. Guzman*, 305 Neb. 376, 940 N.W.2d 552 (2020). See *State v. Bormann*, 279 Neb. 320, 777 N.W.2d 829 (2010).

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ANALYSIS

NO CUSTODIAL INTERROGATION

Connelly argues his confession to Mitchell was a “non-*Mirandized*” statement made during a custodial interrogation because Mitchell’s questions were designed to elicit an incriminating response from him. Neither party contests that Connelly was in custody during each interview. As such, we focus on whether Connelly was subject to an interrogation by law enforcement. For the reasons set forth below, we affirm the trial court’s denial of Connelly’s motion to suppress his pre-*Miranda* statements, because we find Connelly volunteered those statements and was not subject to an interrogation.

[2] *Miranda* prohibits the use of statements derived during custodial interrogations unless the prosecution demonstrates the use of procedural safeguards that are effective to secure the privilege against self-incrimination.⁴ The safeguards provided by *Miranda* “‘come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.’”⁵

[3,4] This court, in *State v. Rodriguez*,⁶ stated that under the *Miranda* rule, a “custodial interrogation” takes place when questioning is initiated by law enforcement after a person has been taken into custody or is otherwise deprived of his or her freedom of action in any significant way. We have also stated that the term “interrogation” under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (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.⁷ An

⁴ *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007). See *Miranda*, *supra* note 2.

⁵ *Bormann*, *supra* note 3, 279 Neb. at 326, 777 N.W.2d at 835.

⁶ See *Rodriguez*, *supra* note 4.

⁷ *Id.*; *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000). See *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

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objective standard is applied to determine whether there is an interrogation within the meaning of *Miranda*.⁸

[5] The relevant question to be asked is, “‘Would a reasonable and disinterested person conclude that police conduct, directed to a suspect or defendant in custody, would likely elicit an incriminating response from that suspect or defendant?’”⁹ If the answer is yes, then there is interrogation requiring the recitation of *Miranda* warnings.¹⁰ However, we have excluded from the definition of interrogation a police officer’s course of inquiry related to and responsive to a volunteered remark by the accused.¹¹

In *Rodriguez*, while in custody, the defendant made incriminating statements to a police officer before the officer could finish advising him of his *Miranda* rights.¹² The defendant’s remarks were made in an abrupt, rambling manner and not in response to any questioning by the officer. We determined, after a review of the interview tape, that the officer made several remarks that seemed focused toward calming the defendant rather than eliciting information, including telling him that he believed him.¹³ We held that “[s]tatements made in a conversation initiated by the accused or spontaneously volunteered by the accused are not the result of interrogation and are admissible.”¹⁴ We affirmed the trial court’s admittance of the defendant’s statements because the statements were spontaneous, excited remarks, which were not the result of police compulsion.¹⁵

⁸ *Bormann*, *supra* note 3.

⁹ *Id.* at 327, 777 N.W.2d at 836 (quoting *State v. Gibson*, 228 Neb. 455, 422 N.W.2d 570 (1988)).

¹⁰ *Bormann*, *supra* note 3.

¹¹ *Buckman*, *supra* note 7. See, also, *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983).

¹² *Rodriguez*, *supra* note 4.

¹³ *Id.*

¹⁴ *Id.* at 944, 726 N.W.2d at 171.

¹⁵ *Rodriguez*, *supra* note 4.

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In *State v. Lamb*,¹⁶ after being placed in a holding cell and before any *Miranda* warnings had been given to him, the defendant told the police officer that he shot his wife. The defendant then asked the officer, “‘How would you like it?’” to which the officer replied, “‘What do you mean by that?’”¹⁷ The defendant then replied, “‘I got tired of seeing her suffer so I shot her.’”¹⁸ The officer later testified that at the time he asked the question, he was concerned about whether the defendant was uncomfortable, ill, or angry about being placed in the holding cell. We agreed with the trial court in the case that the officer’s question was a neutral and spontaneous one, not one calculated to obtain a confession. We also determined the officer’s question did not place the defendant under a compulsion to speak because the defendant was the one who initiated the conversation and the officer simply requested clarification of the defendant’s statement.¹⁹

The facts concerning Connelly’s statements to Mitchell are substantially the same as the statements made in both *Rodriguez* and *Lamb*.²⁰ A review of the interview tape shows an agitated Connelly volunteering incriminating statements before his *Miranda* warnings could be read to him.

Mitchell’s first question to Connelly concerned his red and swollen legs. Connelly responded that it was from “dumping [Wilcoxon’s] body.” Mitchell’s question was a neutral and spontaneous question not intended to elicit a confession, and Connelly’s statement was spontaneously volunteered. The interview tape also shows that Connelly appeared frustrated that the officers only cared about cars, rather than about a missing woman. This is evident when Connelly tells Mitchell that Pruett would not “listen to a damn word,” to which

¹⁶ *Lamb*, *supra* note 11.

¹⁷ *Id.* at 501, 330 N.W.2d at 465.

¹⁸ *Id.*

¹⁹ See *id.*

²⁰ See, *Rodriguez*, *supra* note 4; *Lamb*, *supra* note 11.

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Mitchell simply tells him that she will listen to him. Mitchell's limited inquiry cannot be characterized as a knowing attempt to elicit an incriminating statement from Connelly. When Mitchell did ask Connelly clarifying questions, they were often related to and responsive to Connelly's volunteered statements. At the time of these questions, law enforcement was not yet aware of the murder. There is no evidence in the record that Connelly was under any compulsion to speak about the murder.

Accordingly, although Connelly was in custody and his *Miranda* rights had not yet been read to him, his statements to Mitchell were not made in response to a custodial interrogation. Therefore, the district court did not err in finding that no custodial interrogation took place prior to the recitation of Connelly's *Miranda* rights.

PUBLIC SAFETY EXCEPTION

The district court found the public safety exception, also referred to as the "rescue doctrine," which has been adopted by the U.S. Supreme Court, to be an appropriate exception to admit Connelly's pre-*Miranda* statements.²¹ However, neither the rescue doctrine nor the public safety exception has yet been adopted by Nebraska appellate courts.

In *New York v. Quarles*,²² the U.S. Supreme Court held that a public safety exception to the *Miranda* requirements applies when police ask a subject questions necessary to protect the public or police from immediate danger. Because we determine that Connelly's statements were not the result of police questioning, we need not address the applicability of the public safety exception. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.²³

²¹ See *Quarles*, *supra* note 1.

²² *Id.*

²³ *State v. Goynes*, 303 Neb. 129, 927 N.W.2d 346 (2019), *cert. denied* ___ U.S. ___, 140 S. Ct. 545, 205 L. Ed. 2d 345.

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POST-*MIRANDA* STATEMENTS

Connelly argues his post-*Miranda* statements made to Preston should be suppressed because detectives deployed an “ask first, warn later” tactic disapproved of by the U.S. Supreme Court in *Missouri v. Seibert*²⁴ and because the *Miranda* warnings he received did not cure the damage that was done.

In *Seibert*, the U.S. Supreme Court considered a police protocol in which a suspect was interrogated without *Miranda* warnings until the suspect confessed, at which point, the officer would give *Miranda* warnings, ask for a waiver, and get the suspect to repeat the pre-*Miranda* confession.²⁵ 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 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.²⁶

The plurality opinion held that such tactic effectively threatens to thwart the purpose of *Miranda* by reducing the risk that a coerced confession would be admitted.²⁷

However, as we have already determined, there was no pre-*Miranda* interrogation by Mitchell, and as such, there was no “question-first” tactic here. Therefore, the district court did not err in determining Connelly’s post-*Miranda* interview was admissible because it did not rise to the level of a two-step interrogation.

²⁴ *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004).

²⁵ *Id.*

²⁶ *Id.*, 542 U.S. at 613.

²⁷ *Seibert*, *supra* note 24. See, also, *Miranda*, *supra* note 2.

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VOLUNTARINESS OF STATEMENTS

Connelly's final assignment of error is that there was insufficient evidence presented to the jury to support its conclusion that his statements were voluntary.

[6] The especially damning nature of a confession requires the State to prove that an accused's statement was voluntary before it is admissible.²⁸ In making this determination, a totality of the circumstances test is applied, and the determination reached by the trial court will not be disturbed on appeal unless clearly wrong.²⁹

[7] To meet the requirement that a defendant's statement, admission, or confession was made freely and voluntarily, the evidence must show that such statement, admission, or confession was not the product of any promise or inducement—direct, indirect, or implied—no matter how slight. However, this rule is not to be applied on a strict, per se basis. Rather, determinations of voluntariness are based upon an assessment of all of the circumstances and factors surrounding the occurrence when the statement is made.³⁰

[8,9] Connelly relies on our decision in *State v. Dickson*,³¹ where we cited to the Supreme Court's decision in *Rhode Island v. Innis*³² and stated that mental illness, like age, education, and intelligence, is a relevant factor in the totality test when evaluating the voluntariness of a statement. However, we also stated that no per se rule invalidates the volunteered statement of a mentally ill defendant.³³ We held that such statement is subject to the general rule that a statement freely and voluntarily given without any compelling influences is admissible.³⁴

²⁸ See *State v. Walker*, 242 Neb. 99, 493 N.W.2d 329 (1992).

²⁹ *State v. Garner*, 260 Neb. 41, 614 N.W.2d 319 (2000).

³⁰ *Walker*, *supra* note 28.

³¹ *State v. Dickson*, 223 Neb. 397, 389 N.W.2d 785 (1986).

³² *Innis*, *supra* note 7.

³³ *Dickson*, *supra* note 31.

³⁴ See *id.*

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Connelly argues that his statements about hearing voices, his uncorroborated statements about discarding his cell phone in Columbus and disposing of evidence in Council Bluffs, his confusion while searching for Wilcoxon's body near Fremont, and his erratic jumping from one subject to another indicated a mental illness sufficient to make his incriminating statements involuntary. However, a review of the interview tape indicates that Connelly described his crimes in detail, that his statements tracked chronologically, and that he understood what he was saying. Additionally, no evidence was offered to indicate that Connelly suffered from a mental illness or that he was under the influence of drugs or alcohol at the time the statements were given. Neither was there evidence that Connelly's confession was the product of threats, coercion, or inducements of leniency.

Furthermore, the district court instructed the jury that it must disregard any statement from Connelly if it found that the State did not prove beyond a reasonable doubt that Connelly understood what he was saying and freely and voluntarily made the statement under all surrounding circumstances. An appellate court does not resolve conflicts in the evidence, pass on credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.³⁵ Connelly's argument that his statements were not made voluntarily is without merit.

CONCLUSION

For the foregoing reasons, we affirm the order of the district court denying Connelly's motion to suppress. We conclude that Connelly's pre-*Miranda* statements were made voluntarily and not in response to a custodial interrogation. We further conclude there was sufficient evidence for a jury to find Connelly made his post-*Miranda* statements voluntarily.

AFFIRMED.

³⁵ *State v. Ferrin*, 305 Neb. 762, 942 N.W.2d 404 (2020).

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

BRIAN CHANEY, APPELLANT, v. ROBERT B.
EVNEN, IN HIS OFFICIAL CAPACITY
AS NEBRASKA SECRETARY OF
STATE, ET AL., APPELLEES.
949 N.W.2d 761

Filed October 16, 2020. No. S-20-660.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Rules of the Supreme Court: Pleadings: Appeal and Error.** An appellate court reviews the district court's denial of a motion to amend under Neb. Ct. R. Pldg. § 6-1115(a) for an abuse of discretion. However, an appellate court reviews de novo any underlying legal conclusion that the proposed amendments would be futile.
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. **Moot Question: Jurisdiction: Appeal and Error.** Although mootness does not prevent appellate jurisdiction, it is a justiciability doctrine that can prevent courts from exercising jurisdiction.
5. **Moot Question.** Mootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the dispute's resolution that existed at the beginning of the litigation.
6. **Actions: Moot Question.** An action becomes moot when the issues initially presented in the proceedings no longer exist or the parties lack a legally cognizable interest in the outcome of the action.
7. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question that no longer rests upon existing facts or rights—i.e., a case in which the issues presented are no longer alive.

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8. **Moot Question.** The central question in a mootness analysis is whether changes in circumstances have forestalled any occasion for meaningful relief.
9. **Pleadings: Equity.** A prayer for general equitable relief is to be construed liberally and will often justify granting relief in addition to that contained in the specific prayer, provided it fairly conforms to the case made by the petition and the evidence.
10. ____: _____. The prayer for general relief in an equity action is as broad as the pleadings and the equitable powers of the court sufficient to authorize any judgment to which the party is entitled under the pleadings and the evidence.
11. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
12. **Motions to Dismiss: Pleadings: Appeal and Error.** When reviewing an order dismissing a complaint, an appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.
13. **Constitutional Law: Initiative and Referendum.** The right of initiative is precious to the people and is one which courts are zealous to preserve to the fullest tenable measure of spirit as well as letter.
14. **Pleadings: Words and Phrases.** Pleading facts with particularity means the who, what, when, where, and how: the first paragraph of any newspaper story.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Affirmed.

Scott A. Lautenbaugh, of Law Offices of Scott Lautenbaugh, for appellant.

Douglas J. Peterson, Attorney General, and Ryan S. Post for appellee.

Mark C. Laughlin and Daniel J. Gutman, of Fraser Stryker, P.C., L.L.O., for appellees Albert Davis III et al.

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HEAVICAN, C.J., MILLER-LEMAN, CASSEL, STACY, FUNKE, PAPIK, and FRUEDENBERG, JJ.

PER CURIAM.

Brian Chaney filed a lawsuit in which he sought to prevent Nebraska voters from amending provisions of the Delayed Deposit Services Licensing Act, Neb. Rev. Stat §§ 45-901 to 45-931 (Reissue 2016 & Cum. Supp. 2018), through a ballot initiative measure. Chaney alleged that some individuals who signed the initiative petition wished to withdraw their signatures. He also asserted that certain petition circulators did not comply with a Nebraska statute and committed fraud during the petition process. The district court dismissed Chaney's lawsuit, and Chaney appeals. Finding no error in the district court's decision, we affirm.

I. BACKGROUND

1. INITIATIVE

This case concerns an initiative measure which, if adopted, would establish a statutory cap on the annual percentage rate that delayed deposit services licensees may charge. We recently decided another case involving this initiative petition. See *Thomas v. Peterson*, ante p. 89, 948 N.W.2d 698 (2020). In *Thomas*, we held that the ballot title prepared by the Nebraska Attorney General which referred to delayed deposit service licensees as “payday lenders” was not insufficient or unfair. See *id.* This case concerns the same initiative petition, but raises different legal arguments.

2. CHANEY'S COMPLAINT

On August 31, 2020, Chaney filed a lawsuit naming Secretary of State Robert B. Evnen (the Secretary); Albert Davis III; Thomas A. Wagoner, Jr.; and Fr. Damian Zuerlein as defendants. Davis, Wagoner, and Zuerlein are the sponsors of the initiative petition at issue. Chaney identified the action as one to enjoin the Secretary from including the petition on the

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November 3, 2020, general election ballot, pursuant to Neb. Rev. Stat. § 32-1412(2) (Cum. Supp. 2016).

In the complaint, Chaney alleged that in June 2020, the sponsors submitted signatures in support of the initiative petition to the Secretary. According to the complaint, each signature page included a sworn and notarized statement from the petition circulator asserting, among other things, that the circulator “‘stated to each signer the object of the petition as printed on the petition before he or she affixed his or her signature to the petition.’” After those signatures were verified by county election officials, the Secretary certified on July 31, 2020, that all statutory requirements were met to place the initiative measure on the November 3 general election ballot.

Chaney’s complaint did not contest the Secretary’s determination that the sponsors submitted sufficient signatures from the requisite number of counties as required by article III, § 2, of the Nebraska Constitution. Rather, he asserted that 188 of the signatories wished to withdraw their signatures or that their signatures were otherwise invalid. Chaney alleged that when those individuals signed the petition, the petition circulators did not read the object of the petition to them. He also alleged that each of those individuals would not have signed the petition if the object had been read to them.

Chaney attached to his complaint 188 affidavits. The affidavits are substantially identical, with limited handwritten details relevant to each individual affiant including the county in which the affiant resided. Each affiant swore that the “circulator did not read to me the statement regarding the object of the petition that I now know was printed on the petition page” and that “I would not have signed the petition had the object statement been stated to me before the circulator asked for my signature.”

Based on these allegations, Chaney asserted that the signatures were procured in violation of Neb. Rev. Stat. § 32-628 (Reissue 2016) and that the circulators committed fraud. He also alleged that the 188 affiants wished to withdraw their

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signatures. The complaint claimed that without the signatures of the affiants, the petition was no longer supported by signatures from the requisite 5 percent of the registered voters in 38 counties.

In his prayer for relief, Chaney requested the “issuance of a temporary and permanent injunction enjoining the Secretary from placing the legally insufficient Petition on the November 3, 2020 general election ballot.” He also prayed “[f]or such other further relief as the Court may deem just and equitable.”

3. MOTIONS HEARING

After the filing of the complaint, Chaney filed a motion for a temporary injunction. The sponsors filed a motion to dismiss for failure to state a claim upon which relief could be granted or, in the alternative, a motion for summary judgment. The sponsors also filed a motion to continue Chaney’s motion for temporary injunction.

The district court held a hearing concerning the foregoing motions on September 8, 2020. At that hearing, counsel for Chaney, the Secretary, and the sponsors offered evidence and argument concerning the motions.

4. DISMISSAL ORDER

On September 9, 2020, the district court issued an order sustaining the sponsors’ motion to dismiss and overruling Chaney’s motion for temporary injunction. The district court held that Chaney’s signature withdrawals were untimely and that he failed to allege fraud with particularity. In the course of concluding that Chaney had not adequately alleged fraud, the court reasoned that § 32-628(3) “does not require petition circulators to read the object statement ‘verbatim to each person beforehand.’ . . . Rather, ‘it is sufficient that circulators summarize, generally, the object or purpose of the petition in a way that is not misleading.’”

In ordering dismissal, the district court further stated that Chaney “is not given leave to amend because the amendment

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to his Complaint would not change the allegations in the affidavits attached therein.”

II. ASSIGNMENTS OF ERROR

Chaney assigns, condensed and restated, that the district court erred (1) by granting the motion to dismiss and (2) by not giving him the opportunity to amend his complaint.

III. STANDARD OF REVIEW

[1] An appellate court reviews a district court’s order granting a motion to dismiss *de novo*, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Chafin v. Wisconsin Province of Society of Jesus*, 301 Neb. 94, 917 N.W.2d 821 (2018).

[2] An appellate court reviews the district court’s denial of a motion to amend under Neb. Ct. R. Pldg. § 6-1115(a) for an abuse of discretion. However, we review *de novo* any underlying legal conclusion that the proposed amendments would be futile. *Kelly v. Saint Francis Med. Ctr.*, 295 Neb. 650, 889 N.W.2d 613 (2017).

[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. *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 899 N.W.2d 893 (2017).

IV. ANALYSIS

1. MOOTNESS

[4] The Secretary and sponsors contend that we should not reach the merits of this appeal because it is now moot. They argue that the specific relief Chaney sought in this case pursuant to § 32-1412(2)—an order enjoining the Secretary from certifying or printing the initiative petition on the ballot—is no longer available because the official ballot has been certified and copies of the ballot have been printed. Although mootness does not prevent appellate jurisdiction, it

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is a justiciability doctrine that can prevent courts from exercising jurisdiction. *Nesbitt v. Frakes*, 300 Neb. 1, 911 N.W.2d 598 (2018). Accordingly, our analysis in this case begins not with Chaney’s assignments of error, but with the question of whether this case is moot.

[5-8] Mootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the dispute’s resolution that existed at the beginning of the litigation. *State ex rel. Peterson v. Ebke*, 303 Neb. 637, 930 N.W.2d 551 (2019). 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. *Id.* A moot case is one which seeks to determine a question that no longer rests upon existing facts or rights—i.e., a case in which the issues presented are no longer alive. *Id.* The central question in a mootness analysis is whether changes in circumstances have forestalled any occasion for meaningful relief. See *id.*

[9,10] As noted, the Secretary and the sponsors contend this case is moot because the specific relief Chaney requested pursuant to § 32-1412(2) can no longer be ordered. But even if that relief cannot be granted, it is not the only relief Chaney requested. Chaney also requested “such other further relief as the Court may deem just and equitable.” We understand this language to be a prayer for general equitable relief. Such a prayer is to be construed liberally and will often justify granting relief in addition to that contained in the specific prayer, provided it fairly conforms to the case made by the petition and the evidence. *Daugherty v. Ashton Feed and Grain Co., Inc.*, 208 Neb. 159, 303 N.W.2d 64 (1981). The prayer for general relief in an equity action is as broad as the pleadings and the equitable powers of the court sufficient to authorize any judgment to which the party is entitled under the pleadings and the evidence. *Sullivan v. General United Life Ins. Co.*, 209 Neb. 872, 312 N.W.2d 277 (1981). The relevant question in the mootness analysis in this case is thus whether any meaningful

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relief could be provided in the event Chaney were to prevail. We believe the answer to this question is yes.

The Secretary decides disputed points of election law, but those decisions only retain the force of law until changed by the courts. See Neb. Rev. Stat. § 32-201 (Reissue 2016). This court has previously entertained requests for relief after the certification of a ballot initiative but before the election. See, *Stewart v. Advanced Gaming Tech.*, 272 Neb. 471, 723 N.W.2d 65 (2006); *State ex rel. Wieland v. Beermann*, 246 Neb. 808, 523 N.W.2d 518 (1994). See, also, Neb. Rev. Stat. §§ 32-801 (Reissue 2016) and 32-402.01 (Reissue 1993) (Secretary shall certify issues at least 50 days before general election). And in one such case, *State ex rel. Wieland v. Beermann*, *supra*, we provided relief. There, a citizen sought a writ of mandamus compelling the Secretary to remove proposed legislative resolutions from the general election ballot because the required explanatory statements had been filed after the statutory deadline. We granted the writ and then directed removal of the measures from the general election ballot just days before the election. It is safe to presume that at the time of our decision in *State ex rel. Wieland*, printing of the ballots had already begun.

Although the relief in *State ex rel. Wieland* arose out of our mandamus jurisdiction rather than our appellate jurisdiction, it suggests that we could direct the legal removal of the petition from the ballot even if we could not direct its physical removal. We see no reason why, if Chaney were entitled to prevail, we could not do the same here.

Based on our holding in *State ex rel. Wieland*, circumstances as they now stand have not forestalled any occasion for the meaningful relief requested by Chaney. Therefore, dismissal on mootness grounds is inappropriate.

2. FAILURE TO STATE CLAIM

Turning now to the merits of Chaney's appeal, we begin with his various arguments concerning the district court's

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dismissal of his complaint for failure to state a claim. On this topic, we note that although the parties submitted evidence at the hearing on the motion to dismiss, the district court did not convert the motion to dismiss to a motion for summary judgment or consider the evidence submitted by the parties. See Neb. Ct. R. Pldg. § 6-1112(b) (if, on motion to dismiss for failure to state claim, matters outside pleading are presented to and not excluded by court, motion shall be treated as one for summary judgment). Chaney, however, does not assign error to the district court's decision to decide the motion to dismiss on the pleadings alone, and all of the parties' arguments on appeal focus on whether Chaney's complaint stated a claim upon which relief could be granted, rather than whether he could withstand summary judgment. We thus confine our analysis to the issue of whether Chaney adequately stated a claim as well.

[11,12] In considering whether Chaney stated a claim, we apply well-known principles. To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts to state a claim to relief that is plausible on its face. *Schaeffer v. Frakes*, 306 Neb. 904, 947 N.W.2d 714 (2020). In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim. *Id.* When reviewing an order dismissing a complaint, an appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion. *Holloway v. State*, 293 Neb. 12, 875 N.W.2d 435 (2016). For purposes of a motion to dismiss, a court is not obliged to accept as true a legal conclusion couched as a factual allegation, and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.*

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As noted in the background section above, Chaney identified three different theories in his complaint why certain petition signatures should not be given effect. He claimed that signatories wished to withdraw their signatures, that circulators did not comply with § 32-628(3), and that circulators engaged in fraud. We will take up each of these theories, beginning with Chaney's claim that the individuals who signed affidavits attached to his complaint wished to withdraw their signatures.

(a) Signature Withdrawal

Although not mentioned in Chaney's complaint, a Nebraska statute, Neb. Rev. Stat. § 32-632 (Reissue 2016), allows petition signatories to withdraw their signatures by following certain steps. Section 32-632 provides:

Any person may remove his or her name from a petition by an affidavit signed and sworn to by such person before the election commissioner, the county clerk, or a notary public. The affidavit shall be presented to the Secretary of State, election commissioner, or county clerk prior to or on the day the petition is filed for verification with the election commissioner or county clerk.

Relying on this statute, the district court concluded that Chaney's signature withdrawals were untimely. It reasoned that Chaney had alleged that the Secretary certified the petition for the general election ballot on July 31, 2020, and that the deadline for removing signatures under § 32-632 was thus sometime before that date. None of Chaney's affidavits, however, were signed before August 20.

Section 32-632 allows petition signatories to withdraw their signatures and provides no indication that a signatory must provide any particular reason in order to effectuate the withdrawal of his or her signature. To the extent petition signatories wish to have their signature withdrawn simply because they no longer wish to support an initiative petition, we conclude that they must do so in compliance with § 32-632. If such signature

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withdrawals could be effectuated outside of § 32-632, the restrictions of that section would have no force.

There is no indication that the 188 individuals who signed affidavits attached to Chaney's complaint complied with § 32-632. As the district court observed, those affidavits were signed weeks after the Secretary certified the petition for the ballot. In addition, Chaney's complaint also provides no indication that those ballots were presented to any of the officials specified by § 32-632. Accordingly, we find that the district court did not err to the extent it concluded that Chaney did not state a claim upon which relief could be granted merely by alleging that the individuals who signed affidavits attached to his complaint wished to withdraw their signatures.

In response to the district court's finding that the signature withdrawals were not timely, Chaney argues that the Secretary did not make the signed petitions available to him until after the petition had been certified for the ballot. He argues that the deadline to seek the court's involvement cannot be before the identities of petition signers are made available by the Secretary. While the availability of the identities of the petition signers may have made it close to impossible for Chaney to contact petition signers to inquire about whether they were interested in withdrawing their signature, there is nothing in our record that suggests *signatories* were precluded from seeking signature withdrawal in compliance with § 32-632. In short, Chaney argues that challengers to an initiative petition must have the opportunity to obtain the identities of petition signers and contact them before the time to withdraw their signatures expires. We view this as a policy argument properly directed to the Legislature.

At oral argument, counsel for the Secretary argued that § 32-632 is the sole means by which signatures can be withdrawn or declared invalid and thus that the signatures in support of this initiative petition are not open to challenge even if Chaney could show that circulators did not comply with § 32-628(3) or engaged in fraud. Chaney argues to the contrary.

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We find, however, that we need not resolve the parties' competing positions on this issue, because, as we will explain, Chaney did not adequately allege that circulators failed to comply with § 32-628(3) or engaged in fraud.

(b) Compliance With
§ 32-628(3)

Chaney also contends that circulators failed to comply with § 32-628(3). In support of this theory, Chaney alleged that petition circulators did not read the object statement of the petition to his supporting affiants. He argues petition circulators were required to do so by § 32-628(3). As we will explain, however, we disagree.

Section 32-628(3) requires that every sheet of a petition which contains signatures be accompanied by an affidavit from the circulator. The statute provides that the affidavit shall be in "substantially the following form" and goes on to list various items, including that the circulator "stated to each signer the object of the petition as printed on the petition before he or she affixed his or her signature to the petition." § 32-628(3).

Chaney argues that this language requires the circulator to read the object statement of the petition to the signatory verbatim. The Secretary and the sponsors counter that a verbatim reading is not required. While they concede that the circulator cannot say anything false or misleading, they argue this language allows the circulator to summarize the object statement.

In our view, both Chaney on the one hand and the Secretary and the sponsors on the other have made plausible arguments based on the statutory text. In the end, however, we side with the Secretary and the sponsors and conclude that a verbatim reading of the object statement is not required. In support of this conclusion, we note that the affidavit described in § 32-628(3) need not include the exact language of the statute but must only be in "*substantially* the following form." (Emphasis supplied.)

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[13] While we find that the Secretary and the sponsors have the better textual argument, our reading of § 32-628(3) is largely informed by the fact that we are interpreting a statute pertaining to the exercise of the people's power of initiative. As we have often said, the right of initiative is precious to the people and is one which courts are zealous to preserve to the fullest tenable measure of spirit as well as letter. See, e.g., *Christensen v. Gale*, 301 Neb. 19, 917 N.W.2d 145 (2018). To that end, we have also emphasized that statutory provisions authorizing initiative petitions should be construed in such a manner that the legislative power reserved in the people is effectual and should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes pertaining to its exercise. *Id.* We find those principles applicable here and conclude that requiring petition circulators to read the object statement of the petition to each signatory verbatim would be a narrow and strict interpretation of § 32-628(3) that could unduly restrict the power of initiative.

We find confirmation of our conclusion from a recent case in which we relied on the same principles to resolve a question of statutory interpretation related to the initiative and referendum process. In *Hargesheimer v. Gale*, 294 Neb. 123, 881 N.W.2d 589 (2016), the plaintiffs alleged that a referendum petition should be removed from the ballot because the statutorily required list of sponsors did not include Governor Pete Ricketts. The plaintiffs alleged that Governor Ricketts qualified as a sponsor because he contributed money to the referendum campaign and supported it publicly. We rejected this argument, holding that only those who agreed to assume responsibility for the initiative and referendum petition process qualified as sponsors.

In support of our conclusion, we noted that the argument urged by the plaintiffs would “tend to restrict the powers of initiative and referendum by making compliance with the statute more precarious.” *Id.* at 134, 881 N.W.2d at 597-98. We reasoned that if we were to adopt plaintiffs' reading of

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“sponsoring the petition” to include individuals who participated in or supported the petition process, we would “inject ambiguity and make adherence difficult” and “expose the petition process to procedural challenges and the risk of defects unrelated to the substance of the petition.” *Id.* at 134, 881 N.W.2d at 598. Much like the reading urged by the plaintiffs in *Hargesheimer*, we believe that the reading advanced by Chaney would “mak[e] compliance with the statute more precarious” and “expose the petition process to procedural challenges and the risk of defects unrelated to the substance of the petition.” See 294 Neb. at 134, 881 N.W.2d at 598.

Having concluded that petition circulators were not required to read the object statement of the petition to signatories, we find Chaney’s claim for relief based on a violation of § 32-628(3) crumbles. The only way in which Chaney alleges that circulators did not comply with § 32-628(3) is by failing to read the object statement to signatories.

(c) Fraud

[14] This leaves only Chaney’s argument that petition signatures were subject to invalidation because circulators committed fraud and that he adequately alleged the details of such fraud. As we evaluate this theory, we must do so under a different pleading standard. Under our pleading rules, claims of fraud are subject to a heightened pleading standard. Our rules of pleading provide that “[i]n all averments of fraud, . . . the circumstances constituting fraud . . . shall be stated with particularity.” Neb. Ct. R. Pldg. § 6-1109(b) (rev. 2008). Pleading facts with particularity means the who, what, when, where, and how: the first paragraph of any newspaper story. *Chafin v. Wisconsin Province Society of Jesus*, 301 Neb. 94, 917 N.W.2d 821 (2018). With this standard in mind, we take up Chaney’s allegations of fraud.

The complaint did not make any factual allegations suggesting that circulators committed fraud on petition signatories, let alone plead such details with particularity. The complaint does

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not allege, for example, any of the “who, what, when, where, and how” details concerning the provision of misleading information to signatories.

The only factual allegations that even approach the necessary level of particularity are Chaney’s assertions that circulators defrauded the Secretary by asserting that “they stated to each signer the object of the petition as printed on the petition.” But Chaney claims this was fraudulent solely because circulators did not read the object statement as printed on the petition. Chaney’s fraud allegation thus collapses back into his argument that a circulator can only “state[] to each signer the object of the petition as printed on the petition” by reading that statement verbatim. We have concluded that is not the case and thus conclude that Chaney has not adequately alleged that circulators defrauded the Secretary.

Boiled to its essence, Chaney’s complaint alleged only that certain petition circulators did not read the object statement of the petition to certain signatories and that signatories decided that they wished to withdraw their signatures. As we have explained, those allegations, even if true, do not establish that the circulators failed to comply with § 32-628(3) or that they committed fraud. And, to the extent that individual signatories simply decided that they wanted to withdraw their signatures, they could do so only through the means set forth by the Legislature, not via this lawsuit. Because Chaney’s factual allegations, even if true, do not establish a right to the relief he seeks, the district court did not err in finding that the complaint failed to state a claim upon which relief could be granted.

3. LEAVE TO AMEND
NOT REQUIRED

Finally, Chaney claims that the district court erred in not allowing him the opportunity to amend his complaint. Chaney acknowledges, however, that he never asked that the district court grant him leave to amend his complaint. The Secretary

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and the sponsors argue that the district court could not abuse its discretion by declining to grant leave to amend when it was not asked to do so.

A number of federal circuit courts have concluded that a trial court cannot abuse its discretion by denying leave to amend when it was not requested. See, e.g., *U.S. ex rel. Shara Ambrosecchia v. Paddock Labs.*, 855 F.3d 949 (8th Cir. 2017); *Fletcher-Harlee v. Pote Concrete Contractors*, 482 F.3d 247 (3d Cir. 2007); *Sinay v. Lamson & Sessions Co.*, 948 F.2d 1037 (6th Cir. 1991); *Coates v. Illinois State Bd. of Ed.*, 559 F.2d 445 (7th Cir. 1977). We, however, do not appear to have ever specifically adopted that rule. And, we have said that “[a]s a general rule, when a court grants a motion to dismiss for failure to state a claim, a party should be given leave to amend absent undue delay, bad faith, unfair prejudice or futility.” *Eadie v. Leise Properties*, 300 Neb. 141, 150, 912 N.W.2d 715, 722 (2018).

But even if we have left open the possibility that a trial court could abuse its discretion by dismissing a complaint without allowing for amendment in the absence of a request for leave to amend, it remains true that, as a practical matter, it will be more difficult for a plaintiff to show that the district court has abused its discretion by doing so. Without such a request, the trial and appellate courts will likely be left to guess at what amendments plaintiff might seek to make and thus have no way to know whether the problems with the dismissed complaint can be cured.

Hargesheimer v. Gale, 294 Neb. 123, 881 N.W.2d 589 (2016), illustrates the difficulty of showing that a district court erred by not allowing leave to amend when the plaintiffs made no request to do so. In that case, the plaintiffs argued that the district court should not have dismissed their complaint with prejudice, but granted them leave to amend. We noted, however, that they did not make a request to amend the complaint and that they did not show how an amendment could cure the problems with the dismissed complaint.

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Like the plaintiffs in *Hargesheimer*, Chaney has not shown how an amendment could have cured his failure to state a claim upon which relief could be granted. Chaney pled that 188 petition signatories wished to withdraw their signatures because they were procured by fraud and that the object statements were not read to signatories. However, we have concluded that the withdrawals were untimely submitted and that Chaney's allegations of fraud, even if they could render the withdrawals timely, were based on an incorrect understanding and application of § 36-328(3). Upon our review of the record, we conclude that Chaney has made no showing how amendment could have cured these defects.

Because Chaney neither moved for leave to amend nor showed how the defects in his complaint could have been cured, the district court did not err by declining to grant him leave to amend.

V. CONCLUSION

For the reasons we have explained, the district court did not err by dismissing Chaney's complaint or by not providing him with the opportunity to amend his complaint. Accordingly, we affirm.

AFFIRMED.

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

IN RE INTEREST OF LEYTON C. AND LANDYN C.,
CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V.
MADISON C., APPELLANT.

949 N.W.2d 773

Filed October 23, 2020. No. S-19-423.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Parental Rights: Proof.** In order to terminate an individual's parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-292 (Reissue 2016) exists and that termination is in the children's best interests.
3. **Juvenile Courts: Minors.** The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests, and the juvenile code must be construed to assure the rights of all juveniles to care and protection.
4. **Parental Rights: Presumptions: Proof.** A child's best interests are presumed to be served by having a relationship with his or her parent. This presumption is overcome only when the State has proved that the parent is unfit.
5. **Parental Rights: Parent and Child.** In proceedings to terminate parental rights, the law does not require perfection of a parent; instead, courts should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child.
6. **Parental Rights.** Last-minute attempts by parents to comply with the rehabilitation plan do not prevent termination of parental rights.

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7. _____. When a parent is unable or unwilling to rehabilitate himself or herself within a reasonable period of time, the child's best interests require termination of parental rights.
8. **Parental Rights: Time.** The 15-month condition contained in Neb. Rev. Stat. § 43-292(7) (Reissue 2016) provides a reasonable timetable for parents to rehabilitate themselves.
9. **Courts: Appeal and Error.** Upon reversing a decision of the Nebraska Court of Appeals, the Nebraska Supreme Court may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach.
10. **Parental Rights.** One need not have physical possession of a child to demonstrate the existence of neglect contemplated by Neb. Rev. Stat. § 43-292(2) (Reissue 2016).
11. **Parent and Child: Child Custody.** A parent's failure to provide an environment to which his or her children can return can establish substantial, continual, and repeated neglect.
12. **Parental Rights: Proof.** Any one of the bases for termination of parental rights codified by Neb. Rev. Stat. § 43-292 (Reissue 2016) can serve as the basis for the termination of parental rights when coupled with evidence that termination is in the best interests of the child.

Petition for further review from the Court of Appeals, PIRTLE, RIEDMANN, and WELCH, Judges, on appeal thereto from the Separate Juvenile Court of Lancaster County, LINDA S. PORTER, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Melanie A. Kirk, of Johnson, Flodman, Guenzel & Widger, for appellant.

Patrick F. Condon, Lancaster County Attorney, Maureen Lamski, and Thomas Gage, Senior Certified Law Student, for appellee.

Joy Shiffermiller, of Shiffermiller Law Office, P.C., L.L.O., guardian ad litem.

HEAVICAN, C.J., MILLER-LEMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

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CASSEL, J.

INTRODUCTION

The juvenile court terminated a mother's parental rights to her children. The Nebraska Court of Appeals reversed, concluding that the State failed to prove that termination was in the children's best interests.¹ We granted the petitions for further review of the children's guardian ad litem (GAL) and the State. Because clear and convincing evidence supported termination of parental rights, we reverse the Court of Appeals' decision and remand the cause with direction.

BACKGROUND

Madison C. is the mother of Leyton C., born in August 2015, and Landyn C., born in February 2017. The children's father has relinquished his parental rights and is not involved in this appeal.

PROCEDURAL BACKGROUND

In July 2016, the State filed a petition seeking to adjudicate Leyton.² The petition alleged that Madison left Leyton in the care of Madison's mother in November 2015 without making proper provisions for his care, that Madison tested positive for methamphetamine in June 2016, that Madison failed to consistently provide a safe and stable home for Leyton, and that Leyton was at risk of harm.

In September 2016, the juvenile court adjudicated Leyton following Madison's plea of no contest to the allegations in the petition. The court ordered Madison not to remove Leyton from his maternal grandparents' home, where Madison and Leyton were residing. It further ordered Madison to refrain from using or possessing controlled substances and to submit to random drug testing.

¹ *In re Interest of Leyton C. & Landyn C.*, 28 Neb. App. 95, 940 N.W.2d 288 (2020).

² See Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2015).

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In a December 1, 2016, dispositional order, the court removed Leyton from Madison’s care. The court placed Leyton’s physical custody with Madison’s mother and allowed Madison to reside with them. The court noted that Madison failed to enter outpatient substance abuse treatment.

In January 2017, the court prohibited any contact between Leyton and Madison’s boyfriend, Jaden R. In February, the State moved for an emergency placement change because Madison’s mother, while accompanied by Leyton, gave Jaden a ride. The court subsequently placed Leyton with Madison’s sister.

In March 2017, the State filed a supplemental petition, seeking to adjudicate Landyn, Madison’s newborn baby, as a juvenile under § 43-247(3)(a) (Reissue 2016). The petition alleged that Landyn was in a situation dangerous to life or limb or injurious to his health or morals because his meconium tested positive for amphetamines, Madison tested positive for methamphetamine, and Madison failed to comply with orders to correct the adjudicated issues regarding Leyton.

In April 2017, the court adjudicated Landyn after Madison pled no contest to the allegations of the supplemental petition. The court placed Landyn in a nonrelative foster home. Leyton joined Landyn at that foster home in July.

In November 2017, after Madison began cooperating with services, the court ordered that she have monitored parenting time with the children. The State later moved for an order approving a change in placement. On January 3, 2018, the court approved placing the children with Madison.

On July 3, 2018, the court entered an order directing placement of the children outside Madison’s home. It referenced Madison’s “failure to participate in virtually all court ordered services over the last three months, including individual counseling/treatment, random drug testing, and family support.”

On October 11, 2018, the State filed a motion for termination of Madison’s parental rights. It alleged that termination of such rights was in the children’s best interests, and it set forth several statutory grounds for termination under Neb. Rev.

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Stat. § 43-292(2), (4), and (6) (Reissue 2016). As to Leyton only, it alleged the ground enumerated in § 43-292(7).

TERMINATION HEARING

The juvenile court conducted a hearing over several dates beginning on December 14, 2018, and concluding on February 26, 2019.

The evidence established that at the time of Leyton's birth, Madison was 18½ years old and living with her parents. Approximately 1 month later, in September 2015, Madison met Jaden. Their relationship moved quickly. In November, Madison accompanied Jaden to South Dakota for 3 days. Upon her return, she was cited for child abandonment and unlawful use of a motor vehicle. At trial, Madison did not recall admitting to a police officer that she had left Leyton for approximately 18 days.

Jaden became controlling. Madison testified that he would not let her return home to see Leyton or call her family. When she was allowed to see her family, it was usually for "30 minutes at max" and in Jaden's presence. Madison testified that starting in 2016, she would be "lucky [to] see [Leyton] at all during the week." Because remarks by Jaden caused Madison to be concerned for Leyton's safety, she left Leyton with her family.

In January 2016, Jaden began physically abusing Madison. He punched and kicked her and used other implements to hurt her. He threatened her life at knifepoint. One witness characterized Jaden's abuse of Madison as "horrific" and "severe." Madison testified that Jaden hurt her several times a week until May 2017, when he became incarcerated.

According to Madison, Jaden made her use methamphetamine starting in 2016. But she admitted that not all of the methamphetamine she used with Jaden was against her will. After she tested positive for methamphetamine in June, she claimed that she had been forced to use the drug. When both Madison and Landyn tested positive for methamphetamine in approximately March 2017, Madison maintained that a

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friend had put something in her drink. Madison's case manager from July 2016 to May 2017 testified that Madison never admitted to "knowingly" using methamphetamine.

In June 2016, Madison completed a substance abuse evaluation which recommended "Level One Outpatient Therapy." Madison did not engage in the recommended outpatient treatment or in individual therapy. According to Madison's case manager, Madison "wanted to get through the pregnancy and ensure that Landyn would be born safely before engaging in services." Her cooperation with drug testing was inconsistent. Madison's case manager testified that she missed many tests between November 2016 and April 2017.

Emily Goodman, a licensed independent mental health practitioner, initially met with Madison in March 2017 to engage in outpatient drug and alcohol treatment. Goodman set up recurring appointments to meet with Madison twice per week, but Madison did not attend between March 10 and June 20. As of July 14, when weekly therapy was recommended, Madison maintained regular attendance, not missing an appointment until September 29. Goodman believed Madison had one of the most severe cases of post-traumatic stress disorder (PTSD) that Goodman had seen. Goodman last met with Madison in March 2018.

Madison agreed that she did not engage in any services until the fall of 2017. She explained that "Jaden was still around so, I mean, it was kind of difficult and I didn't know what was going on." After Madison's parenting time was reduced to once per week in August 2017, Madison's participation improved and she began attending visits. Her parenting time was then increased to twice per week. In November, the Department of Health and Human Services recommended monitored parenting time because of Madison's compliance with services.

After placement of the children with Madison in January 2018, Madison's participation in services waned. She met with Goodman once in January, even though it was recommended that they meet weekly. She ceased regularly submitting to

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drug testing and attending team meetings. When Goodman brought up Madison's noncompliance with drug testing, Madison replied that she was tired of others being involved in her life and "just wanted to be done with all of it." Madison relapsed using methamphetamine in approximately March, explaining that she feared losing her children and wanted to "numb [her] feelings."

In approximately April 2018, Madison began a relationship with Riley S. She was not honest with her caseworker or her treatment team about the relationship. At trial, she admitted using drugs with him. Because Riley "had a warrant out for assault, . . . he was not allowed to be around the [children]." Madison admitted that Riley was in her apartment during a visit.

Gay Malone, a child and family service specialist with the Department of Health and Human Services, began working on Madison's case in May 2017. At that time, services implemented for Madison included random drug screening, supervised visitation, and individual therapy. Madison did not consistently participate in those services. Malone testified that Madison either was unavailable for visits or was emotionally upset at such visits about trying to pay rent and having the case ongoing. In May 2018, "drop-ins" were implemented in an effort to ensure the children's safety, but Madison did not cooperate with the drop-ins.

On July 2, 2018, the children were removed from Madison's care. Hair follicle testing on the children completed on July 6 revealed that Leyton tested positive for exposure to methamphetamine and marijuana and Landyn tested positive for exposure to marijuana. Madison denied using methamphetamine, but stated that her friends had used the drug in her apartment. At the termination trial, however, Madison admitted that Leyton tested positive for methamphetamine because she used the drug in her residence.

In July 2018, Sarah Worley began providing individual therapy to Madison, focusing on PTSD and substance use.

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Madison initially missed four sessions in July and August and did not attend on a consistent basis. Madison began drug testing on July 24, but she participated infrequently in August.

Worley completed an updated substance abuse evaluation, which recommended residential treatment. Upon Madison's arrival for residential treatment in August, she tested positive for methamphetamine, amphetamines, marijuana, and opiates. Madison ultimately left residential treatment after a few days, because someone she knew at the time of her abuse was at the program. Worley believed that having such a person present would have made treatment more difficult. At trial, Madison also testified that she left that treatment because it "wasn't [her] niche," explaining that residential treatment "was too much." Worley helped Madison find an alternative way to address her substance abuse needs. Approximately a week after Madison left residential treatment, she began intensive outpatient treatment. The record is unclear whether she began that treatment in August or September.

The court received recordings of September 2018 telephone calls between Madison and Riley while he was in jail and of a jail visit with Riley. At the time of the telephone calls, Madison had told Worley that she was no longer dating Riley. In the recordings, Madison and Riley expressed their love for one another and their desire to move out of state and be together forever.

The conversations between Madison and Riley concerned Malone. One telephone call occurred during a visit, and Malone believed she could hear Leyton's voice. Malone was disturbed that Madison's mother—who had supported Madison's relationship with Jaden—was aware that Madison accepted a jail telephone call from Riley. Malone noted that Madison and Riley talked as though he had stayed in Madison's apartment since the spring of 2018. Malone was troubled that Madison would not sign a release to allow her most recent evaluator to talk to Madison's parents—with whom Madison was reportedly living at the time. Malone questioned whether Madison

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was truly living with her parents because Madison said during one of the calls that she needed to get her belongings from Riley's grandmother's house. Malone testified that when she viewed the jail video between Riley and Madison, she "d[id] not see a stress — [PTSD] reaction" when Madison was telling Riley about Jaden's claims of being violent in prison.

In September 2018, Madison tested positive for methamphetamine. In October, Madison twice tested positive for clonazepam, a medication for which she did not have a prescription. Worley was troubled that Madison did not take responsibility for the clonazepam result. At trial, Madison attributed testing positive for clonazepam to taking one of Riley's medications. She explained that although she "broke up with him after he got outta jail," she "hung out with him" in October. Worley testified that Madison told her in September that she had broken up with Riley "because of his drug use and [because] he wasn't a good influence in her life." Madison tested positive for morphine in December. Worley believed that the low level of drug detected was consistent with Madison's report of having eaten poppyseeds.

Worley testified that Madison had made excellent progress in the 3 months prior to trial. Worley explained that Madison had been "continuously attending treatment," had been participating fully, and had been honest about what had happened to her. Worley noted that Madison had completed intensive outpatient treatment and that Madison continued to engage with relapse prevention services. Worley felt that Madison's prognosis was "good." Although Madison had made progress during individual therapy, Worley testified that Madison still had work to do with regard to her PTSD.

A registered nurse who has worked extensively in the area of domestic violence offered general testimony. She testified that victims of domestic violence sometimes deny or minimize what is occurring or want to disbelieve that someone could do such things to them. Recovery takes time, and substance abuse is often seen along with domestic violence because drug

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usage is a coping mechanism. According to the registered nurse, if there are coexisting issues of domestic violence and substance abuse, it is expected that the recovery time would be longer. Recovery from domestic violence can be manifested in different ways, including the ability to function on a daily basis, obtaining employment, managing emotional or psychological symptoms from the violence, or managing substance abuse. The registered nurse was not familiar with Madison aside from “very limited information” and had no knowledge whether any of her testimony applied to Madison.

Obtaining employment had long been a goal set for Madison. A November 2017 order directed her to work with family support services regarding gaining employment. But Madison did not take advantage of the services offered. Malone was unaware of Madison’s having any job prior to the filing of the motion to terminate parental rights in October 2018. That month, Madison obtained a job, working 2 days a week. She was unemployed at the time of the February 2019 hearing.

The evidence regarding Madison’s parenting of the children was positive. Goodman testified that Madison was able to adequately and appropriately parent her children, and she did not observe anything leading her to believe that Madison was a safety concern or a risk to the children. A family support worker similarly testified that she never had to intervene due to safety concerns. About the only concern expressed by any witness was that Madison “wasn’t fully parenting the children” because her family often attended visits and interacted with the children.

Madison believed that she had changed and that she would no longer endanger her children. Madison testified that she knows how to ask for help and that she does not use drugs. She recognized that Riley was not a good influence and should not be around her children.

Malone believed termination of Madison’s parental rights was in the children’s best interests. She explained that the children deserve the stability that comes from permanency and

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that both children had been out of Madison's care for 16 months of the most recent 22 months. Malone testified that Madison had been unable to demonstrate the sustained change that was necessary for her to provide a stable and permanent home for the children. Malone recognized that Madison demonstrated a change from August 2017 through February 2018, but that Madison then stopped participating in services, resulting in the children's removal from her care. Malone did not believe that survivors of domestic violence should be given extra time to reunify with their children. She explained that "children don't understand that the reason that they're not reunified . . . is because their mother was a survivor of domestic violence, or used substances to delay her recovery."

Other witnesses provided insight on the children's interests. Goodman testified that "the more removals from a primary caregiver[,] the increase of traumatic response for children." Worley testified that being in foster care for an extended period can damage a child's "sense of self and . . . belonging." Leyton's therapist testified that it was "especially harmful for younger children to move back and forth between home environments because . . . the time of attachment and significant development for most children occurs between those ages of zero and five." Disruption may cause a young child to believe that he or she is unsafe or that the world is unsafe. She testified that Leyton needed permanency "as immediately as possible," noting that he had been removed twice and that he was very young.

JUVENILE COURT'S DECISION

In April 2019, the court entered an order terminating Madison's parental rights. The court observed that Madison "has struggled with honesty when it comes to her own use of controlled substances and her relationships with violent partners" throughout this case. It stated that the testimony of Madison and Riley that they had ended their relationship "did not appear credible and appeared to be situationally motivated by the pending termination of parental rights rather than

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any honest recognition by [Madison] that he was an unhealthy influence for her or for her children.”

The court found that the State proved by clear and convincing evidence that termination of Madison’s parental rights was warranted. It found the State proved grounds for termination under § 43-292(2), (4), and (6) as to both children and under § 43-292(7) as to Leyton. The court also found that termination of parental rights was in the children’s best interests.

COURT OF APPEALS’ DECISION

Upon Madison’s appeal, a majority of the Court of Appeals determined that the juvenile court erred in concluding that termination of Madison’s parental rights was in the children’s best interests. Because the majority’s resolution on that issue was dispositive, it did not consider whether the State proved a statutory ground for termination.

The majority found that Madison demonstrated a continued improvement in her parenting skills and had established a beneficial relationship with her children. The majority recognized that it would have been in the children’s best interests for Madison to end her relationship with Jaden and engage in services, but stated that “her inability or unwillingness to do so must be viewed in consideration of her young age and the abusive relationship in which she was transfixed.”³ After evaluating Madison’s progress “in the context of the situation in which the parent exists,” the majority found that termination of Madison’s parental rights “came too quickly.”⁴ The majority reasoned that “[g]iven Madison’s young age and trauma experience, we cannot find that the timeline of this case provides her with a ‘reasonable time’ in which to rehabilitate herself.”⁵

³ *In re Interest of Leyton C. & Landyn C.*, *supra* note 1, 28 Neb. App. at 107, 940 N.W.2d at 296.

⁴ *Id.* at 109, 940 N.W.2d at 297.

⁵ *Id.* at 110, 940 N.W.2d at 298.

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The dissenting judge noted that the juvenile court specifically recognized Madison had struggled with honesty throughout the case. The judge found “particularly concerning . . . Madison’s inability to separate herself from the type of unhealthy relationships that precipitated many of her problems.”⁶

We granted the petitions for further review of the GAL and the State.

ASSIGNMENTS OF ERROR

The GAL assigns that the Court of Appeals erred in (1) finding that Madison had made “‘continued progress’” in correcting the conditions that led to the adjudication, (2) finding that the State failed to prove by clear and convincing evidence that Madison was unable or unwilling to rehabilitate herself within a reasonable time, and (3) finding that the State failed to prove by clear and convincing evidence that the children’s best interests were served by terminating Madison’s parental rights.

The State assigns that the Court of Appeals erred in (1) failing to follow the long line of cases establishing that juveniles should not have to wait for uncertain parental maturity⁷ and (2) failing to give deference to the trial judge’s assessment of credibility and relying heavily on the testimony of Madison.

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. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.⁸

⁶ *Id.* at 115, 940 N.W.2d at 301 (Pirtle, Judge, dissenting).

⁷ *In re Interest of Alec S.*, 294 Neb. 784, 884 N.W.2d 701 (2016); *In re Interest of Jahon S.*, 291 Neb. 97, 864 N.W.2d 228 (2015); *In re Interest of Octavio B. et al.*, 290 Neb. 589, 861 N.W.2d 415 (2015).

⁸ *In re Interest of Vladimir G.*, 306 Neb. 127, 944 N.W.2d 309 (2020).

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ANALYSIS

[2] In order to terminate an individual's parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the children's best interests.⁹ The Court of Appeals began with the best interests component, finding it to be dispositive. We likewise begin our analysis by considering the children's best interests.

BEST INTERESTS

[3] The GAL and the State collectively assign five errors which essentially challenge the Court of Appeals' determination that the juvenile court erred in finding that the State proved by clear and convincing evidence that terminating Madison's parental rights was in the children's best interests. We are mindful that the foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests, and the juvenile code must be construed to assure the rights of all juveniles to care and protection.¹⁰

[4] A child's best interests are presumed to be served by having a relationship with his or her parent. This presumption is overcome only when the State has proved that the parent is unfit.¹¹ In the context of the constitutionally protected relationship between a parent and a child, parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.¹² The best interests analysis and the parental fitness analysis are separate

⁹ *In re Interest of Donald B. & Devin B.*, 304 Neb. 239, 933 N.W.2d 864 (2019).

¹⁰ *In re Interest of Veronica H.*, 272 Neb. 370, 721 N.W.2d 651 (2006).

¹¹ *In re Interest of Alec S.*, *supra* note 7.

¹² *Id.*

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inquiries, but each examines essentially the same underlying facts as the other.¹³

The children's best interests and Madison's fitness to parent them were affected by her drug use and her choice of intimate partners. There is no dispute that Madison began using methamphetamine in 2016, that Landyn's meconium tested positive for amphetamines, and that hair follicle testing of the children in July 2018 showed that Leyton had been exposed to methamphetamine and marijuana and that Landyn had been exposed to marijuana. Goodman testified that parents who are actively under the influence of methamphetamine typically show difficulty providing a safe environment for their children. At the termination trial, evidence was adduced regarding three of Madison's relationships with men. All three men had used drugs and had spent time in jail. Such relationships put the children's safety at risk.

[5] We have stated that in proceedings to terminate parental rights, the law does not require perfection of a parent; instead, courts should look for the parent's continued improvement in parenting skills and a beneficial relationship between parent and child.¹⁴ The GAL assigns that the Court of Appeals erred in finding that "Madison has made continued progress"¹⁵ and that "the State has failed to prove by clear and convincing evidence that Madison is unable or unwilling to rehabilitate herself within a reasonable time."¹⁶ We agree.

[6] Madison had been formally under the juvenile court's jurisdiction since Leyton's adjudication in September 2016. It was not until approximately a year later that she began complying with services implemented to correct the conditions leading to the adjudication. Her compliance lasted for

¹³ *Id.*

¹⁴ *In re Interest of Joseph S. et al.*, 291 Neb. 953, 870 N.W.2d 141 (2015).

¹⁵ *In re Interest of Leyton C. & Landyn C.*, *supra* note 1, 28 Neb. App. at 111, 940 N.W.2d at 298.

¹⁶ *Id.* at 112, 940 N.W.2d at 299.

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roughly 5 months and resulted in the return of her children to her care. Madison then independently cared for the children for approximately 6 months—from January to July 2018—and became overwhelmed after 2 months. Her progress and participation following the children’s return was short lived, and the children were removed in July. The Court of Appeals focused on Madison’s progress from September, when she began substance abuse treatment, through the termination hearing that concluded in February 2019. But Madison began that substance abuse treatment 1 month before the filing of the termination motion. Since at least February 1, 2017, she had been ordered by the court to complete outpatient treatment for substance abuse. Last-minute attempts by parents to comply with the rehabilitation plan do not prevent termination of parental rights.¹⁷

The Court of Appeals excused Madison’s initial inability to progress due in part to her abusive relationship with Jaden. The court stated that Madison made “overall progress” after ending that relationship.¹⁸ But it took Madison several months after ending her relationship with Jaden to begin participating with services. And, as we noted above, shortly after the children were placed with Madison, her progress went downhill. She used methamphetamine. She stopped cooperating with drug tests and other services. She avoided communication with her caseworker. Rather than showing continued progress, Madison’s involvement in services has fluctuated. At the time of trial, she was on an upward trend, but her history makes it difficult to believe she is committed to make sustained progress. While we are sensitive to the abuse suffered by Madison, our focus is on the children’s best interests.

The Court of Appeals also downplayed Madison’s “questionable choices,” stating that “most of these choices occurred

¹⁷ *In re Interest of Alec S.*, *supra* note 7.

¹⁸ *In re Interest of Leyton C. & Landyn C.*, *supra* note 1, 28 Neb. App. at 108, 940 N.W.2d at 297.

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before she engaged in mental health and substance abuse treatment.”¹⁹ We have trouble reconciling that statement with the evidence that Madison tested positive for methamphetamine in September 2018, tested positive for a nonprescribed medication twice in October, and was still spending time with Riley in October following his release from jail.

The State contends that the Court of Appeals erred by taking Madison’s testimony at face value and failing to consider the juvenile court’s assessment of credibility. The juvenile court specifically stated that Madison had “struggled with honesty” regarding her drug use and intimate partners. Even so, the Court of Appeals expressed reluctance to “discredit” Madison’s denial of any drug use after early September 2018.²⁰

The evidence warrants deferring to the juvenile court’s assessment of Madison’s credibility. According to Goodman, honesty is pivotal to having a positive outcome in a therapeutic relationship. It appears that after Madison told Goodman that she “wanted to find somebody who wasn’t involved in any criminal activity, that did not use any drugs,” Madison became involved with Riley—somebody involved in criminal activity who used drugs. At trial, Madison admitted that she was not honest with her caseworker or her treatment team about her relationship with Riley. Worley discussed the importance of being honest in treatment. Although there was evidence that Madison and Riley discussed living together and exchanging rings, Madison had not shared that information in therapy with Worley. Madison lied about Riley’s being in her apartment during a visit with the children. She admitted lying to the court about using drugs with Riley and lying to her family about her drug use. Worley believed that Madison was honest with her as far as drug use. Thus, Worley did not think that Madison voluntarily used drugs prior to March 2018. But at trial, Madison admitted that some of her drug use with Jaden was voluntary. And Madison told an evaluator in

¹⁹ *Id.* at 109, 940 N.W.2d at 297.

²⁰ *Id.* at 110, 940 N.W.2d at 298.

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November that she relapsed on methamphetamine in August, but the evidence showed that she used in March, April, and May.

Although the Court of Appeals highlighted Madison's youth and expressed awareness that "children should not be suspended in foster care awaiting uncertain parental maturity,"²¹ we agree with the State that this is not a case where the children should be forced to forgo permanency and linger in foster care. Leyton has been placed with Madison's mother, then with Madison's sister, then with a nonrelative foster family, then with Madison, and then back to the foster family. Landyn has been placed with the nonrelative foster family, then with Madison, and then back to the foster family. Goodman testified that "the more removals from a primary caregiver[,] the increase of traumatic response for children." Leyton's therapist testified that Leyton was experiencing anxiety and had a history of nightmares and night terrors.

[7,8] We have stated that when a parent is unable or unwilling to rehabilitate himself or herself within a reasonable period of time, the child's best interests require termination of parental rights.²² The 15-month condition contained in § 43-292(7) provides a reasonable timetable for parents to rehabilitate themselves.²³ Madison has failed to do so. Upon our de novo review of the record, we conclude that the Court of Appeals erred in finding that the State failed to prove by clear and convincing evidence that the termination of Madison's parental rights was in the children's best interests. We reverse the Court of Appeals' decision in that regard.

²¹ *Id.* at 112, 940 N.W.2d at 299.

²² See, e.g., *In re Interest of Walter W.*, 274 Neb. 859, 744 N.W.2d 55 (2008); *In re Interest of Destiny A. et al.*, 274 Neb. 713, 742 N.W.2d 758 (2007); *In re Interest of Phoenix L.*, 270 Neb. 870, 708 N.W.2d 786 (2006), *disapproved on other grounds*, *In re Interest of Destiny A. et al.*, *supra* note 22.

²³ See *In re Interest of Alec S.*, *supra* note 7.

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STATUTORY GROUNDS

[9] Upon reversing a decision of the Court of Appeals, we may consider, as we deem appropriate, some or all of the assignments of error the Court of Appeals did not reach.²⁴ Due to its conclusion that the State failed to prove termination was not in the children’s best interests, the Court of Appeals did not address whether statutory grounds for termination existed.

The juvenile court determined that the State proved grounds as to both children under § 43-292(2), (4), and (6), and as to Leyton under § 43-292(7). We begin with consideration of whether the State proved by clear and convincing evidence that Madison “substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection.”²⁵

[10] The evidence presented at the termination hearing demonstrated that Madison failed to provide her young children with necessary parental care and protection for a prolonged period of time. We recognize that one need not have physical possession of a child to demonstrate the existence of neglect contemplated by § 43-292(2).²⁶ During Madison’s relationship with Jaden, which lasted over 1½ years, she left Leyton with her parents, visiting him infrequently. Landyn was placed out of Madison’s care for nearly the first year of his life. He has spent a mere 6 months in Madison’s care.

[11] A parent’s failure to provide an environment to which his or her children can return can establish substantial, continual, and repeated neglect.²⁷ Madison’s drug use has impeded the ability to return the children to her care. She began using methamphetamine prior to Leyton’s adjudication and continued using the drug up until the month prior to the filing of the motion to terminate parental rights. She continued using

²⁴ *McEwen v. Nebraska State College Sys.*, 303 Neb. 552, 931 N.W.2d 120 (2019).

²⁵ See § 43-292(2).

²⁶ See *In re Interest of Joseph S. et al.*, *supra* note 14.

²⁷ *Id.*

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this drug even though services were offered to help her and even after beginning substance abuse treatment. Further, she exposed the children to drugs as evidenced by Landyn's meconium testing positive and by the results of their hair follicle tests. She also subjected the children to individuals who posed a danger and who used methamphetamine and other drugs. Madison failed to consistently participate in family services offered to help her reunite with her children.

[12] The State proved by clear and convincing evidence that Madison neglected to provide necessary parental care and protection for her children. Any one of the bases for termination of parental rights codified by § 43-292 can serve as the basis for the termination of parental rights when coupled with evidence that termination is in the best interests of the child.²⁸ Having determined that the State proved a statutory ground enumerated in § 43-292, we need not consider the sufficiency of the evidence concerning the other statutory grounds for termination identified by the juvenile court.²⁹ Because the State proved both that a statutory ground existed for termination of Madison's parental rights and that termination of such rights was in the children's best interests, the Court of Appeals erred by reversing the juvenile court's judgment.

CONCLUSION

Upon our de novo review of the record, we conclude that the State adduced clear and convincing evidence that termination of Madison's parental rights was in the children's best interests. Because we also determine that the State proved a statutory ground for termination, we reverse the decision of the Court of Appeals and remand the cause with direction to affirm the judgment of the juvenile court.

REVERSED AND REMANDED WITH DIRECTION.

²⁸ *In re Interest of Noah C.*, 306 Neb. 359, 945 N.W.2d 143 (2020).

²⁹ See *id.*

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

STATE OF NEBRASKA EX REL. KEVIN W. MALONE,
APPELLANT, v. MEGAN BALDONADO-BELLAMY,
IN HER OFFICIAL CAPACITY AS OFFICIAL COURT
REPORTER, DISTRICT COURT FOR DOUGLAS
COUNTY, NEBRASKA, AND JOHN FRIEND,
IN HIS OFFICIAL CAPACITY AS CLERK OF
THE DISTRICT COURT FOR DOUGLAS
COUNTY, NEBRASKA, APPELLEES.

950 N.W.2d 81

Filed October 23, 2020. No. S-19-856.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is an appellate court's duty to determine whether it has jurisdiction to decide them.
3. **Mandamus.** A person choosing to seek speedy relief by a writ of mandamus pursuant to Neb. Rev. Stat. § 84-712.03(1)(a) (Cum. Supp. 2018) must follow the procedural requirements set forth in Neb. Rev. Stat. §§ 25-2156 through 25-2169 (Reissue 2016).
4. _____. An action to procure the issuance of a writ of mandamus is not begun until a motion and affidavit, or a petition verified positively, is filed in the district court.
5. **Mandamus: Jurisdiction.** The filing of a motion and affidavit or a verified petition is a jurisdictional requirement before a district court may issue a writ of mandamus, and until such filing is made, the court does not have jurisdiction over an action for writ of mandamus.
6. **Jurisdiction: Appeal and Error.** When a trial court lacks 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.

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Appeal from the District Court for Douglas County: TIMOTHY P. BURNS, Judge. Appeal dismissed.

Bradley H. Supernaw and Richard L. Boucher, of Boucher Law Firm, for appellant.

Douglas J. Peterson, Attorney General, and Danielle Rowley for appellee Megan Baldonado-Bellamy.

Donald W. Kleine, Douglas County Attorney, Joshua R. Woolf, Tess M. Moyer, and Timothy Coffey, Senior Certified Law Student, for appellee John Friend.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE, and PAPIK, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Kevin W. Malone appeals the order of the district court for Douglas County which declined to issue a writ of mandamus which he sought pursuant to Neb. Rev. Stat. § 84-712 et seq. (Reissue 2014 & Cum. Supp. 2018) (public records statutes) in order to obtain an audio recording of his criminal trial. The district court determined that the public records statutes were inapplicable to Malone's request for the audio recording and that access to the record of court proceedings was governed by court rules rather than the public records statutes. Malone claims that the court erred when it determined that the public records statutes did not entitle him to a copy of the audio recording of his trial.

The court reporter and the clerk of the district court from whom Malone sought to obtain the audio recording argue on appeal that in addition to the basis upon which the district court denied mandamus, denial was proper for other reasons, including the contention that the district court lacked jurisdiction because Malone failed to file a verified petition or a motion and affidavit in support of his request for a writ of mandamus. We agree that the district court lacked jurisdiction

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of this action for writ of mandamus, and as a result, we lack jurisdiction of this appeal. We therefore dismiss this appeal for lack of jurisdiction.

STATEMENT OF FACTS

Following a jury trial in 2017, Malone was convicted of motor vehicle homicide, manslaughter, leaving the scene of a personal injury accident resulting in serious bodily injury or death, and driving without an ignition interlock device. On appeal, the Nebraska Court of Appeals rejected Malone's claims of insufficient evidence and excessive sentences and affirmed his convictions and sentences. *State v. Malone*, 26 Neb. App. 121, 917 N.W.2d 164 (2018).

During the direct appeal of his convictions, Malone reviewed the bill of exceptions from his trial. Following his review, Malone believed that the trial record was incomplete. Malone had testified in his defense at the trial, and he believed that an exchange between himself and the prosecutor on cross-examination had been omitted. Malone thereafter made efforts to confirm his suspicion that the exchange had been omitted and to correct the record.

In April 2018, Malone sent a letter to Megan Baldonado-Bellamy, the court reporter who had been assigned to his trial. In the letter, Malone stated his belief that the exchange was missing. He asked Baldonado-Bellamy to check the audio recording of the trial and to provide documentation that the exchange had been made part of the record. Baldonado-Bellamy replied to Malone's letter with a letter in which she stated that she had listened to the audio recording and that the transcript that had been provided was accurate.

In June 2018, Malone sent a second letter to Baldonado-Bellamy and he sent a request to the district court; in both documents, Malone requested that Baldonado-Bellamy provide him copies of the audio recording made of his trial. The judge in Malone's criminal trial replied with a letter in which she stated that she had "reviewed the record" and that Malone's "claim that there is testimony missing from the

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official record/Bill of Exceptions is unfounded.” The judge concluded that Malone had been “provided with the bill of exceptions as requested.”

In July 2018, Malone filed a document in his criminal case in which he requested that the clerk of the district court provide an audio recording of his trial. Malone also sent a letter to John Friend, the clerk of the district court for Douglas County, in which he described the letter as a “follow up” to the court filing and requested, *inter alia*, copies of the audio recording of his trial.

Also in July 2018, Malone sought assistance from the Nebraska Attorney General’s office in obtaining the audio recording of his trial. An assistant attorney general responded to Malone’s request with a letter stating the Attorney General’s office had considered Malone’s request in accordance with the public records statutes and had concluded that the request for an audio recording of his trial was not covered by the public records statutes and that therefore, his request required no further action. Malone sent a letter to the assistant attorney general expressing his disagreement with her conclusions; the assistant attorney general responded with a letter confirming her earlier conclusions but informing Malone he had “the option under Neb. Rev. Stat. § 84-712.03 to pursue this matter in a court of law.”

On January 17, 2019, Malone filed a “Complaint for Writ of Mandamus” in the district court. He asserted that the action was authorized pursuant to § 84-712.03(1)(a), which provides that “[a]ny person denied any rights granted by sections 84-712 to 84-712.03 may elect to . . . [f]ile for speedy relief by a writ of mandamus in the district court within whose jurisdiction the state, county, or political subdivision officer who has custody of the public record can be served[.]” Malone named Baldonado-Bellamy and Friend as respondents. Malone alleged that he was “entitled to a p[er]emptory writ of mandamus” requiring Baldonado-Bellamy and Friend to provide copies or allow inspection of certain records he had requested in accordance with the public records statutes.

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Malone attached copies of his April 2018 letter to Baldonado-Bellamy and his July 2018 letter to Friend to support his assertion that both had “a clear duty to provide the requested documents pursuant to the Nebraska Public Records Act.” Malone also attached a copy of the July 2018 letter from the Attorney General’s office, as well as affidavits of four persons who each stated that he or she had been present at Malone’s trial and had recalled the exchange between Malone and the prosecutor that Malone asserted was omitted from the bill of exceptions. Malone’s “Complaint for Writ of Mandamus” did not include a notarized verification.

On July 15, 2019, Baldonado-Bellamy filed a suggestion of mootness and motion to dismiss. She alleged in the motion and stated in an affidavit that she had resigned her employment as an official court reporter for the district court in December 2017 and that at that time, she retained possession of all shorthand notes and tape recordings she had used to make the records for cases in which she had served as the official court reporter.

Baldonado-Bellamy stated that prior to July 9, 2019, she was unaware of a court rule that provided that upon termination of her employment, she was required to transfer materials used to make records to the clerk of the district court. Baldonado-Bellamy stated that after learning of the rule, she delivered to the clerk of the district court all shorthand notes and tape recordings she had used to make the records for all cases in which she had served as official court reporter. She asserted that because she had relinquished control of all shorthand notes and tape recordings related to Malone’s criminal trial, Malone’s “Complaint for Writ of Mandamus” was moot as to her because she was no longer the custodian of the records sought. Malone objected to Baldonado-Bellamy’s suggestion of mootness and motion to dismiss, and after a hearing, the court overruled the motion without prejudice.

Baldonado-Bellamy filed an amended answer in which she generally denied that she had a duty under the public records statutes to provide the audio recordings to Malone. She

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asserted additional defenses, including, *inter alia*, an assertion that Malone’s “Complaint is not made upon affidavit or verified petition as required by Neb. Rev. Stat. § 25-2160.” Friend also filed an answer in which he generally denied that he had a duty under the public records statutes and in which he asserted various defenses. Trial was held and included testimony by Malone, Baldonado-Bellamy, and Friend.

Following the trial, the district court entered an order in which it denied and dismissed Malone’s action for writ of mandamus. The court stated that although § 84-712(1) provides that a person may seek a public record, the statute clearly provides that a person may do so “[e]xcept as otherwise expressly provided by statute” The court then cited Neb. Rev. Stat. § 24-1003 (Reissue 2016), which states in part that “[t]he [Nebraska] Supreme Court shall provide by rule for the recording and preservation of evidence in all cases in the district . . . courts and for the preparation of transcripts and bills of exceptions.” The court also cited Neb. Rev. Stat. § 25-1140 (Reissue 2016), which provides in part that the “procedure for preparation, settlement, signature, allowance, certification, filing, and amendment of the bill of exceptions shall be regulated and governed by rules of practice prescribed by the Supreme Court.” The court noted that pursuant to such statutory authority, this court had adopted a detailed set of rules dealing with court reporting personnel and the recording, preparation, and preservation of court records made in district courts. The court stated that such rules included a uniform set of procedures for the judge, counsel, parties, and nonparties to request the court reporter to prepare a transcript of any proceeding or, for purposes of an appeal, a bill of exceptions. The court noted in particular that Neb. Ct. R. App. P. § 2-105(B)(5) (rev. 2018) provided a procedure for counsel or parties to follow if they believed the bill of exceptions was incorrect or needed to be amended.

The district court concluded that the public records statutes were inapplicable to Malone’s request for the audio recording

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of his trial, because the rules promulgated by this court pursuant to statutory authority have “expressly provided” the procedure by which one can obtain a record, transcript, or a bill of exceptions from a trial from the court reporter in the district court, as well as the procedure to amend a bill of exceptions a party believes to be incorrect. The court further reasoned that if a person could request an audio recording of a trial pursuant to the public records statutes, it would circumvent the detailed rules adopted by this court. The court concluded that because the public records statutes were inapplicable to Malone’s request for an audio recording of his trial, Malone’s petition for a writ of mandamus should be denied and dismissed and that it need not consider other issues raised by the parties.

Malone appeals the district court’s order which denied his petition for a writ of mandamus.

ASSIGNMENTS OF ERROR

Malone claims that the district court erred when it found that the court reporter’s notes and audio recordings from his trial were not public records under § 84-712.01(1) and when it found that the court rules providing for the production and amendment of bills of exceptions “expressly provide” that audio recordings and court reporter’s notes are to be excepted from the public records statutes.

Baldonado-Bellamy argues in her brief, inter alia, that the district court lacked jurisdiction to consider Malone’s request for writ of mandamus, because he failed to file either a verified petition or a motion and affidavit to support issuance of a writ of mandamus.

STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court’s decision. *In re App. No. C-4973 of Skrdlant*, 305 Neb. 635, 942 N.W.2d 196 (2020).

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ANALYSIS

[2] Before reaching the legal issues presented for review, it is our duty to determine whether we have jurisdiction to decide them. *Id.* In this case, Baldonado-Bellamy asserts that we lack jurisdiction over this appeal, because the district court lacked jurisdiction over Malone’s action for writ of mandamus for the reason that Malone failed to file either a motion and affidavit or a verified petition as required by governing mandamus law. We agree.

Baldonado-Bellamy cites Neb. Rev. Stat. § 25-2160 (Reissue 2016), which provides in part that “[t]he motion for the writ [of mandamus] must be made upon affidavit.” She also cites *State ex rel. Van Cleave v. City of No. Platte*, 213 Neb. 426, 430, 329 N.W.2d 358, 361 (1983), in which we held that when “neither a motion and affidavit nor a petition positively verified has been filed, the trial court was without authority to issue the peremptory writ of mandamus.” Baldonado-Bellamy argues that to the extent Malone’s “Complaint for Writ of Mandamus” may be considered a petition, it was not positively verified, and that to the extent it may be considered a motion, it was not accompanied by a supporting affidavit sworn to by Malone. She notes that Malone’s pleading attached affidavits of fact witnesses but that Malone did not swear to or file an affidavit setting forth facts to establish his right to the writ of mandamus.

Malone does not dispute that he did not file either a verified petition or a motion and affidavit as required by § 25-2160. Instead, he argues that he filed for mandamus under the public records statutes, which do not contain the same requirement. He further argues that any jurisdictional defect was cured because the court held a hearing at which he provided sworn testimony to support his request.

[3] Malone filed his petition pursuant to § 84-712.03(1)(a), which provides that “[a]ny person denied any rights granted by sections 84-712 to 84-712.03 may elect to . . . [f]ile for speedy relief by a writ of mandamus in the district court within whose jurisdiction the state, county, or political subdivision

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officer who has custody of the public record can be served[.]” We have said, “In the context of a public records denial, a district court’s jurisdiction over a writ of mandamus is governed by § 84-712.03, and such jurisdiction does not turn on whether the claim advanced by the relator has merit.” *State ex rel. BH Media Group v. Frakes*, 305 Neb. 780, 789, 943 N.W.2d 231, 241 (2020). Although jurisdiction does not turn on the merits of the claim advanced, § 84-712.03(1)(a) provides that a person denied rights under the public records statutes may seek relief by a writ of mandamus in a district court. The procedure for a writ of mandamus in district courts is governed by Neb. Rev. Stat. §§ 25-2156 through 25-2169 (Reissue 2016), and we read the reference to “writ of mandamus in the district court” in § 84-712.03(1)(a) as incorporating such statutes to govern the procedure for obtaining the relief authorized by § 84-712.03(1)(a). Therefore, a person choosing to seek speedy relief by a writ of mandamus pursuant to § 84-712.03(1)(a) must follow the procedural requirements set forth in §§ 25-2156 through 25-2169.

In *State ex rel. Krieger v. Board of Supervisors*, 171 Neb. 117, 120-21, 105 N.W.2d 721, 724-25 (1960), we summarized the statutory procedure in a mandamus action as follows:

The regular procedure in mandamus, after a petition therefor has been filed, is to make an application for a writ by motion supported by affidavit, whereupon the court may grant the writ without notice, may require notice to be given, or may grant an order to show cause why the writ should not be allowed. See § 25-2160 When the right to the writ is clear, and it is apparent that no valid excuse can be given for failure to perform the duty, a peremptory writ should be issued. In all other cases, when a writ is issued, it should be in the alternative and contain an order to show cause. See §§ 25-2158 and 25-2159 The alternative writ and the answer thereto constitute the pleadings in any case wherein an alternative writ has been issued and no other pleadings

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are permitted. See §§ 25-2162 and 25-2164 If no answer is filed to an alternative writ then a peremptory writ must be allowed. § 25-2163 Generally, when a hearing on an application is ordered and notice thereof given or an order to show cause has been issued and served and a return in either situation presents an issue or issues of fact, the court should not try such issue or issues at that stage of the proceedings but, in such case, issue a writ. However, such writ should be an alternative writ and issues should be made up thereon by the filing of an answer thereto and then tried on the issue or issues raised thereby. . . . However, under our holdings, if no writ has been issued the case may be heard on the petition and response thereto when a hearing or order to show cause has been ordered under section 25-2160 . . . and notice thereof given.

[4] Our case law has long recognized that the “motion . . . upon affidavit” requirement of § 25-2160 may be fulfilled by a verified petition, and we have also long stressed the importance of the motion and affidavit or verified petition, stating, “‘An action to procure the issuance of a writ of mandamus is not begun until a motion and affidavit, or a petition verified positively, is filed in the district court’” *Little v. Board of County Commissioners*, 179 Neb. 655, 660, 140 N.W.2d 1, 5 (1966) (quoting *State v. Harrington*, 78 Neb. 395, 110 N.W. 1016 (1907)). See, also, *State ex rel. Van Cleave v. City of No. Platte*, 213 Neb. 426, 429, 329 N.W.2d 358, 360 (1983) (noting in part that verification “upon which a writ of mandamus is sought must be positively verified, and a verification based upon mere belief is inadequate”).

[5] We have characterized the foregoing requirements as jurisdictional. In *State v. Harrington*, this court stated that “a court has no power or jurisdiction to issue a peremptory writ without, first, the filing of the application in the court,” 78 Neb. at 400, 110 N.W. at 1017-18, and that “a notice that at some future time the relator would apply [for a writ of

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mandamus] has no substantial basis and . . . such a notice served at such a time was insufficient to confer jurisdiction upon the district court,” 78 Neb. at 399, 110 N.W. at 1017. Based on this precedent, the filing of a motion and affidavit or a verified petition is a jurisdictional requirement before a district court may issue a writ of mandamus, and until such filing is made, the court does not have jurisdiction over an action for writ of mandamus.

Malone does not dispute that he did not file a verified petition or a motion and affidavit. Instead, he argues that the statutory requirement for a motion and affidavit was met when the court ordered a trial and took sworn testimony. He notes that this court stated that the purpose of the holding in *State ex rel. Van Cleave v. City of No. Platte* was so that “the trial court is assured that there is someone who represents to the court that the facts presented are true and who may be subject to perjury if it later proves otherwise.” 213 Neb. at 430, 329 N.W.2d at 361. Malone argues that in this case, the district court heard sworn testimony by three witnesses, including Malone, and the court therefore based its decision on sworn statements.

We have not held that sworn testimony is an acceptable substitute for the “motion . . . upon affidavit” under § 25-2160, and the only alternative that our case law has recognized is a petition verified positively. See, *State ex rel. Van Cleave v. City of No. Platte*, *supra*; *Little v. Board of County Commissioners*, *supra*. We note that the section of *State ex rel. Krieger v. Board of Supervisors*, 171 Neb. 117, 121, 105 N.W.2d 721, 725 (1960), quoted above with regard to the regular procedure in mandamus indicates that there is case law to the effect that under appropriate circumstances, “if no writ has been issued the case may be heard on the petition and response thereto.” However, we do not read *State ex rel. Krieger* to excuse failure to meet the “motion . . . upon affidavit” requirement of § 25-2160; it instead addresses a court’s failure to issue an alternative writ as required under § 25-2159.

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Malone's argument might appear to have some support from other jurisdictions. In *Austin v. City of San Antonio*, 630 S.W.2d 391, 393 (Tex. App. 1982), the court stated:

While a petition for writ of mandamus should be verified, that requirement has been relaxed where, as here, there has been a full evidentiary hearing. . . . And that defect may be waived, as it was in this case when the agency failed to raise the issue before the trial court. . . . We find, therefore, that any defects in the respective parties' pleadings were waived, and that the issues raised by the parties were tried by consent.

We note that unlike the agency in *Austin v. City of San Antonio*, *supra*, Baldonado-Bellamy in this case raised Malone's failure to comply with § 25-2160. Therefore, there was no waiver or consent in this case. Furthermore, as noted above, our precedent treats § 25-2160 as imposing a jurisdictional requirement, and parties cannot waive a jurisdictional requirement. See *DeLima v. Tsevi*, 301 Neb. 933, 921 N.W.2d 89 (2018) (parties cannot confer subject matter jurisdiction upon judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of parties).

We reject Malone's argument that the sworn testimony at trial satisfied the jurisdictional requirement of § 25-2160. We conclude that because Malone did not file a motion and affidavit or a properly verified petition, the mandamus action was not begun and the district court did not have jurisdiction to order such trial.

[6] In this case, the district court dismissed Malone's action for writ of mandamus based on the merits. However, the court should not have reached the merits, because the action had not been begun in the manner required by law, and the court therefore should have dismissed for lack of jurisdiction. Because the district court lacked jurisdiction over the mandamus action, we lack jurisdiction of this appeal. When a trial court lacks jurisdiction to adjudicate the merits of a claim,

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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. *State v. McGuire*, 301 Neb. 895, 921 N.W.2d 77 (2018). Therefore, we must dismiss this appeal for lack of jurisdiction.

CONCLUSION

We conclude that because Malone did not file a motion and affidavit or a verified petition, the district court lacked jurisdiction of this proceeding for mandamus. Consequently, we lack jurisdiction of this appeal, and we therefore dismiss this appeal for lack of jurisdiction.

APPEAL DISMISSED.

FREUDENBERG, J., not participating.

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

JEREMY KAISER, APPELLANT, v. ALLSTATE
INDEMNITY COMPANY, APPELLEE.

949 N.W.2d 787

Filed October 23, 2020. No. S-19-858.

1. **Insurance: Contracts.** Interpretation of an insurance policy is a question of law.
2. **Judgments: Appeal and Error.** In reviewing questions of law, an appellate court must reach its own conclusions independent of the lower court's conclusions.
3. **Summary Judgment: Appeal and Error.** An appellate court reviews a district court's grant of summary judgment de novo, viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor.
4. **Insurance: Contracts: Presumptions: Proof.** In assessing which party in an insurance dispute bears the burden of proving or disproving coverage, a court must first determine whether the insurance policy presumptively extends coverage to all, or only to specific, perils.
5. **Insurance: Contracts.** A specific perils policy covers limited risks and, by implication, excludes all other risks.
6. ____: _____. An all perils policy impliedly covers all risks except those expressly addressed in the policy's exclusion paragraphs.
7. **Insurance: Contracts: Presumptions: Proof.** Under a specific perils policy, the insured carries the initial burden of proving that a provision in the insurance policy requires the insurer to provide coverage for a specific type of loss. But that initial burden is presumed met in an all perils policy, provided the insured can show that covered property was damaged.
8. **Insurance: Contracts: Proof.** Once the insured's initial burden of proving coverage is met, the insurer bears the burden of proving the applicability of an exclusion under the policy as an affirmative defense.
9. **Insurance: Contracts: Appeal and Error.** An insurance policy is a contract, and an appellate court construes it like any other contract, according to the meaning of the terms that the parties have used.

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10. ____: ____: _____. An appellate court gives terms in an insurance policy that are clear their plain and ordinary meaning as a reasonable person in the insured's position would understand them.
11. **Insurance: Contracts.** Terms in an insurance policy that are reasonably susceptible to multiple conflicting meanings are ambiguous and construed in favor of the insured.
12. **Words and Phrases.** Contamination is the act of contaminating, the condition of being contaminated, defilement, pollution, or infection.
13. **Insurance: Contracts.** Simply because multiple provisions in an insurance policy individually exclude coverage for a single peril does not mean that those terms are necessarily ambiguous.
14. ____: _____. Whether terms in an insurance policy are individually ambiguous will depend on the susceptibility of their language to multiple reasonable meanings, not on whether they overlap with each other.
15. **Insurance: Contracts: Proof.** If the insurer meets its burden of proving the applicability of any exclusions under the policy as affirmative defenses, then the burden returns to the insured to prove the applicability of an exception to any exclusions.
16. **Words and Phrases.** Because the phrase "sudden and accidental" is expressed in the conjunctive, it requires both sudden and accidental to be shown.
17. **Insurance: Courts.** When an insured's claim to his or her insurer is for one whole property loss, courts must frame the property loss accordingly, and not by its component parts.
18. **Time: Words and Phrases.** An event occurring over a period of time is not sudden.
19. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
20. **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.

Appeal from the District Court for Douglas County: LEIGH ANN RETELSDORF, Judge. Affirmed.

Matthew P. Saathoff and Donald E. Loudner III, of Saathoff Law Group, P.C., L.L.O., for appellant.

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Leslie S. Stryker Viehman and Brian D. Nolan, of Nolan, Olson & Stryker, P.C., L.L.O., for appellee.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

HEAVICAN, C.J.

I. INTRODUCTION

Jeremy Kaiser filed an insurance claim alleging that his tenants damaged his rental house by producing or using methamphetamine indoors. Allstate Indemnity Company (Allstate) denied the claim. The district court granted summary judgment for Allstate, holding that the loss was excluded from coverage under Allstate's insurance policy with Kaiser. Kaiser appeals.

We moved Kaiser's appeal to our docket to decide whether property loss from his tenants' producing or using methamphetamine indoors was a covered peril. We conclude that it is not and affirm the decision of the district court.

II. FACTUAL BACKGROUND

Kaiser owned real property in Omaha, Nebraska, that he maintained as a rental house. He carried a rental insurance policy for the property through Allstate. According to the policy, Allstate agreed to cover most direct physical loss to the property.

However, as relevant here, paragraphs 12, 13(e) and (f), 18, and 19(d) excluded from coverage any property loss "consisting of or caused by" the following perils:

12. Any type of vapors, fumes, acids, toxic chemicals, toxic gasses, toxic liquids, toxic solids, waste materials, [i]rritants, contaminants, or pollutants, [i]ncluding, but not limited to:

- a) lead in any form;
- b) asbestos in any form;
- c) radon in any form; or

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d) oil, fuel oil, kerosene, liquid propane or gasoline intended for, or from, a storage tank located at the residence premises.

13. . . .

. . . .

e) Contamination, including, but not limited to, the presence of toxic, noxious, or hazardous gasses, chemicals, liquids, solids or other substances at the residence premises or in the air, land or water serving the residence premises;

f) Smog, smoke from the manufacturing of any controlled substance, agricultural smudging and industrial operations[.]

. . . .

18. Vandalism. However, we do cover sudden and accidental direct physical loss caused by fire resulting from vandalism unless your dwelling has been vacant or unoccupied for more than 90 consecutive days immediately prior to the vandalism.

19. Any act of a tenant, or guests of a tenant, unless the act results in sudden and accidental direct physical loss caused by:

. . . .

d) [S]moke. However, we do not cover loss caused by smoke from the manufacturing of controlled substances, agricultural smudging or industrial operations[.]

(Emphasis omitted.) The Allstate insurance policy further provided that when property loss resulted from multiple causes, the loss was wholly excluded from coverage if “the predominant cause(s) of loss is (are) excluded.”

Kaiser did not make regular inspections of his rental house. Beginning in February 2013, he received reports from persons living near the property that the house was being used for drug-related activity.

After his tenants voluntarily surrendered the property on May 1, 2013, Kaiser inspected the house and found evidence

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of methamphetamine. Kaiser retained Absolute Bio Recovery Service to conduct preliminary tests of the house. Absolute Bio Recovery Service discovered methamphetamine vapor and residue throughout the house and recommended that the house be decontaminated before it could be safely rented to new tenants.

On May 7, 2013, Kaiser submitted a claim to Allstate for the cleanup costs. On May 8, Allstate denied the claim.

Despite the denial of coverage, Kaiser worked to remediate and decontaminate the house throughout May 2013. He removed flooring, HVAC equipment, and light fixtures from the house, all of which had absorbed methamphetamine vapor and residue. He also hired Meth Lab Cleanup LLC, a company that specialized in restorations of this kind. On May 26, Meth Lab Cleanup certified that the house was again fit for human habitation.

On February 11, 2014, Kaiser filed a complaint against Allstate in the district court for Douglas County. Kaiser asserted two claims: breach of contract and bad faith. According to Kaiser, “[a]t sometime [sic] after April 15, 2012, the Tenants converted the Property into a methamphetamine lab and started producing methamphetamine.” According to the complaint, this claim should have been covered by Allstate as “vandalism and malicious mischief,” but it was wrongfully denied. Kaiser sought \$38,361.80 for remediation costs, lost rent, and compensation from serving as the general contractor overseeing the house’s restoration. Allstate timely filed an answer disputing Kaiser’s claims.

After some discovery, the parties filed cross-motions for summary judgment. Stating that it lacked “competent evidence of how the damage was actually caused,” the district court entered an order denying both motions.

Kaiser filed an amended complaint alleging that he lacked sufficient knowledge as to whether the property loss was caused by his tenants’ using or manufacturing methamphetamine. Allstate filed an amended answer in which it specifically

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cited, as affirmative defenses, exclusions in paragraphs 9, 12, 13(e) and (f), 18, and 19(d) of its insurance policy. Kaiser and Allstate both filed renewed cross-motions for summary judgment. Kaiser also filed a motion to file a second amended complaint, which the district court denied.

On January 26, 2017, the district court issued an order granting Allstate's motion for summary judgment and denying Kaiser's competing motion. The district court found that Kaiser's tenants had manufactured methamphetamine in the house. Additionally, based on an affidavit from Allstate's expert, a professor of chemistry at the University of Nebraska at Omaha, the district court found that methamphetamine damaged Kaiser's property in two ways: first, "methamphetamine vapor is a toxic chemical, gas or liquid, depending upon the assumed physical state at a particular point in time," and second, "[m]ethamphetamine residue is a contaminant, chemical residue and pollutant." Accordingly, the district court agreed with Allstate that Kaiser's property loss was excluded from coverage under paragraphs 12 and 13(e) and (f) of Allstate's insurance policy. The district court also found that Kaiser's property loss was not covered under paragraph 18 or paragraph 19(d).

Kaiser appealed the district court's summary judgment. This court summarily dismissed the appeal pursuant to Neb. Ct. R. App. P. § 2-107(A)(2) (rev. 2017) because we could not find that the district court had entered a final, appealable order. On remand, the district court issued an order clarifying that its previous order was intended to dismiss both Kaiser's contract cause of action and his bad faith cause of action.

Kaiser then filed the current notice of appeal.

III. ASSIGNMENTS OF ERROR

Kaiser assigns, consolidated and restated, that the district court erred in finding that (1) Kaiser's property loss was excluded from coverage under paragraphs 12 and 13(e) and (f) of the Allstate insurance policy, (2) Kaiser's property loss

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was not covered under paragraph 18 or paragraph 19(d) of the Allstate insurance policy, and (3) summary judgment was improper because a genuine issue of material fact remained as to whether Kaiser's property loss was caused by methamphetamine production or use.

IV. STANDARD OF REVIEW

[1,2] Interpretation of an insurance policy is a question of law.¹ In reviewing questions of law, an appellate court must reach its own conclusions independent of the lower court's conclusions.²

[3] An appellate court reviews the district court's grant of summary judgment de novo, viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor.³

V. ANALYSIS

1. ALLSTATE INSURANCE POLICY

The issue presented on appeal is whether the district court erred in finding that under the Allstate insurance policy, Kaiser's property loss was excluded from coverage.

[4-6] In assessing which party in an insurance dispute bears the burden of proving or disproving coverage, a court must first determine whether the insurance policy presumptively extends coverage to all, or only to specific, perils.⁴ A specific perils policy covers limited risks and, by implication, excludes all other risks.⁵ In contrast, an all perils policy impliedly

¹ See *Henn v. American Family Mut. Ins. Co.*, 295 Neb. 859, 894 N.W.2d 179 (2017).

² See *In re Estate of Adelung*, 306 Neb. 646, 947 N.W.2d 269 (2020).

³ *Russell v. Franklin County*, 306 Neb. 546, 946 N.W.2d 648 (2020).

⁴ See *Poulton v. State Farm Fire & Cas. Cos.*, 267 Neb. 569, 675 N.W.2d 665 (2004) (citing 7 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* 3d § 101:7 (1997), and Annot., 30 A.L.R. 170 (1995)).

⁵ See *Poulton*, *supra* note 4.

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covers all risks except those expressly addressed in the policy's exclusion paragraphs.⁶

[7,8] Under a specific perils policy, the insured carries the initial burden of proving that a provision in the insurance policy requires the insurer to provide coverage for a specific type of loss.⁷ But that initial burden is presumed met in an all perils policy, provided the insured can show that covered property was damaged.⁸ Once the initial burden of proving coverage is met, the insurer bears the burden of proving the applicability of an exclusion under the policy as an affirmative defense.⁹

Here, Kaiser characterizes his Allstate policy as an all perils policy. Allstate did not dispute that characterization in its brief or at oral argument. Thus, assuming that Kaiser's characterization is accurate, Kaiser met his initial burden when the parties stipulated that at the relevant time, the damaged property was covered under the Allstate insurance policy. It is, in turn, Allstate's burden to prove that the property loss from Kaiser's tenants' producing or using methamphetamine in the house was specifically excluded from coverage by its policy.

(a) Paragraphs 12 and 13(e) and (f)

The district court found that Allstate met its burden of proof by showing that Kaiser's property loss was caused by the presence of "methamphetamine vapor" and "[m]ethamphetamine residue" in the house. According to the district court, this meant that the property loss was excluded under paragraphs

⁶ See *id.*

⁷ See *id.*

⁸ See *Gage County v. Employers Mut. Cas. Co.*, 304 Neb. 926, 937 N.W.2d 863 (2020).

⁹ See *id.*

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12 and 13(e) and (f) of the Allstate insurance policy because methamphetamine vapor is “a toxic chemical, gas or liquid, depending upon the assumed physical state at a particular point in time,” and methamphetamine residue is “a contaminant, chemical residue and pollutant.” Kaiser assigns first that this characterization was in error because the terms in paragraphs 12 and 13(e) and (f) are ambiguous.

[9-11] An insurance policy is a contract, and an appellate court construes it like any other contract, according to the meaning of the terms that the parties have used.¹⁰ An appellate court gives terms in an insurance policy that are clear their plain and ordinary meaning as a reasonable person in the insured’s position would understand them.¹¹ But terms that are reasonably susceptible to multiple conflicting meanings are ambiguous and construed in favor of the insured.¹²

We disagree with Kaiser that the terms in paragraphs 12 and 13(e) and (f) are ambiguous. Paragraph 12 specifically excludes coverage for any property loss caused by or consisting of “vapors, fumes, acids, toxic chemicals, toxic gasses, toxic liquids, toxic solids, waste materials, [i]rritants, contaminants, or pollutants.” And paragraph 13(e) and (f) uses similar language, excluding coverage for any property loss caused by or consisting of “[s]mog” or “[c]ontamination, including, but not limited to, the presence of toxic, noxious, or hazardous gasses, chemicals, liquids, solids or other substances at the residence premises” (Emphasis omitted.)

[12] Although they are not defined in the insurance policy itself, the relevant terms are contained in standard dictionaries. Contamination is “[t]he action of contaminating, or condition of being contaminated; defilement, pollution,

¹⁰ *Van Kleek v. Farmers Ins. Exch.*, 289 Neb. 730, 857 N.W.2d 297 (2014).

¹¹ *Id.*

¹² See *id.*

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infection.”¹³ The terms in paragraphs 12 and 13(f) are also defined.¹⁴

Throughout his brief, Kaiser himself repeatedly referred to the property damage as “contamination” and his restoration efforts as “decontamination.” In corresponding with Kaiser, the contractors he hired to restore the house also identified the damage they encountered as contamination. In its work plan for the house, Absolute Bio Recovery Service described using a variety of techniques “to address contamination,” and in its “Final Report Methamphetamine Decontamination,” Meth Lab Cleanup identified the scope of its work as involving a “decontamination and post remedial assessment.” At the time, Kaiser did not object to these characterizations of the property loss as contamination. This evidence goes to show that Kaiser, as the insured, reasonably interpreted the term “contamination” as encompassing the type of property damage he experienced.

[13,14] As Kaiser now suggests, definitions of the terms in paragraphs 12 and 13(e) and (f) indicate that several of these terms are synonymous. But his conclusion that the terms are

¹³ “Contamination,” Oxford English Dictionary Online, <http://www.oed.com/view/Entry/40057> (last visited Oct. 10, 2020).

¹⁴ See, e.g., “Vapor,” Oxford English Dictionary Online, <http://www.oed.com/view/Entry/221469> (last visited Oct. 10, 2020); “Fume,” Oxford English Dictionary Online, <http://www.oed.com/view/Entry/75429> (last visited Oct. 10, 2020); “Acid,” Oxford English Dictionary Online, <http://www.oed.com/view/Entry/1547> (last visited Oct. 10, 2020); “Toxic,” Oxford English Dictionary Online, <http://www.oed.com/view/Entry/204104> (last visited Oct. 10, 2020); “Waste,” Oxford English Dictionary Online, <http://www.oed.com/view/Entry/226027> (last visited Oct. 10, 2020); “Irritant,” Oxford English Dictionary Online, <http://www.oed.com/view/Entry/99857> (last visited Oct. 10, 2020); “Contaminant,” Oxford English Dictionary Online, <http://www.oed.com/view/Entry/40053> (last visited Oct. 10, 2020); “Pollutant,” Oxford English Dictionary Online, <http://www.oed.com/view/Entry/146987> (last visited Oct. 10, 2020); “Smog,” Oxford English Dictionary Online, <http://www.oed.com/view/Entry/182692> (last visited Oct. 10, 2020).

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inherently ambiguous does not follow. Simply because multiple provisions in an insurance policy individually exclude coverage for a single peril does not mean that those terms are necessarily ambiguous.¹⁵ Instead, a well-written insurance policy will likely have terms that overlap, which might support the denial of coverage on several grounds in an appropriate case.¹⁶ Whether those terms are individually ambiguous will depend on the susceptibility of their language to multiple reasonable meanings, not on whether the terms overlap with each other.¹⁷ Kaiser has failed to specifically identify any second meanings to which the terms are reasonably susceptible in context.

Accordingly, Kaiser's argument that the terms in paragraphs 12 and 13(e) and (f) are ambiguous and so should be construed with different meanings than the district court assigned to them is without merit. Like the rest of these terms, "contamination" is readily defined in standard dictionaries, and Kaiser himself used and accepted the term in describing the restoration of his house. The district court did not err in finding that Kaiser's property loss was excluded from coverage as "contamination," among other perils, under paragraphs 12 and 13(e) and (f) of the Allstate insurance policy. Kaiser's first assignment of error is without merit.

(b) Paragraphs 18 and 19(d)

Kaiser next assigns that even if the district court did not err in finding his property loss was excluded under paragraphs 12 and 13(e) and (f), the district court still erred in not granting him relief under two other paragraphs of the Allstate insurance policy. Specifically, Kaiser points to paragraphs 18 and 19(d). Although paragraph 18 generally excludes from

¹⁵ See, e.g., *American Fam. Mut. Ins. Co. v. Wheeler*, 287 Neb. 250, 842 N.W.2d 100 (2014).

¹⁶ See *id.*

¹⁷ See *Henn*, *supra* note 1.

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coverage “vandalism,” it provides an exception for “sudden and accidental direct physical loss caused by fire resulting from vandalism.” (Emphasis omitted.) Likewise, although paragraph 19 excludes from coverage property loss resulting from most “act[s] of a tenant,” paragraph 19 provides an exception for “[a]ny act of a tenant [that] results in sudden and accidental direct physical loss caused by . . . d) smoke.” (Emphasis omitted.)

According to Kaiser, his property loss was predominantly caused in accordance with these exceptions. And the insurance policy provides that when there are two or more causes of loss to the covered property, coverage is only excluded if the predominant cause of loss is excluded. Therefore, Kaiser contends that even if his property loss was excluded from coverage under paragraphs 12 and 13(e) and (f) of the Allstate insurance policy, the language regarding two or more causes of loss should provide relief because the perils described in paragraphs 18 and 19(d) were the predominant causes of loss. We disagree.

[15] If the insurer meets its burden of proving the applicability of any exclusions under the policy as affirmative defenses, then the burden returns to the insured to prove the applicability of an exception to any exclusions.¹⁸ Here, as discussed above, paragraphs 18 and 19 contain exceptions to the exclusions for “vandalism” and “act[s] of a tenant.” (Emphasis omitted.) In order for the exceptions to those exclusions to apply, Kaiser has the burden to show that the harm was the “sudden and accidental” result of fire or smoke.

In support of his argument that he comes within these exceptions, Kaiser cites to insurance law cases from other jurisdictions in which vandalism has been inferred by tenants’ using and manufacturing illegal substances that resulted

¹⁸ See *Dutton-Lainson Co. v. Continental Ins. Co.*, 271 Neb. 810, 716 N.W.2d 87 (2006).

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in property damage.¹⁹ We need not decide here whether to follow those other jurisdictions because we conclude that Kaiser has failed to show that his property loss was “sudden and accidental.”

We have previously construed the phrase “sudden and accidental” in an insurance policy. In *Dutton-Lainson Co. v. Continental Ins. Co.*,²⁰ we construed the phrase in the context of an exception to a pollution exclusion. After incurring costs from an environmental cleanup of pollutants used in its manufacturing operations over some 37 years, Dutton-Lainson Company (Dutton-Lainson) filed a claim for indemnification with its insurer. Continental Insurance Company (Continental Insurance) denied the claim, however, under an exclusion for losses caused by pollution. In response, Dutton-Lainson claimed that a sudden and accidental exception to the pollution exclusion applied. The parties presented these arguments in district court, and thereafter, the district court granted summary judgment to Continental Insurance. Dutton-Lainson appealed, renewing its argument that the sudden and accidental exception to the pollution exclusion applied.²¹

We rejected Dutton-Lainson’s argument. First, we found that “[s]ince the ‘sudden and accidental’ exception to the pollution exclusion clause [was] expressed in the conjunctive, both requirements must be met for the exception to become operative.”²² We then reviewed how other courts had interpreted the term “sudden” as a necessary component of the phrase:

Courts have disagreed as to whether “sudden” refers to something temporally abrupt from an objective

¹⁹ See, e.g., *Livaditis v. American Casualty Co. of Reading, Pa.*, 117 Ga. App. 297, 160 S.E.2d 449 (1968); *Bowers v. Farmers Ins. Exchange*, 99 Wash. App. 41, 991 P.2d 734 (2000); *Graff v. Allstate Ins. Co.*, 113 Wash. App. 799, 54 P.3d 1266 (2002).

²⁰ *Dutton-Lainson Co.*, *supra* note 18.

²¹ See *id.*

²² *Id.* at 821, 716 N.W.2d at 97.

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standpoint, something unexpected from the subjective standpoint of the insured, or whether the term is ambiguous. In considering the meaning of the term “sudden,” several courts have noted that recognized dictionaries differ as to its meaning.²³

For example, we noted that definitions of the term “sudden” varied in recognized dictionaries between having primarily to do with a lack of notice and with a rate of occurrence.²⁴

In any event, however, we found that under the terms of the policy, pollution that occurred over a significant period of time was not covered as “sudden.”²⁵ “[A] reasonable person in the position of the insured would understand the term ‘sudden,’ as found in the context of the qualified pollution exclusion, to refer to the objectively temporally abrupt release of pollutants into the environment.”²⁶ Thus, we affirmed the district court’s grant of Continental Insurance’s motion for summary judgment. Dutton-Lainson’s loss from pollution that occurred over a period of 37 years was not sudden.²⁷

²³ *Id.*

²⁴ See *id.* at 821-22, 716 N.W.2d at 97-98 (comparing term “sudden” as defined in “Webster’s Third New International Dictionary of the English Language, Unabridged 2284 (1993), [as] ‘happening without previous notice or with very brief notice; coming or occurring unexpectedly; not foreseen or prepared for’”; with term “sudden” as defined in “Black’s Law Dictionary 1432 (6th ed. 1990) [as] ‘[h]appening without previous notice or with very brief notice; coming or occurring unexpectedly; unforeseen; unprepared for’”; and with term “sudden” as defined in “Random House Dictionary of the English Language 1900 (2d ed. 1987) . . . as ‘happening, coming, made, or done quickly’”). See, also, “Sudden,” Oxford English Dictionary Online, <http://www.oed.com./view/Entry/193468> (last visited Oct. 10, 2020) (“[h]appening or coming without warning or premonition; taking place or appearing all at once”).

²⁵ See *Dutton-Lainson Co.*, *supra* note 18.

²⁶ *Id.* at 823-24, 716 N.W.2d at 99.

²⁷ See *id.* Accord, *Mapes Indus. v. United States F. & G. Co.*, 252 Neb. 154, 560 N.W.2d 814 (1997); *Bituminous Cas. Corp. v. Aaron Ferer and Sons Co.*, No. 4:06CV3128, 2007 WL 2066452 (D. Neb. July 16, 2007).

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[16] Our analysis here is similar. As in *Dutton-Lainson*, the Allstate insurance policy expresses the phrase “sudden and accidental” in the conjunctive. Therefore, to carry his burden of proving coverage under paragraph 18 or paragraph 19(d), Kaiser must show that his property loss resulted in direct physical loss that was both “sudden and accidental.” Because we conclude that Kaiser has failed to show that his property loss was sudden, we need not determine whether it was accidental.

Kaiser’s argument that the property loss was sudden rests on his assertion that as a result of his tenants’ producing or using methamphetamine indoors, methamphetamine vapor and residue “quickly bonded to most surfaces throughout the rental house.”²⁸ Because this bonding occurred “quickly,” Kaiser would have us infer that the resulting property loss as a whole was sudden. But this argument wrongly frames the issue.

In *Dutton-Lainson*, we could also have framed the property loss as the result of numerous sudden discharges of pollutants over 37 years.²⁹ Likely, some amount of the pollutants at issue had escaped quickly every day, each time contributing to the ultimate loss for which *Dutton-Lainson* sought indemnification from Continental Insurance. But we opted against framing the property loss in terms of its smallest components.³⁰ Instead, because *Dutton-Lainson* sought indemnification for one property loss—that is, the cleanup from one pollution—we framed it accordingly. And because that one property loss occurred over a period of 37 years, it was not sudden.³¹

²⁸ Brief for appellant at 29.

²⁹ See *Dutton-Lainson Co.*, *supra* note 18.

³⁰ See *id.*

³¹ See *id.*

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[17] Here, too, Kaiser's claim to Allstate is for one whole property loss, not its component parts. Kaiser leased the whole property to tenants. Allstate insured the whole property from certain perils. The tenants produced or used methamphetamine in the house and thereby rendered the house uninhabitable as a whole. Kaiser filed a claim to Allstate demanding payment for the whole loss. Thus, we frame the property loss at issue not by each release of methamphetamine vapor and residue, but by the loss that resulted from their many releases and for which Kaiser sought indemnification. We decline to embrace Kaiser's logic of death by a thousand paper cuts.

Viewed through a proper frame, then, the evidence in the record indicates that Kaiser's property loss as a whole occurred over time, not suddenly. Kaiser himself testified that his tenants resided at the property for more than a year, from April 15, 2012, until May 1, 2013. He received reports throughout the year from persons living near the house that the house was being used for suspicious drug-related activities. On at least one occasion, in April 2013, Kaiser learned that someone living there had "got[ten] in trouble for doing meth last night."

Although he did not know specifically when during that year the tenants began producing or using methamphetamine in the house, Kaiser indicated in his amended complaint that such producing or using could have occurred as soon as April 15, 2012, the day the tenants took possession of the house. Kaiser specifically stated that to the best of his knowledge, the use or production of methamphetamine was ongoing throughout the tenancy: "the Tenants who were occupying the Property *had been using* methamphetamine in the Property and/or *operating* an illegal methamphetamine lab on the Property, unbeknownst to [Kaiser]." (Emphases supplied.) The phrases "had been using" and "[had been] operating" imply that the tenants' use of methamphetamine or operation of a methamphetamine

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laboratory in the house occurred in the past but on a continuous, ongoing basis.³²

It was Kaiser's burden to prove that his property loss occurred "suddenly and accidentally." But Kaiser did not put forth any evidence that his property loss occurred in this way. To the contrary, the evidence that Kaiser himself offered indicates that the loss actually occurred as the result of his tenants' smoking or producing methamphetamine in the house on an ongoing basis over a significant period of time, perhaps up to a year.

[18] But "an event occurring over a period of time is not sudden."³³ Thus, just as we held in *Dutton-Lainson* that pollution occurring over 37 years was not sudden,³⁴ we now also hold that a property loss from methamphetamine vapor and residue occurring by indoor methamphetamine use or production over a period of months or more is not sudden. A reasonable person in Kaiser's position would not understand "sudden" to refer to a property loss occurring over a period of months. Kaiser has failed to carry his burden of proving otherwise.

Because Kaiser has failed to carry his burden of proving that his property loss was sudden and accidental, he has also failed to carry his burden of proving that his property loss was covered as predominantly caused in accordance with paragraphs 18 and 19(d). The district court did not err in finding Kaiser's property loss was excluded from coverage under paragraphs 12 and 13(e) and (f) of the Allstate insurance policy and

³² See The Chicago Manual of Style ¶ 5.120 (15th ed. 2003); "Past perfect continuous," Cambridge Dictionary Online, <http://www.dictionary.cambridge.org/us/grammar/british-grammar/past-perfect-continuous> (last visited Oct. 10, 2020) (as defined in grammar section: "[W]e use the past perfect continuous to talk about actions or events which started before a particular time in the past and were still in progress up to that time in the past").

³³ *Dutton-Lainson Co.*, *supra* note 18, 271 Neb. at 823, 716 N.W.2d at 99.

³⁴ *Id.*

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not covered under paragraph 18 or paragraph 19(d). Kaiser's second assignment of error is without merit.

2. SUMMARY JUDGMENT

Kaiser next assigns that the district court erred in granting Allstate's motion for summary judgment because a genuine issue of material fact remained as to whether Kaiser's property loss was caused by the tenants' producing or using methamphetamine.

In its order, the district court concluded that the evidence from Allstate's expert indicated that the tenants' methamphetamine production, not use, caused Kaiser's property loss. Kaiser disputes this factual finding. He contends that although in his initial complaint he claimed his property loss was the result of methamphetamine production, he did not have a basis for that conclusion and now believes it could have been methamphetamine use instead. Kaiser accordingly assigns that summary judgment was not proper. We disagree.

[19,20] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.³⁵ 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.³⁶

Here, it is immaterial whether Kaiser's tenants damaged the house by producing or using methamphetamine indoors. As both parties and both parties' experts testified, the cause of loss was "methamphetamine vapor" and "methamphetamine

³⁵ *Arnold v. Walz*, 306 Neb. 179, 944 N.W.2d 747 (2020).

³⁶ *Id.*

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residue.” Based on that evidence, the district court correctly concluded that the property loss was excluded from coverage under paragraphs 12 and 13(e) and (f) of the Allstate insurance policy and was not covered under paragraphs 18 and 19(d). Even if, as Kaiser urges, we were to find that a genuine factual dispute remained, the dispositive fact remains that methamphetamine vapor and methamphetamine residue are excluded causes of loss under the Allstate insurance policy. Therefore, whether the methamphetamine vapor and methamphetamine residue were released inside the house through production or through use is immaterial to this court’s ultimate conclusions of law.

We concur with the district court’s grant of summary judgment. Kaiser’s third assignment of error is without merit.

VI. CONCLUSION

The district court’s order granting Allstate’s motion for summary judgment is affirmed.

AFFIRMED.

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

STATE OF NEBRASKA, APPELLEE, v.
MIRANDA M. COLLINS, APPELLANT.

950 N.W.2d 89

Filed October 23, 2020. No. S-19-959.

1. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion.
2. **Courts: Appeal and Error.** Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.
3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Appeal and Error.** An appellate court independently reviews questions of law in appeals from the county court.
5. **Criminal Law: Courts: Appeal and Error.** When deciding appeals from criminal convictions in county court, an appellate court applies the same standards of review that it applies to decide appeals from criminal convictions in district court.
6. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
7. ____: _____. Absent an abuse of discretion by the trial court, an appellate court will not disturb a sentence imposed within the statutory limits.
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.

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9. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently.
10. **Effectiveness of Counsel: Constitutional Law: Statutes: Records: Appeal and Error.** Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal presents a question of law, which turns upon the sufficiency of the record to address the claim without an evidentiary hearing or whether the claim rests solely on the interpretation of a statute or constitutional requirement.
11. **Effectiveness of Counsel: Appeal and Error.** An appellate court determines as a matter of law whether the record conclusively shows that (1) a defense counsel's performance was deficient or (2) a defendant was or was not prejudiced by a defense counsel's alleged deficient performance.
12. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
13. **Sentences.** In determining a sentence to be imposed, relevant factors customarily considered and applied are the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.
14. _____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
15. **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.
16. **Statutes.** To the extent there is a conflict between two statutes, the specific statute controls over the general statute.
17. **Statutes: Legislature: Presumptions: Intent.** In enacting a statute, the Legislature must be presumed to have knowledge of all previous legislation upon the subject. The Legislature is also presumed to know the language used in a statute, and if a subsequent act on the same or similar subject uses different terms in the same connection, the court must presume that a change in the law was intended.
18. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel, the defendant must show that his or her counsel's

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performance was deficient and that this deficient performance actually prejudiced the defendant's defense.

19. ____: _____. To show that counsel's performance was deficient, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.
20. ____: _____. To show prejudice in a claim of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
21. **Words and Phrases.** A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Appeal from the District Court for Lancaster County, SUSAN I. STRONG, Judge, on appeal thereto from the County Court for Lancaster County, TIMOTHY C. PHILLIPS, Judge. Judgment of District Court affirmed.

Stephanie Flynn, of Stephanie Flynn Law, P.C., L.L.O., and Toni Wilson, of Leija Wilson Law, for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Miranda M. Collins appeals the order of the district court for Lancaster County which affirmed her convictions and sentences in the county court for Lancaster County for operating a motor vehicle to avoid arrest and obstructing a police officer. Collins claims on appeal that the district court erred when it affirmed what she asserts was an excessive sentence imposed by the county court and when it affirmed the county court's order directing that her appearance bond be applied to fines and costs. She also claims that trial counsel provided ineffective assistance because counsel failed to present sufficient evidence and information at the sentencing hearing. We affirm

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the order of the district court which affirmed Collins' convictions and sentences.

STATEMENT OF FACTS

On March 22, 2019, Collins was arrested, and the State filed a complaint in the county court charging her with operating a motor vehicle to avoid arrest in violation of Neb. Rev. Stat. § 28-905 (Reissue 2016). The State alleged, inter alia, that the offense was committed "in willful reckless operation of the motor vehicle," and the State therefore charged the offense as a Class IV felony pursuant to § 28-905(3). The factual basis presented by the State indicates that the charge arose from an incident in which, during a traffic stop of a vehicle driven by Collins, the officer detected the odor of marijuana and asked Collins to step out of the vehicle so that the officer could conduct a search. Collins refused to step out of the vehicle, and instead, she rolled up her windows, locked the doors, and sped off in the vehicle. The county court found probable cause to detain Collins and set an appearance bond of "\$7,500.00 Ten Percent." On March 25, Collins filed an appearance bond which stated that \$750 had been deposited "in cash 90% of which shall be returned to the defendant upon appearance as required above and 10% of which shall be retained by the Clerk for bond costs."

On April 3, 2019, pursuant to a plea agreement, the State filed an amended complaint in which it reduced the charge of operating a motor vehicle to avoid arrest to a Class I misdemeanor under § 28-905(2) and added a charge of obstructing a peace officer, a Class I misdemeanor, in violation of Neb. Rev. Stat. § 28-906 (Reissue 2016). Collins pled guilty to both charges, and the county court found a factual basis and found Collins guilty of both charges. That same day, after granting Collins a sentencing allocution, the county court ordered Collins to pay a fine of \$750 on the conviction for operating a motor vehicle to avoid arrest and to pay a fine of \$250 on the conviction for obstructing a peace officer. In connection with the conviction for operating a motor vehicle to avoid

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arrest, the county court also ordered that Collins' driver's license be revoked for 1 year. The court ordered Collins to pay costs, and the court further ordered that after the \$75 (representing 10 percent of the deposit) had been retained by the clerk, the \$675 balance held on Collins' appearance bond be applied to payment of the fines and costs imposed as part of her sentence.

On April 5, 2019, Collins' counsel filed a motion for new trial in which he asserted that subsequent to the April 3 sentencing hearing, he had learned new information that, if he had known of it at the time of Collins' sentencing, he would have offered for the court's consideration. Counsel characterized such information as "newly discovered evidence," which he alleged required a new trial. That same day, counsel also filed a motion to reconsider sentence in which counsel alleged that the "newly discovered evidence" required the court to reconsider the sentence imposed. Counsel's particular objection to the sentence focused on the revocation of Collins' driver's license for 1 year.

In his affidavit, Collins' counsel stated that in a separate case, Collins anticipated being bonded into drug court; that she risked losing her housing if she could not demonstrate participation in a drug treatment program; and that a prompt resolution of the present case was necessary to avoid delaying her entry into drug court in the other case. Counsel stated that the urgency to resolve the present case limited the time he had to prepare with Collins for sentencing and that therefore, he did not learn certain relevant information about Collins before the April 3, 2019, plea and sentencing hearing. Counsel asserted the new information was generally that Collins was a single mother and a student who had no family or friends who could help her with transportation and that if her driver's license were revoked, she would not be able to transport her children to school or transport herself to attend classes.

After a hearing, the county court denied both Collins' motion for new trial and her motion to reconsider sentence. At the hearing on the motions, the county court stated that if

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it “had known some of these things beforehand, [it] probably would have likely ruled differently,” but it did not think that it could “go back and change it at this point in time based on these motions the way they’re brought before the Court.” In response to Collins’ query regarding the bond, the county court stated that it did not think it could be returned to her because the bond had “already been applied.” In the order denying the motions, the county court stated that the appearance bond was to remain applied to fines and costs and not returned to Collins.

Collins appealed her convictions and sentences to the district court. In her statement of errors, Collins claimed that the county court (1) imposed an excessive sentence when it revoked her driver’s license and (2) erred when it ordered that her bond be applied to fines and costs.

After a hearing, the district court entered an order which affirmed Collins’ convictions and sentences. Regarding Collins’ claim of excessive sentence, the district court noted that the sentence of a \$750 fine and a 1-year license revocation for operating a motor vehicle to avoid arrest was within the statutory limits. The district court noted that Collins had requested that she be sentenced to probation rather than imprisonment to facilitate her participation in drug court in a separate case. Because the county court had declined to impose either imprisonment or probation, which would have been within the statutory limits, the district court found the sentence of a fine and revocation to be lenient considering the nature of the offense. The district court determined that the county court’s sentence was not based on reasons that were untenable or clearly against the evidence, and it concluded that the sentence imposed by the county court was not an abuse of discretion.

Regarding the county court’s order to apply the bond to fines and costs, Collins argued that the order violated Neb. Rev. Stat. § 29-901 (Cum. Supp. 2018) and case law interpreting that statute, which Collins asserted made it mandatory for the court to return 90 percent of the bond deposit to her. The

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district court noted, however, that subsequent to the case law cited by Collins, the Legislature had amended Neb. Rev. Stat. § 29-2206 (Reissue 2016) to allow a court to deduct fines or costs from a bond posted by the offender. The district court concluded that the county court appropriately exercised its discretion when it applied the bond deposit to fines and costs imposed in Collins' sentence.

Collins appeals the district court's order which affirmed her convictions and sentences in the county court. The district court appointed new counsel to represent Collins on appeal.

ASSIGNMENTS OF ERROR

Collins claims that the district court erred when it rejected her claims that (1) the county court imposed an excessive sentence for operating a motor vehicle to avoid arrest and (2) the county court erred when it ordered that her bond be applied to fines and costs. Collins also claims that she received ineffective assistance of counsel in the county court because "counsel failed to present sufficient evidence and information for the [county court's] consideration in determining the proper sentence and thus her right to a fair sentencing hearing was prejudiced."

STANDARDS OF REVIEW

[1-5] In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion. *State v. Valentino*, 305 Neb. 96, 939 N.W.2d 345 (2020). 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.* When deciding appeals from criminal convictions in county court,

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we apply the same standards of review that we apply to decide appeals from criminal convictions in district court. *Id.*

[6-8] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Canaday*, ante p. 407, 949 N.W.2d 348 (2020). Absent an abuse of discretion by the trial court, an appellate court will not disturb a sentence imposed within the statutory limits. *State v. Martinez*, 306 Neb. 516, 946 N.W.2d 445 (2020). 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.*

[9] Statutory interpretation presents a question of law, which an appellate court reviews independently. *State v. Wilson*, 306 Neb. 875, 947 N.W.2d 704 (2020).

[10,11] Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal presents a question of law, which turns upon the sufficiency of the record to address the claim without an evidentiary hearing or whether the claim rests solely on the interpretation of a statute or constitutional requirement. *State v. Theisen*, 306 Neb. 591, 946 N.W.2d 677 (2020). We determine as a matter of law whether the record conclusively shows that (1) a defense counsel's performance was deficient or (2) a defendant was or was not prejudiced by a defense counsel's alleged deficient performance. *Id.*

ANALYSIS

*County Court Did Not Abuse
Its Discretion When
Imposing Sentence.*

Collins first claims that the district court erred when it rejected her claim that the county court imposed an excessive sentence. Collins' argument focuses on the sentence imposed for operating a motor vehicle to avoid arrest and specifically

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on the county court's order revoking her license for 1 year. We find no abuse of discretion in the sentencing, and we therefore affirm the district court's order rejecting this claim.

The county court sentenced Collins to pay a fine of \$750 for operating a motor vehicle to avoid arrest and a fine of \$250 for obstructing a peace officer. In connection with the conviction for operating a motor vehicle to avoid arrest, the court also ordered that Collins' driver's license be revoked for 1 year. Collins' argument focuses on the sentence for operating a motor vehicle to avoid arrest. She does not appear to take issue with the \$250 fine ordered for obstructing a peace officer, and we do not discuss that conviction or sentence further herein.

Operating a motor vehicle to avoid arrest had originally been charged by the State as a Class IV felony pursuant to § 28-905(3), but the State reduced the charge pursuant to the plea agreement and Collins pled guilty to operating a motor vehicle to avoid arrest as a Class I misdemeanor under § 28-905(2). Under Neb. Rev. Stat. § 28-106 (Reissue 2016), a Class I misdemeanor may be punished with imprisonment for up to 1 year, a fine of up to \$1,000, or both. In addition, § 28-905(2)(b) provides:

The court may, as part of the judgment of conviction under subdivision (a) of this subsection, order that the operator's license of such person be revoked or impounded for a period of not more than one year and order the person not to drive any motor vehicle for any purpose in the State of Nebraska for a like period. The revocation or impoundment shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked.

The county court's imposition of a fine of \$750 in this case was within the statutory limits, and under § 28-905(2)(b), the county court had discretion to revoke Collins' license for up to 1 year. The district court on appeal from the county court noted that the county court did not impose a sentence of either imprisonment or probation, and the district court concluded

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that imposition of only a fine was a lenient sentence in light of the circumstances. We agree that the imposition of a fine of \$750 was well within the statutory range and was not an abuse of discretion given the circumstances of this case.

On appeal, Collins focuses her argument on the revocation of her license. When, as in this case, the offense of operating a motor vehicle to avoid arrest is a misdemeanor under § 28-905(2)(a), then under § 28-905(2)(b), the court “may” revoke the defendant’s license for not more than 1 year. The use of “may” indicates that license revocation is discretionary when the offense is a misdemeanor. Compare § 28-905(3)(b) (providing that when offense is felony, court “shall” revoke defendant’s license for 2 years).

[12-14] Collins argues the county court abused its discretion when it revoked her license because it did not consider relevant factors. Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Price*, 306 Neb. 38, 944 N.W.2d 279 (2020). In determining a sentence to be imposed, relevant factors customarily considered and applied are the defendant’s (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge’s observation of the defendant’s demeanor and attitude and all the facts and circumstances surrounding the defendant’s life. *Id.*

Collins contends that the county court failed to consider the circumstances of her life when it revoked her license. In particular, she notes that a license revocation will affect her ability to participate in drug court and her ability to transport

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her children and herself to school. She also directs our attention to the county court's comment at the hearing on her motions for new trial and to reconsider sentence to the effect that a different sentence may have been imposed if the court had known some of the facts of Collins' life before imposing sentence.

With respect to the county court's alleged failure to consider the facts of Collins' life, the record shows that after Collins' counsel had made arguments regarding sentencing, and before it imposed sentence, the county court asked whether there was anything Collins wanted to say and she declined to comment. We view this as the county court's having given Collins the opportunity to bring relevant information to its attention, and the court did not abuse its discretion when it did not question her regarding unknown matters she now asserts were relevant to her sentencing.

Further to her excessiveness claim, Collins contends the county court "gave excessive weight to the facts and circumstances of the case." Brief for appellant at 18. We believe this contention tends to minimize the nature of the offense. We note in this regard that the factual basis provided by the State for Collins' plea indicates that in committing the offense of operating a motor vehicle to avoid arrest, Collins "sped away from the traffic stop at a high rate of speed," that she was estimated to have driven "about 50 miles an hour through a residential neighborhood," and that she "violate[d] the traffic sign . . . without slowing down, crossing traffic." Such circumstances were relevant to the county court's decision whether to impose a license revocation. Notwithstanding the hardship a license revocation invariably imposes on an offender, we do not find that the county court abused its discretion when it relied on the facts and circumstances of the case and ordered license revocation.

We conclude that the sentence imposed by the county court was not an abuse of discretion and that therefore, the district court did not err when it rejected Collins' argument that the sentence was excessive.

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*County Court Was Allowed by
Statute to Apply Bond to
Fines and Costs.*

Collins next claims that the district court erred when it rejected her claim that the county court erred when it ordered that her bond be applied to pay the fines and costs imposed as part of her sentence. We conclude that at the time of the sentencing, the statutes allowed the county court to so order, and that the district court did not err when it rejected this claim.

Collins contends that the county court's order to deduct fines and costs from the bond deposit violated § 29-901, *State v. Zamarron*, 19 Neb. App. 349, 806 N.W.2d 128 (2011), and *State v. McKichan*, 219 Neb. 560, 364 N.W.2d 47 (1985). Section 29-901 provides in part that a deposit of not more than 10 percent of the amount of the bond may be made with the clerk of the court, with "ninety percent of such deposit to be returned to the defendant upon the performance of the appearance or appearances and ten percent to be retained by the clerk as appearance bond costs." In *Zamarron*, *supra*, the Nebraska Court of Appeals concluded that the district court erred when it applied the defendant's appearance bond to pay court costs that the defendant had been ordered to pay as part of his sentence. The Court of Appeals cited § 29-901 and stated that an "appearance bond must be refunded (less any applicable statutory fee) after full compliance with all court orders to appear." *Zamarron*, 19 Neb. App. at 352, 806 N.W.2d at 130. The Court of Appeals also cited *McKichan*, *supra*. In *McKichan*, this court had held that "the deposit of cash in lieu of or in support of bail under § 29-901 is for the purpose only of ensuring the defendant's appearance in court when required; and upon full compliance with any such court orders and release of bail, the statutory refund must be made." 219 Neb. at 563, 364 N.W.2d at 49. Collins argues that the use of the word "must" in both *McKichan* and *Zamarron* indicates that the appellate courts have interpreted the refund under § 29-901 to be mandatory.

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But as the district court noted in its order which affirmed Collins' convictions and sentences subsequent to the decisions in both *McKichan* and *Zamarron*, the Legislature in 2012 amended § 29-2206 by adding subsection (3), which provided that the court "may deduct fines or costs from a bond posted by the offender to the extent that such bond is not otherwise encumbered by a valid lien, levy, execution, or assignment to counsel of record or the person who posted the bond." Collins maintains that § 29-2206 conflicts with § 29-901 and that reading the two statutes in *pari materia* yields an ambiguity which must be resolved by applying the language of § 29-901, which makes a refund mandatory.

[15,16] We disagree with Collins' reading of the two statutes. 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. *State v. Street*, 306 Neb. 380, 945 N.W.2d 450 (2020). And to the extent there is a conflict between two statutes, the specific statute controls over the general statute. *Id.* Both § 29-901 and § 29-2206 address disposition of bonds, and we must read them in a manner such that they are consistent, harmonious, and sensible when considered with one another.

Collins proposes that any conflict between the statutes must be resolved by favoring § 29-901, which she asserts is the specific statute regarding return of a bond and controls over § 29-2206. Because Collins' reading of the statutes does not make the statutes consistent, harmonious, and sensible with one another and under her reading § 29-901 nullifies § 29-2206, we reject Collins' proposal.

[17] Instead, we read § 29-901 as providing that generally, 90 percent of the bond deposit is to be returned to the defendant; however, § 29-2206 provides a specific exception to that general rule in that it allows the court to deduct fines and costs from the bond deposit prior to return of the remainder,

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if any. This reading of the statutes is bolstered by the fact that the relevant language in § 29-901 existed at the time the relevant language was added to § 29-2206. In enacting a statute, the Legislature must be presumed to have knowledge of all previous legislation upon the subject. *In re Estate of Psota*, 297 Neb. 570, 900 N.W.2d 790 (2017). The Legislature is also presumed to know the language used in a statute, and if a subsequent act on the same or similar subject uses different terms in the same connection, the court must presume that a change in the law was intended. *Id.* See, also, *Shipler v. General Motors Corp.*, 271 Neb. 194, 216, 710 N.W.2d 807, 829 (2006) (“last expression of legislative will is the law”). Therefore, we presume that when it amended § 29-2206 in 2012 to allow a court to deduct fines and costs from a bond, the Legislature was aware of the language of § 29-901 requiring the return of 90 percent of the bond deposit to the defendant. We therefore presume the Legislature specifically intended that the deduction of fines and costs was an exception to the general rule that the bond deposit is to be returned to the defendant.

We conclude that when the county court entered its order on April 3, 2019, § 29-2206 allowed it to deduct fines and costs from the bond deposit and § 29-901 did not prohibit it from doing so. We therefore conclude that the district court did not err when it affirmed the county court’s order to deduct fines and costs from Collins’ appearance bond deposit.

*Collins Has Not Shown
Ineffective Assistance
of Counsel.*

Collins finally claims that she received ineffective assistance of counsel in the county court because at the sentencing hearing, “counsel failed to present sufficient evidence and information for the [county court’s] consideration in determining the proper sentence and thus her right to a fair sentencing hearing was prejudiced.” We conclude that the record on direct appeal does not show ineffective assistance.

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Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal depends upon the sufficiency of the record to address the claim to determine whether a defense counsel's performance was deficient and whether the defendant was prejudiced by the alleged deficient performance. See *State v. Theisen*, 306 Neb. 591, 946 N.W.2d 677 (2020). We have said the record is sufficient if it establishes either that trial counsel's performance was not deficient, that the appellant will not be able to establish prejudice, or that trial counsel's actions could not be justified as a part of any plausible trial strategy. *Id.*

[18-21] To prevail on a claim of ineffective assistance of counsel, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *State v. Anderson*, 305 Neb. 978, 943 N.W.2d 690 (2020). To show that counsel's performance was deficient, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. *Id.* To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

We note as an initial matter that in her brief, Collins argues in part that counsel provided ineffective assistance because counsel "failed to ask for [her] bond to be released to her." Brief for appellant at 28. We do not think this argument is encompassed within Collins' assignment of error in which she alleges that "counsel failed to present sufficient evidence and information for the [county court's] consideration in determining the proper sentence." See *State v. Mrza*, 302 Neb. 931, 926 N.W.2d 79 (2019) (providing that assignments of error on direct appeal regarding ineffective assistance of trial counsel must specifically allege deficient performance). In any event, this claim is unavailing because as we discussed above, at the time the county court ordered that fines and costs be

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deducted from Collins' bond, the county court had statutory authority to do so whether or not Collins requested return of the bond, and therefore, counsel's alleged failure to ask that the bond be released to her did not prejudice Collins.

As quoted above, Collins primarily asserts that counsel provided ineffective assistance when "counsel failed to present sufficient evidence and information for the [county court's] consideration in determining the proper sentence." She specifically argues that at sentencing, counsel failed to present the evidence that counsel later asserted in the motions for new trial or to reconsider sentence all to the effect that newly discovered evidence would show that a license revocation would be a hardship for Collins. We determine that the record on direct appeal does not show that counsel's performance was deficient in this regard and that the record refutes a finding that any such deficiency was prejudicial.

Regarding deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. *Anderson, supra*. The record on direct appeal does not contain evidence which would assist this court in assessing what factors a lawyer with ordinary training and skill would have presented at the sentencing, nor does it indicate that Collins' counsel behaved unreasonably when he focused on avoiding a sentence of imprisonment at the expense of other features of the sentence.

In the affidavit of counsel offered in support of the motions for new trial and to reconsider sentence, counsel states that "[d]ue to the urgency" of getting Collins into drug court, counsel "had limited time between plea negotiations and plea entry to discuss sentencing with [Collins]," and that counsel "was unaware of certain facts about [Collins] that are material to sentencing." But rather than declaring that such circumstance showed deficient performance, counsel stated to the contrary that "due to extenuating circumstances, [counsel] could not have with reasonable diligence discovered and produced [such evidence] prior to or during sentencing." Counsel's affidavit, taken as a whole, refutes a determination that counsel's

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failure to present the evidence at sentencing constituted deficient performance.

Further, we believe that the record also refutes a finding of prejudice. Regarding prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different, and a reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Anderson*, 305 Neb. 978, 943 N.W.2d 690 (2020). Collins gains some support for her allegation of prejudice from the county court's comment at the hearing on the motions for new trial and to reconsider sentence that if it "had known some of these things beforehand, [it] probably would have likely ruled differently." However, the county court's comment is vague as to what the court would have done differently and we cannot presume that the court would not have imposed a license revocation. We cannot find that the court's comment establishes a probability sufficient to undermine confidence in the outcome.

We have reviewed the record and find that it refutes a finding of prejudice even if counsel had been deficient. At the plea hearing, the State informed Collins of the sentencing range for the amended charges and stated that as to the charge of operating a motor vehicle to avoid arrest, "your driver's license will also be revoked for up to one year." Collins stated that she understood the charges and possible penalties just recited.

The State's advisement, such as it was, could only have alerted Collins and her counsel that license revocation could follow. Later, in the plea colloquy, the county court asked Collins whether she had "had enough time to think about [her] plea and discuss it with [counsel]," and Collins replied that she had. After accepting Collins' plea and before pronouncing sentence, the county court allowed counsel to argue on behalf of Collins. After Collins' counsel's argument, the county court asked whether Collins had "anything she wishe[d] to say," and Collins replied, "No."

The record of the plea and sentencing hearing shows that even if counsel was deficient in failing to inform Collins of

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the possibility of a license revocation and to solicit information from Collins relevant to that possibility, such deficiency did not prejudice Collins. After the State stated “your driver’s license will also be revoked for up to one year,” the court gave Collins the opportunity to say she had not discussed the issue of a license revocation with counsel; instead, she said she had had sufficient time to discuss her plea with counsel. Also, prior to sentencing and after hearing the argument counsel had made on her behalf, the court provided Collins the opportunity to inform it of circumstances relevant to sentencing that had not been presented by counsel, but she chose not to say anything.

We conclude that the record on direct appeal refutes Collins’ claim of ineffective assistance of counsel. We therefore reject Collins’ claim on direct appeal that counsel provided ineffective assistance at sentencing.

CONCLUSION

We conclude that the district court did not err when it rejected Collins’ claim that the county court imposed excessive sentences and her claim that the county court erred when it ordered that fines and costs be deducted from her bond. We further conclude that Collins’ claim of ineffective assistance of counsel is refuted by the record on direct appeal. We therefore affirm the district court’s order which affirmed Collins’ convictions and sentences.

AFFIRMED.

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

ROBERT DICK, APPELLEE AND CROSS-APPELLANT, v.
KOSKI PROFESSIONAL GROUP, P.C., THIRD-PARTY
PLAINTIFF, APPELLANT AND CROSS-APPELLEE, AND
BLAND & ASSOCIATES, P.C., THIRD-PARTY
DEFENDANT, APPELLEE AND
CROSS-APPELLANT.

950 N.W.2d 321

Filed October 30, 2020. No. S-19-132.

1. **Judgments: Jury Trials: Pretrial Procedure: Appeal and Error.** The allocation of peremptory challenges in a multi-party civil suit is left to the discretion of the trial court and will be reviewed for an abuse of discretion.
2. **Judgments: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.
4. **Jury Instructions: Pleadings: Appeal and Error.** A party may not complain of the failure of the trial court to instruct on issues that are outside the scope of the pleadings.
5. **Jury Instructions.** Jury instructions must be read together; they must be read conjunctively, rather than separately in isolation.
6. **Jury Instructions: Appeal and Error.** If the jury instructions given, which are taken as a whole, correctly state the law, are not misleading,

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- and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.
7. **Directed Verdict: Appeal and Error.** When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and where the issues should be decided as a matter of law.
 8. **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.
 9. **Juries.** In Nebraska, the number of peremptory challenges allowable in civil actions is governed by case law and unwritten rules of court.
 10. **Juries: Parties.** A party can exercise the peremptory challenge to remove a potential juror on the basis of that party's belief that the juror's status as a member of some cognizable group will prejudice his or her attitude toward that party's case.
 11. ____: _____. Where there are multiple parties on the same side of a lawsuit, each side of the lawsuit is entitled to a total of three peremptory challenges, unless the multiple parties' interests are adverse to each other.
 12. ____: _____. Multiple parties on the same side of a civil lawsuit are adverse to each other when a good-faith controversy exists between them over an issue of fact that the jury will decide.
 13. **Parties.** The fact that one party may have to defend against a theory of recovery not asserted against the other does not in itself mean that the two parties' interests are adverse.
 14. _____. Relevant circumstances to determine whether the defendants' interests are adverse to each other include but are not limited to (1) whether separate acts of misconduct were alleged against the separate defendants, (2) whether comparative negligence principles applied to the case, (3) the type of relationship among the defendants, (4) whether cross-claims or third-party complaints had been filed and the positions taken therein, (5) information disclosed on pretrial discovery, and (6) representations made by the parties.
 15. **Juries: Parties: Appeal and Error.** One who does not exercise all his or her peremptory challenges cannot assign as error the court's refusal to allow a greater number or a lesser number to the opposing parties.
 16. **Contracts: Shareholder Agreements.** Shareholder agreements are construed according to the principles of the law of contracts.
 17. **Actions: Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.

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18. **Contracts: Shareholder Agreements.** The meaning of an unambiguous shareholder agreement, like any contract, is a question of law.
19. **Contracts.** Matters seeking avoidance of a valid contract are affirmative defenses.
20. **Contracts: Words and Phrases.** A condition precedent is a condition that must be performed before the parties' agreement becomes a binding contract or a condition which must be fulfilled before a duty to perform an existing contract arises.
21. **Contracts: Breach of Contract: Damages.** A condition precedent is in contrast to a promise in a contract, the nonfulfillment of which is a breach, i.e., the failure to perform that which was required by a legal duty, and the remedy lies in an action for damages.
22. **Contracts: Intent: Words and Phrases.** Whether language in a contract is a condition precedent depends on the parties' intent as gathered from the language of the contract.
23. ____: ____: _____. Where contracting parties' intent is not clear, the language is generally interpreted as promissory rather than conditional.
24. **Contracts: Liability: Tender.** In a simultaneous exchange, entailing mutual conditions precedent, liability under the contract by the first party is triggered by an offer of tender by the second party, which is conditional upon contemporaneous performance of the first.
25. **Contracts: Words and Phrases.** Tender is an offer to perform a condition or obligation, coupled with the present ability of immediate performance, so that, were it not for the refusal of cooperation by the party to whom tendered, the condition or obligation would be immediately satisfied.
26. **Tender: Waiver.** Tender before suit is filed is waived where the party entitled to payment, by conduct or declaration, proclaims that if a tender should be made, acceptance would be refused.
27. **Contracts: Tender: Proof.** Acts which, in themselves, are insufficient to make a complete tender may constitute proof of readiness to perform, so as to protect the rights of a party under a contract, where a proper tender is rendered impossible by circumstances not due to the fault of the tenderer.
28. **Actions: Contracts: Pleadings.** To constitute a defense to an action based on contract, the matters must generally be germane to the cause of action pleaded, in addition to presenting a legal reason why plaintiff will not recover.
29. **Claims: Contracts: Torts.** A claim of defense arising out of tort concepts is not generally available where the claim of the plaintiff is premised upon contract.
30. **Contracts.** Fiduciary duties arise from the relationship and not from the terms of the agreement.

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31. **Contracts: Parties.** The implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract.
32. **Contracts.** The scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract.
33. _____. The covenant of good faith and fair dealing cannot give rise to new obligations not otherwise contained in a contract's express terms.
34. **Contracts: Breach of Contract.** The "prior material breach" doctrine applies when a contract contemplates an exchange of performances between the parties, and the doctrine holds that one party's failure to perform allows the other party to cease its own performance.
35. _____. A duty under a separate contract is not affected by the doctrine of prior material breach, nor is a duty under the same contract affected if it was not one to render a performance to be exchanged under an exchange of promises; further, only duties to render performance are affected.
36. **Actions: Breach of Contract.** A prior material breach by the other contracting party is an affirmative defense that applies only when the breaching party breaches the same contract on which he or she is suing.
37. **Shareholder Agreements: Corporations.** Shareholder agreements may be freestanding of corporate bylaws.
38. **Claims: Juries: Verdicts.** Factual issues necessarily determined by a jury's verdict on one claim in a case are also deemed resolved with respect to other claims in the same case.
39. **Judgments.** The existence of a fiduciary duty and scope of that duty are questions of law for the court to decide.
40. **Corporations: Trusts.** The law of trusts forms the basis for fiduciary duties. Fiduciaries in a corporation are not trustees in the strict sense because they do not have title to the estate; they are instead fiduciaries to the extent that they control the corporation's property.
41. **Equity: Courts.** The scope of fiduciary duties is flexible, reflecting the historical approach of the courts of equity.
42. **Corporations.** Minority shareholders do not owe a fiduciary duty to each other or to the corporation.
43. _____. An officer of a corporation occupies a fiduciary relationship toward the corporation and its stockholders.
44. _____. The existence of a fiduciary duty of an officer in a closely held corporation depends on the ability to exercise the status that creates it, and nominal corporate officers with no management authority generally do not owe fiduciary duties to the corporation.
45. **Actions: Damages: Proof.** The plaintiff in an action for breach of fiduciary duty has the burden to prove that (1) the defendant owed the

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- plaintiff a fiduciary duty, (2) the defendant breached the duty, (3) the defendant's breach was the cause of the injury to the plaintiff, and (4) the plaintiff was damaged.
46. **Actions: Corporations: Proof.** In an action for breach of fiduciary duty toward a corporation, the plaintiff must establish a prima facie case of both the existence of a fiduciary duty and its breach before the burden shifts to the defendant to prove the defendant acted in an open, fair, and honest manner such that no breach of fiduciary duty occurred.
 47. **Corporations: Proof.** Negotiating to leave one's fiduciary position with a closely held corporation and to enter into competing employment elsewhere is not a transaction that shifts the burden to the fiduciary to prove the negotiation's fairness.
 48. **Employer and Employee.** An employer's right to demand and receive loyalty must be tempered by society's legitimate interest in encouraging competition.
 49. **Employer and Employee: Trade Secrets.** An employee who plans to compete with his or her employer may not (1) appropriate the employer's trade secrets, (2) solicit the employer's customers while still working for the employer, (3) solicit the departure of other employees while still working for the employer, or (4) carry away confidential information, such as customer lists.
 50. **Trial: Evidence: Appeal and Error.** Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked.
 51. **Corporations: Contracts.** Customers without exclusive contractual arrangements with corporations or with whom a corporation has to annually renew contracts are not corporate business opportunities.
 52. **Equity: Unjust Enrichment: Principal and Agent.** Equitable clawback is a restitutionary remedy based on principles of unjust enrichment and the faithless servant doctrine. It establishes a mandate that an agent who engages in activities that breach the agent's fiduciary duties to the principal is not entitled to and must forfeit any compensation for services rendered during the period of the breach.
 53. **Jury Instructions: Appeal and Error.** Any jury instruction is subject to the harmless error rule, which requires a reversal only if error adversely affects the substantial rights of the complaining party.
 54. **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

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the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.

55. **Torts: Employer and Employee.** Factors to consider in determining whether interference with a business relationship was unjustified include: (1) the nature of the actor's conduct, (2) the actor's motive, (3) the interests of the other with which the actor's conduct interferes, (4) the interests sought to be advanced by the actor, (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (6) the proximity or remoteness of the actor's conduct to the interference, and (7) the relations between the parties. The issue is whether, upon a consideration of the relative significance of the factors involved, the conduct should be permitted without liability, despite its effect of harm to another.
56. **Contracts.** An individual's interest in prospective economic advantage receives less protection than his or her enforceable contract rights.
57. **Torts: Proof.** The party alleging tortious interference has the burden of proving that the conduct did not fall within the competitor's privilege.
58. **Torts: Intent.** One is privileged purposely to cause a third person not to enter into or continue a business relation with a competitor of the actor if (1) the relation concerns a matter involved in the competition between the actor and the competitor, (2) the actor does not employ improper means, (3) the actor does not intend thereby to create or continue an illegal restraint of competition, and (4) the actor's purpose is at least in part to advance his or her interest in the competition with the other.
59. **Torts.** Improper means of competition has been described as physical violence, fraud, civil suits, and criminal prosecutions—though even these means may not be forbidden, depending upon the relation between the actor and the person induced, and the object sought to be accomplished by the actor.
60. **Evidence: Appeal and Error.** In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.

Appeal from the District Court for Douglas County: J
RUSSELL DERR, Judge. Affirmed.

Robert M. Slovek and Dwyer Arce, of Kutak Rock, L.L.P.,
for appellant.

Aaron A. Clark, Ruth A. Horvatch, and Cody E.
Brookhouser-Sisney, of McGrath, North, Mullin & Kratz, P.C.,
L.L.O., for appellee Robert Dick.

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HEAVICAN, C.J., CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

FREUDENBERG, J.

I. NATURE OF CASE

An accountant left one firm in order to join another. Several clients followed the accountant to his new firm. The accountant, who was a shareholder and officer at his former firm, sued the former firm for failing to perform a mandatory provision in the shareholder agreement to buy out a departing shareholder's corporate shares at a price that accounted for any lost billings by virtue of clients' following a departing shareholder. The firm made numerous allegations in defense of the accountant's claim and brought counterclaims against the accountant, including breach of fiduciary duty and misappropriation of confidential information. The accountant's prior firm also brought third-party claims against the accountant's new firm, which included tortious interference with business expectations and a malicious prosecution claim in relation to a complaint made by the new firm to the Nebraska State Board of Public Accountancy (NSBPA). All claims presented to the jury were determined in favor of the accountant and his new firm. The accountant's former firm appeals, presenting 15 assignments of error challenging the allocation of peremptory strikes, the denial of its motion for directed verdict, the exclusion of certain evidence, and several of the jury instructions. We affirm the judgment.

II. BACKGROUND

The underlying action was commenced by Robert Dick, an accountant, against Koski Professional Group, P.C. (KPG), a closely held professional corporation providing accounting services. Dick worked at KPG as an accountant for 22 years and eventually held the corporate office of vice president.

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In 2015, Dick moved his practice to Bland & Associates, P.C. (Bland). Bland agreed to pay Dick a base salary plus a percentage commission on his clients' billings. Although not solicited to do so prior to his departure, many of Dick's clients transferred their business to Bland after Dick began working there. There was no noncompete agreement between Dick and KPG.

Dick had purchased 30 percent of KPG shares during his tenure at KPG, at a total purchase price of approximately \$257,000. Some of the funds for the stock purchase were obtained through a loan by Randall Koski (Koski), president of KPG, to Dick. The loan was secured by a promissory note and set forth a payment plan and interest. At the time of his departure, Dick still owed approximately \$63,000 on the loan. Dick continued the scheduled payments and paid off the balance in full before trial.

When Dick left KPG, he communicated to Koski that he wished for KPG to purchase his shares pursuant to the terms of the controlling shareholder agreement (Shareholder Agreement). The Shareholder Agreement described voluntary termination as an operative event requiring the shareholder to sell and the corporation to purchase all of the disposing shareholder's stock. The Shareholder Agreement set forth the purchase price for an operative event such as a shareholder's voluntary departure as 80 percent of the adjusted book value. The adjusted book value in such circumstances was based in part on "[r]etained [a]nnual [b]illings," described as the difference between KPG's total professional fees during the most recently completed fiscal year and all professional fees billed to clients who are no longer clients of KPG and were being served by the departing shareholder 1 year subsequent to departure. The repurchase under the Shareholder Agreement was to occur within 60 days of termination. The agreement further specified that KPG was to issue a promissory note to purchase the stock in 120 equal monthly installments with 5 percent per annum interest.

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Koski disavowed a buyout obligation at the price set forth under the Shareholder Agreement. Koski believed that Dick's actions in relation to procuring his new employment had breached his fiduciary duties to KPG and the corporate bylaws and, further, that because of the promissory note, Dick had failed to offer the stock free of all liens. KPG never valued the shares or set a closing date for a repurchase. Dick sued.

1. AMENDED COMPLAINT

Dick alleged breach of contract. Dick also asked for an order granting specific performance of the Shareholder Agreement compelling KPG to calculate the adjusted book value per share, deliver a promissory note secured by the pledge of stock, and pay in full all installment payments to repurchase the stock plus prejudgment interest and other interest provided under the Shareholder Agreement. He asked for an accounting or such other relief necessary to determine the value of his stock. Alternatively, Dick asked for an order accelerating the payment of all amounts due to purchase his stock and the entry of a monetary judgment representing the full adjusted book value owed by reason of KPG's repudiation and default. Dick also alleged violations of the Nebraska Wage Payment and Collection Act,¹ but dismissed that claim after trial.

2. AMENDED ANSWER

KPG generally denied the allegations set forth in Dick's amended complaint and alleged several affirmative defenses, including prior material breach and failure to satisfy a condition precedent. KPG alleged that Dick's breach of contract claim was barred by his own prior material breach of the Shareholder Agreement and bylaws, thereby excusing KPG's duty to perform. KPG alleged that Dick failed to satisfy a condition precedent of the applicable stockholder agreement by

¹ See Neb. Rev. Stat. §§ 48-1228 to 48-1234 (Reissue 2010, Cum. Supp. 2018 & Supp. 2019).

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failing to return his stock to KPG free and clear of any security interests or encumbrances.

KPG did not allege a prior breach of fiduciary duty or good faith and fair dealing as affirmative defenses to Dick's breach of contract claim.

3. COUNTERCLAIMS

KPG then set forth seven counterclaims against Dick, some of which mirrored the alleged affirmative defenses.

(a) Breach of Fiduciary Duty

First, KPG alleged a counterclaim for breach of fiduciary duty. KPG asserted that Dick breached his fiduciary duties of loyalty and care, imposed by virtue of his being an officer and shareholder of a close corporation, by (1) disclosing KPG's confidential business techniques and commercial data to Bland; (2) failing to send out engagement letters on behalf of KPG to two different KPG clients in order to take those clients to Bland; (3) "'shopp[ing]'" KPG's long-term clients to other accounting firms to find the one that would offer him the largest fees for taking those clients to them; (4) engaging with Bland, while still working for KPG, in an agreement in which he would receive a 10-percent commission on all clients he brought to Bland from KPG, in violation of the rules of professional conduct of the NSBPA; (5) concealing from KPG his efforts to transition to a rival accounting firm; (6) breaking his specific promise to KPG that he would not contact KPG clients during that period of time; (7) mishandling and providing negligent accounting services to KPG clients; and (8) violating KPG's bylaws by sending KPG's confidential business techniques and commercial data to Bland.

While the underlying facts of this stated claim were the same as those referred to in the affirmative defense of unclean hands, KPG sought damages as a result of the alleged breaches, as well as a return of compensation paid to Dick during the period of his breach—under the "equitable claw back" doctrine.

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(b) Breach of Shareholder Agreement

Second, KPG asserted that Dick breached the explicit terms of the Shareholder Agreement, as well as implied covenants of good faith and fair dealing, by demanding that KPG repurchase his stocks and by initiating litigation to compel the same, when Dick was allegedly unable to return his stock unencumbered. Like in its affirmative defense of prior material breach and failure to satisfy a condition precedent based on similar allegations, KPG asserted that it was excused from performing any further obligation under the Shareholder Agreement. KPG asked for damages as a result of Dick's breach.

(c) Breach of KPG's Bylaws

Third, and again repeating one of the allegations stated under breach of fiduciary duty, KPG alleged that Dick breached bylaws providing that officers and employees of KPG maintain and preserve confidentiality as to all business techniques, commercial data, formulas, goodwill, operational methods, product identifications, service marks, trademarks, trade names, and trade secrets, by disclosing confidential information to Bland in order to undercut KPG pricing for its clients. KPG alleged it suffered monetary damages as a result of the breach.

(d) Misappropriation of Trade Secrets

Fourth, KPG alleged that Dick violated Nebraska's Trade Secrets Act, Neb. Rev. Stat. § 87-501 et seq. (Reissue 2014), by utilizing KPG's trade secrets for his own benefit in the course of his employment with Bland. KPG asked for damages due to actual losses and unjust enrichment, as provided by § 87-504.

(e) Tortious Interference With Contact or
Business Relationship or Expectancy

KPG's fifth counterclaim was based in part on the same allegations as those set forth in KPG's counterclaim alleging breach of fiduciary duties and in part on the additional alleged facts that (1) Dick had encouraged clients who switched from

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KPG to Bland not to pay their outstanding balances with KPG and (2) Dick maliciously assisted Bland in filing a false complaint against KPG with the NSBPA. KPG sought damages.

(f) Civil Conspiracy

Sixth, repeating allegations made under its breach of fiduciary duty and tortious interference claims concerning Dick's breach of KPG's bylaws by sending confidential information to Bland, KPG alleged that Dick conspired with Bland to "wrongfully co-opt KPG's niche practice, all while taking concerted steps to prevent KPG from discovering Dick's wrongful conduct." KPG sought damages for this alleged civil conspiracy.

(g) Unjust Enrichment

Seventh, KPG asked for the return of certain amounts paid to Dick or on his behalf under the theory of unjust enrichment. Specifically, KPG sought reimbursement of a \$16,000 discretionary bonus paid to Dick on the condition that he stay through an orderly transition process, which Dick allegedly did not do. KPG also sought reimbursement for \$3,587.13 paid to cover Dick's health insurance premium for the fourth quarter of 2015, during which Dick no longer worked for KPG.

4. THIRD-PARTY COMPLAINT

KPG brought a third-party complaint against Bland stating six claims for which KPG sought monetary damages: (1) tortious interference with an existing contract or business relationship or expectancy; (2) aiding and abetting a breach of fiduciary duty; (3) malicious prosecution based on Bland's commencement of NSBPA proceedings against KPG, allegedly without probable cause and with malice, "in an effort to bully and intimidate" KPG; (4) misappropriation of trade secrets as defined by KPG's bylaws and § 87-502(4); (5) civil conspiracy to willfully and maliciously interfere with KPG's business operations, customer relationships, and corporate opportunities; and (6) unjust enrichment through the receipt and

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continued use of KPG's confidential business techniques and commercial data.

5. PRETRIAL ORDER REGARDING
10-PERCENT COMMISSION

KPG moved for partial summary judgment against Bland on its allegation that Bland's payment of a 10-percent commission to Dick for prior KPG clients violated the rules of professional conduct of the NSBPA and that this accordingly constituted tortious interference with its business relationships or expectations. Bland responded by filing a cross-motion for partial summary judgment against KPG, alleging that as a matter of law, the commission did not create a conflict of interest or violate the NSBPA's regulations, because it was paid directly by Bland to Dick and did not affect the amounts paid by a client or the outcome of an engagement between Bland and a client. Dick filed a separate motion for partial summary judgment for the same reasons as set forth in Bland's motion.

Following a hearing, the court overruled KPG's motion for partial summary judgment and granted Bland's motion for partial summary judgment on the issue of whether the commission violated NSBPA regulations. The court found as a matter of law that Bland was not violating NSBPA regulations by paying Dick a 10-percent commission on fees paid to Bland for work performed for clients Dick brought to Bland. The NSBPA rule in question, the court explained, prohibited commissions that would create a potential conflict of interest, such as a licensee's receiving a commission from an outside service provider for referring that provider's service to that licensee's client. The court did not rule on whether there was any other basis for concluding that Bland engaged in an unjustified intentional act of interference against KPG.

6. PEREMPTORY CHALLENGES

Prior to jury selection, the court issued a written order finding that the interests of Dick and Bland were sufficiently adverse such that each should have three peremptory

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challenges. The jury selection process is not otherwise reflected in the appellate record.

7. EVIDENCE PRESENTED AT TRIAL

The jury trial was held from October 1 through 12, 2018. The following evidence was adduced.

(a) Dick Employed by
Randall K. Koski, P.C.

Dick testified that he was hired at Randall K. Koski, P.C., in 1993. At that time, the firm was Koski's sole practice, established in 1986. Koski had as a client a nursing home chain and was looking for someone with health care experience. Dick had experience working with Medicare.

Dick testified that at Randall K. Koski, P.C., he specialized in cost reports and other accounting services for long-term health care facilities. He brought in his first client in 1995, at which time there were only three nursing homes being served by KPG. By the time Dick resigned, KPG served around 45 nursing homes.

Dick testified that since 1995, he had personally brought in every long-term health care client that Randall K. Koski, P.C., and KPG had served. A shareholder, Michelle Thornburg, described that while "Dick may have been the face of that networking," KPG resources assisted him in that effort significantly. Koski also generally disagreed with Dick's perspective that he was the driving force of KPG's growth in that area. According to Koski, long-term health care clients have always been between one-third and one-half of KPG's client base.

(b) Shareholder Agreements, Stock
Purchases, and Promissory Notes

In 1997, Koski filed with the Secretary of State an amendment to the articles of incorporation of Randall K. Koski, P.C., to change the corporation's name to that of KPG. The amendment, adopted by Koski as the sole shareholder, provided that "all other terms and conditions of the articles of incorporation

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filed January 14, 1991 were reconfirmed and deemed to be in full force and effect.”

In 1997, the first KPG shareholder agreement was signed by Koski, Dick, and Thornburg. Shareholder agreements were again signed by all relevant parties in 2005 and 2011. The relevant provisions were the same in each of these subsequently executed shareholder agreements.

In addition to the “mandatory sales and purchases” provisions that took into account any clients that leave with a voluntarily departing shareholder, the agreements provided for shareholder indebtedness to the corporation or a third-party secured creditor to be offset against the buyout price. The shareholder agreements further had a provision that stated:

This Agreement contains the entire understanding among the parties and supersedes any prior understanding among the parties and agreements between them respecting the within subject matter. There are no representations, agreements, arrangements or understandings, oral or written, between or among the parties hereto relating to the subject matter of this Agreement which are not fully expressed herein.

There was no reference in the KPG shareholder agreements to corporate bylaws. At the time of the corporation’s formation, there were three shareholders, a few employees, and gross revenues of close to \$500,000. When Dick resigned in 2014, there were four shareholders, over a dozen employees, and \$1.8 million in gross revenue. The fourth shareholder, Adrian Lape-Brinkman, joined in 2010, after purchasing a 15-percent interest in KPG for \$186,493.08.

Dick originally purchased 12.5 shares in KPG from KPG for \$52,260.25. In 2000, Dick purchased additional shares in KPG from KPG for \$40,356.

In 2005, Dick purchased 11.8 shares in KPG from Koski for \$90,000, giving Dick a 24-percent ownership interest and reducing Koski’s interest to 52 percent. The 2005 purchase was memorialized by a stock purchase agreement between

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Dick and Koski and was financed by Koski on a 10-year repayment term with interest, delineated in a security agreement between Dick and Koski. In 2010, Dick again purchased shares in KPG from Koski for \$74,597.23, at which point Dick owned 30 percent of KPG. Dick and Koski refinanced the remaining \$41,000 unpaid balance of the 2005 loan into a new loan for the 2010 purchase, for a total loan of \$115,000 plus interest.

Under the promissory note, Dick promised to pay \$1,199.67 per month from January 1, 2010, through December 31, 2019. The evidence was uncontroverted that Dick never defaulted on any of the loan payments.

It was undisputed that after the underlying lawsuit was filed, Dick continued to make payments and Koski continued to accept those payments until Dick paid off the remaining balance in September 2019. The total amount paid by Dick for all the KPG shares he purchased was \$257,998.74, plus \$40,181.69 in interest under the loan from Koski.

(c) Bylaws

KPG entered into evidence the bylaws of Randall K. Koski, P.C., adopted in 1990 when Koski was the sole owner and shareholder. The bylaws provided that “[a]ll officers, agents, and employees of [KPG] shall be required . . . to maintain and preserve confidentiality as to all business techniques, commercial data, formulas, good will, operational methods, product identifications, [etc.]” Koski testified that the Randall K. Koski, P.C., bylaws became the bylaws of KPG when the articles of incorporation for KPG were filed, since “[t]he only change in the corporation was the name”

(d) Shareholder Disagreements

Dick testified that in 2014, he became concerned that KPG’s resources were not sufficient to meet the continuing growth of the long-term health care client base. Dick suggested hiring more staff or merging with another accounting

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firm. Koski and Thornburg, however, were not interested in expanding in that way.

Also, Dick and Lape-Brinkman began to feel that it was inequitable that the shareholders' salaries were not in any manner tied to the number of clients they brought to KPG or to the amount of work they did. All shareholders were paid the same base salary no matter how many shares they owned. The shareholders were then each given a yearly distribution of KPG's profits based on their percentage of shareholder interest and without regard to the amount of revenue they brought to the firm or the amount of work performed.

Dick estimated that he oversaw approximately \$600,000 of work, while the other shareholders oversaw approximately \$400,000 of work each, some of whom were getting paid the same as Dick for doing less work. According to Dick, none of the other shareholders practiced in his specialty. Koski asserted that any extra hours worked by Dick were due to time spent correcting an error that Koski believed Dick's negligence had created, while Dick and his client testified that the error had occurred previously when the client was doing his own accounting work.

One idea that Dick and Lape-Brinkman suggested to the other shareholders was that shareholders be given a commission or bonus for clients they bring to the firm. Dick described this as a "standard practice." At a shareholder meeting in November 2014, Koski and Thornburg rejected such ideas, but suggested a formal proposal.

Soon after the November 2014 meeting, Koski sent an email to the other shareholders stating his belief that "much damage has been done to [the] 'partnership'" as a result of the disagreement about compensation. Koski expressed that he did not believe an agreement could be reached that would make everyone happy. Koski concluded:

The great irony here is that if I had always kept owner compensation confidential and none of you knew what

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the other was making, everyone would be tickled with this year's compensation.

I have a plan to finalize 2014 compensation. It is predicated on the idea that we will remain together as a firm at least for most of 2015. If anyone does not feel that they can remain with the firm for most of 2015, allowing us time for an orderly sale, merger or liquidation, if necessary, please be honest with me and tell me that, for I do not wish to make a discretionary allocation to anyone who will not remain here through an orderly process. You might be thinking that we all lose if we liquidate, and you would be correct. Substantially.

I have decided that my salary for 2014 will be \$160,000

. . . .

At the moment, following are my plans for a discretionary reduction in my compensation. I originally planned to allocate this to [Dick], [Thornburg,] and [Lape-Brinkman], as I have made known to you previously. [Thornburg] has very unselfishly asked me to allocate from her share \$4,000 to Kelli and \$2,000 to Annette and none to herself. The remainder of approximately \$30,000 plus would go to [Dick] and [Lape-Brinkman] in whatever proportion you may agree upon. . . .

. . . .

For the record, I have enjoyed the camaraderie, whether it was real or imagined, and I hope it may continue into the future.

Dick thus received a \$16,000 distribution. Dick testified that there was never any discussion of liquidating the firm, either prior to the email or afterward. The firm was never dissolved, and Dick stayed with KPG for the first 9 months of 2015.

In January 2015, a formal proposal was submitted, which the majority of the shareholders rejected. At some point after Dick left, the remaining shareholders were able to reach an agreement to change their compensation structure.

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(e) Employment Negotiations With
Bland and Resignation

Dick submitted his resignation on September 30, 2015, effective immediately. Dick testified that he made sure all his pending work was completed prior to his departure. Dick did not give KPG notice that he was considering moving his practice elsewhere. Dick explained that he was worried KPG would fire him immediately if it found out he was considering other employment.

Dick described that he had originally begun communication with Bland about the possibility of a merger. But when it became clear that neither KPG nor Bland was interested in a merger, on May 28, 2015, Dick began discussing the possibility of moving his practice to Bland. Dick communicated with Bland through his wife's email account, which Dick testified was the email account he often utilized for his personal email communications.

(f) Dick's "Book of Business"

During these negotiations, Bland requested that Dick send information relating to Dick's "book of business." Dick sent to Bland (from his wife's email account) a spreadsheet containing information about the volume, general location, price, and type of work Dick performed. It was understood that clients were free to go where they wished and that Dick's book of business was developed in his employment at KPG, where the clients might choose to remain. Nevertheless, the managing shareholder at Bland testified that Dick's book of business was relevant to putting together a compensation package for Dick.

The spreadsheet was entered into evidence at trial. It demonstrated chunks of hours and the total billings for each chunk (such as 34 hours for a \$3,200 fee), with a description of the general type of work (such as "[t]ax" or "Medicaid"). The spreadsheet often indicated the time of year the work was due and sometimes indicated the state in which the work was performed. Clients were identified, if at all, by designations

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such as "Owner A." The document summarized total billings in various categories such as "[a]udit," "[t]ax," "Medicaid," and "[r]etirement [p]lan" and then summarized total billings into date categories of "January - June," "July - September," and "October - December."

Dick testified that some of the information in the spreadsheet came from Dick's estimation of fees and hours, while other parts of the information came from the KPG computer database. According to Thornburg, only shareholders and two paraprofessionals who did billing had access to such fees-and-hours data in their computer system. Dick acknowledged that the database was password protected, but testified that the fees-and-hours information was public information.

Thornburg acknowledged that a range of KPG pricing information was given to potential clients and that clients were obviously aware of what they were being billed. Clients were not asked to keep that information confidential. Koski testified that KPG would share its billing rates with anyone, "because it tells them nothing," and that pricing information was given to each customer.

Both Bland and KPG provided potential clients with cost estimates, which the potential clients were free to share with others. KPG did so through its engagement letters, and Lape-Brinkman testified that there was nothing in the engagement letters that restricted a potential, current, or past client from disclosing to Bland or other firms what KPG charged for the described services. The managing shareholder at Bland testified that he always asked potential clients what fees they were currently paying before putting together a proposal, which the clients ordinarily freely disclosed. He generally sought that information in order to understand whether it would be worthwhile to make an offer, since Bland did not "want to undercut" and "take a losing job."

It was undisputed that long-term health care facilities generally must publicly disclose Medicaid cost reports, which include accounting fees. But Koski pointed out that those

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fees could be a sum of multiple firms' work. KPG's website described the types of tax work KPG performed for its clients. It also listed the states in which it performed services.

During his testimony, Koski explained that he primarily took issue with Dick's sharing with Bland the historical information about services provided to KPG clients, KPG client locations, and number of hours spent servicing KPG clients. Koski stated, "Standard hourly billing rates are one thing, but what you actually realized on a client engagement is something else" Koski testified that the latter information was not publicly available. Koski described that such information could be used by a competitor to organize staff and other resources required to serve that client.

At no point did Dick relay to Bland any client names. At no point did Dick or anyone at Bland utilize the information in the spreadsheet or any other information to undercut KPG's rates or solicit new clients. The managing shareholder at Bland testified that he did not attempt to identify KPG clients from the information conveyed in the spreadsheet. The managing shareholder stated that Bland has never utilized the spreadsheet to solicit KPG clients or for any other competitive purpose. Dick testified that after sending the spreadsheet to Bland, he never looked at the information again.

(g) Job Offer and 10-Percent Commission

By August 2015, Bland had offered Dick a job. At Bland, all accountants receive an extra payment of 10 percent of the billings on the first year of collections for all clients they personally bring to the firm. This has been Bland's policy for quite some time. In 2015, approximately 50 Bland employees received such a commission. Dick's position as an accountant at Bland meant he also would receive such a commission. The court excluded expert testimony proffered by KPG that Bland's 10-percent commission system violated the rules of professional conduct of the NSBPA.

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(h) KPG Clients That Left

Dick testified that he did not talk to any clients before resigning from KPG about his move to Bland, and there was no evidence contradicting this testimony. After his resignation, Dick did send out emails to some former clients informing them of his new place of employment and stating that he would appreciate having the opportunity to continue providing them services. Ultimately, 23 clients chose to follow Dick to Bland, while 37 clients stayed with KPG.

Koski testified that in the 18 months following Dick's resignation, 83 clients were "lost," while 37 stayed. Of those 83 clients, according to Koski, 38 originally followed Dick but only 23 remained with Dick a year after his departure from KPG. Koski could not strictly account for where the other long-term health care clients went, but opined that their loss was related to the "disruption" and "consternation" surrounding Dick's resignation.

The executives of nine of the clients who followed Dick from KPG to Bland testified that Dick did not reach out to them or solicit their business following his departure. Rather, they discovered Dick's departure from KPG employees, during a regular bidding process, or by other means. These clients then reached out to Dick directly.

In total, the executives of 13 clients who followed Dick testified. They all testified Dick never made any disparaging comments about KPG or offered to undercut KPG's pricing. Indeed, Dick assured one of those clients that KPG was fully equipped to continue to serve its needs. No evidence was presented that any former KPG client followed Dick to Bland because of better pricing.

According to Koski, Dick's departure resulted in a decline in KPG's revenue due to the loss of clients as well as the cost of the present litigation. KPG's expert witness testified that due to lost clients, KPG had experienced approximately \$1.8 million in lost profits over a projected 10-year period and based on a 6.04-percent compounding growth in the clients' billings. The 10-year period was based on past longevity of KPG's

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long-term health care clients. The expert also testified, over Dick's objection, that KPG had experienced "clawback" damages in the amount of \$48,247.

KPG's expert admitted on cross-examination that he was directed which clients to include in the lost-profits calculation, and he did not investigate why the clients had left. He did not know whether any of those clients were one-time engagements, went to firms other than Bland, or were no longer in business. Furthermore, he included in his lost-profits calculations clients who had remained with KPG but whose billings decreased.

KPG's expert also testified that he had made no judgment in determining clawback damages whether Dick had worked diligently on behalf of KPG during the 4-month period he was negotiating with Bland prior to resigning.

During the expert's examination, KPG's counsel asked the court to allow the expert to recalculate the lost profits by removing certain clients Dick claimed to have identified during cross-examination that should have been excluded. The court sustained Dick's objection to such a late revision of the expert's report, but allowed the expert to testify as to the mathematical formula by which such a calculation could be made.

Dick's expert witness testified that only former clients of KPG that followed Dick to Bland should have been included in KPG's expert's calculations of lost profits. Clients who continued to have their work done by KPG and former clients who had contracted with KPG for a onetime project should have been excluded from KPG's expert's calculations, but were not. Dick's expert witness also opined that using 6.04 percent as the predicted growth rate was unreasonable. And she also took issue with the 10-year projection, noting that "to assume that every one of these is going to last ten years would be really overstating the life of that client base." Finally, Dick's expert witness opined that the approximately \$200,000 for KPG's legal fees should not have been part of a lost-profits analysis.

According to her own analysis, Dick's expert witness testified that KPG did not suffer any lost profits as a result of

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Dick's resignation. Dick's expert witness testified that the lost revenue of clients who went to Bland was less than the amount KPG previously had to pay for Dick's salary.

(i) No Closing Under Shareholder
Buyout Provision

Dick testified that he had been prepared to proceed under the Shareholder Agreement's buyout provision with a closing date of 60 days from the operative event of his resignation, which would have been November 29, 2015. According to Dick's calculations under the formulas set forth in the Shareholder Agreement, his shares had a total value of \$470,312.51 and, under the Shareholder Agreement, KPG should have paid him approximately \$60,000 per year over a 10-year payment plan outlined in the Shareholder Agreement, with the first monthly payment due on November 29.

Dick's expert witness confirmed those calculations, while KPG's expert calculated the value of the shares at \$302,696. Although there was still an outstanding lien under the promissory note to Koski, Dick testified that he had been prepared to pay off that balance in connection with closing on the shares.

On October 3, 2015, Dick and Koski had a conversation wherein Dick made clear that he wanted his shares to be valued and repurchased. Koski asked Dick what he wanted for his shares. Dick responded that he wished for KPG to calculate the purchase price as provided under the terms of the Shareholder Agreement—though he might be willing to take a lesser amount in a lump sum “just to move on.” According to Dick, Koski refused to purchase the shares under the terms of the Shareholder Agreement, stating that “there's too much money at stake; we're going to fight you.” Thornburg testified that 2014 was the highest-revenue year in the history of the firm, which would result in “a pretty significant payout” for a departing shareholder.

According to Koski, he did not say, “We're going to fight you,” but offered to try to work something out. Nevertheless, Koski believed that the Shareholder Agreement did not control

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KPG's obligations, because Dick had not acted in good faith. Thus, any agreed-upon payout amount would not be commensurate to the sum under the formula of the Shareholder Agreement. Koski also testified, "[Dick] never offered to pay and deliver [the shares] free and clear of liens. He never offered it."

Dick testified that since his resignation, he has received no distributions or other income based on his shares and has no control over KPG operations, yet he has had to pay yearly taxes on KPG income by virtue of his continuing status as a shareholder. Dick testified that he has never had possession of any physical shareholder certificate—the shareholder agreements being the only documentation of the same. There was no evidence that physical shareholder certificates ever existed.

8. MOTION FOR DIRECTED VERDICT AGAINST DICK
ON CLAIM FOR BREACH OF CONTRACT

Near the close of trial, before KPG rested, KPG moved for a directed verdict against Dick on its cause of action under the Shareholder Agreement. Specifically, KPG argued that Dick had failed to rebut, by demonstrating good faith, KPG's prima facie case for its affirmative defense that Dick had breached his fiduciary duty toward KPG. The court pronounced that it was overruling the motion.

The court observed that KPG's claim appeared primarily to be based on the alleged act of disclosing confidential information through the email disclosing billings. The court considered it to be a question for the jury whether such information was confidential. While KPG asserted that additionally, Dick's concealment of his negotiations with Bland was a breach of a fiduciary duty of "utmost honesty with his partners," the court did not agree.

The court noted that the case law did not support the proposition that an officer or shareholder who merely prepares to compete upon departure breaches a fiduciary duty. And the court rejected KPG's premise that Dick had committed a breach of fiduciary duty by soliciting clients after he

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resigned at KPG—an act which the court noted was explicitly contemplated by the Shareholder Agreement. With regard to KPG's argument that Dick had a postresignation fiduciary duty because he was still a shareholder, the court said:

Well, that's kind of a circular argument here, that you won't buy him back, so he's still a shareholder. You won't buy him back 'cause you say, Well, I don't have to because he breached his fiduciary duty. That's the position [KPG's] taken, so what's he supposed to do?

The court also found little merit to the contention that Dick had “stole[n]” KPG clients, when there was no agreement not to compete.

Further, the court believed that postresignation conduct was not alleged as part of KPG's claim for breach of fiduciary duty. The court expressed the belief that any breach of fiduciary duty or tortious interference could not as a matter of law operate as an affirmative defense to Dick's claim for breach of contract. The court stated that there was no shifting of the burden of proof without first proving Dick engaged in a breach of fiduciary duty, and KPG had not done so.

The court overruled renewed motions for a directed verdict against Dick on his breach of contract claim at the close of KPG's counterclaim and at the close of all the evidence.

9. SUPPRESSION OF EVIDENCE OF POSTRESIGNATION
ACTS IN ALLEGED BREACH OF
FIDUCIARY DUTY

On the ground that the issue was not presented in the pleadings, the court later sustained during trial an objection by Dick preventing KPG from offering evidence of Dick's continuing fiduciary duty toward KPG as a shareholder after his resignation from KPG and becoming employed by Bland. The court reasoned that the issue was not pleaded. The court noted that under the allegation of breach of fiduciary duty, there were numerous specific facts pleaded under “[allegations] A through F,” all of which described acts before resignation. The court explained, “[T]here is no G that includes, By continuing to

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compete while continuing to be a shareholder, and that's a pretty big allegation."

The court also found no merit to a claim based on Dick's continuing duty as a shareholder when KPG refused to redeem Dick's shares. Finally, the court noted that there was nothing pleaded regarding any alleged failure to tender the shares.

KPG did not make an offer of proof.

10. MOTION TO AMEND PLEADINGS

The court overruled a related motion to amend the pleadings to conform to the evidence. Specifically, the court rejected any attempt by KPG to interject at such a late juncture the theory that Dick had a continuing fiduciary duty toward KPG by virtue of still being a shareholder. The court noted that in the amended pleadings filed 2 years after Dick's resignation and consisting of 143 paragraphs with numerous specific allegations of alleged breaches of fiduciary duty, "[n]owhere does it talk about breaching, continuing to breach his fiduciary duty by virtue of holding on to his shares."

The court also again observed that Dick had wanted to redeem his shares and that KPG "didn't take the position they're not worth as much," but, rather, "took the position I don't have to pay him anything." The court found it to be a "circular argument" that "[w]e won't buy his shares and he can't compete by virtue he still has fiduciary obligation." That was "a pretty big issue" that "should have been dealt with, if it needed to be dealt with, it should have been dealt with before."

11. MOTIONS FOR DIRECTED VERDICT ON KPG'S
COUNTERCLAIM AND CROSS-CLAIM

After KPG presented its evidence on its counterclaim and third-party claims, KPG moved for a directed verdict on those claims. Dick moved for a directed verdict on his claim against KPG for breach of the Shareholder Agreement and against KPG on its counterclaims. Bland also moved for a directed verdict in its favor on KPG's third-party claims, including its

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claim for malicious prosecution. The court overruled all the motions, and the parties discussed jury instructions.

12. JURY INSTRUCTIONS

At the jury instructions conference, KPG proposed numerous instructions and special verdict forms that the court ultimately refused to give and which will be set forth in more detail in the analysis section. Forty-seven instructions were given by the court to the jury.

The jury was instructed in instruction No. 2 regarding the theories under which KPG alleged it had not just a defense against Dick's breach of contract claim but counterclaims against Dick and third-party claims against Bland for damages. It provided in part:

[KPG] alleges that it does not have to repurchase the stock because Dick breached his fiduciary duty as an employee and shareholder of [KPG] by disclosing alleged confidential information of [KPG] and by discussing employment possibilities with Third Party Defendant Bland . . . while still an employee and shareholder of [KPG].

[KPG] has asserted claims against Dick for:

- Breach of fiduciary duty
- Breach of Shareholder Agreement
- Breach of [KPG's] Corporate by-laws
- Misappropriation of [KPG] trade secrets
- Tortious interference with business relationships and/or expectancy
- Civil conspiracy
- Unjust enrichment

[KPG] has asserted claims against Bland for:

- Tortious interference with business relationships and/or expectancy
- Aiding and abetting Dick's alleged breach of fiduciary duty to [KPG]
- Malicious prosecution
- Misappropriation of [KPG's] trade secrets

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- Civil conspiracy
- Unjust enrichment

Further instructions elaborated on the elements of these claims. These included instructions describing the elements of aiding and abetting a breach of fiduciary duty and malicious prosecution.

Regarding breach of fiduciary duty, instruction No. 5 informed the jury that because Dick was an officer, director, and shareholder, a fiduciary relationship existed between Dick and KPG. This relationship “imposes the responsibility to disclose any conflicts between Dick’s interests and KPG’s interests that might make him act in his own best interests at the expense or the detriment of [KPG].” Furthermore, “[a]s a fiduciary, Dick must exercise the utmost good faith in all his dealings with the other [KPG] shareholders and must always act for the common benefit of all.”

Instruction No. 8 stated that “[s]hareholder employees in a close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another, to act among themselves in the utmost good faith and loyalty.” But the instruction described that “[a]n individual’s fiduciary duty ends upon termination of the employment relationship.” “However,” it further explained, while an employee has a duty not to compete with his or her employer during employment,

employees, including employees with fiduciary duties, may plan and prepare for their competing business while still employed without breaching the duty of loyalty. Employees, including employees with fiduciary duties, are allowed to discuss job offers, while still employed, to engage in future competition with their employer without incurring liability.

While planning and preparing for a competing business is permissible, an employee may not act in direct competition with his or her employer while still employed. Factors showing that an employee acted in direct competition

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during his or her employment include the following: use of confidential and trade secret information acquired from the employer to compete; soliciting customers and clients to join the competing business before the end of the employment relationship; or committing some other fraudulent or unlawful act aimed at destroying the employer's business. To give rise to liability, the alleged disloyal acts must substantially hinder the employer in the continuation of its business.

Instruction No. 9 informed the jury that KPG asserted that Dick breached his fiduciary duty to KPG "in one or more of the following ways: . . . Violated [KPG's] bylaws by disclosing [KPG's] alleged confidential information to Bland; . . . Failed to send out an Engagement Letter to [two named entities] in an effort to undermine [KPG's] relationships with clients."

Instructions Nos. 11 through 15 described claims based on misappropriation of "trade secret/confidential information." Instruction No. 12 set forth:

Confidential information and trade secrets are defined as information including, but not limited to, a drawing, formula, pattern, compilation, program, device, method, technique, code, or process that:

(a) derives economic value, actual or potential, from not being known to, and not being ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Confidential and trade secret information must have independent economic value. To be considered confidential and trade secret information, possession of the secret information must confer a competitive advantage.

Matters of public knowledge or of general knowledge in an industry are not confidential information or trade secrets; confidential information or a trade secret is something known to only a few and not susceptible of general knowledge. Confidential information and trade secrets

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must be particular secrets of [KPG] and not the general secrets of the trade in which [KPG] is engaged. If information is ascertainable at all by any means that are not improper, the information is not confidential information or a trade secret.

Instruction No. 13 stated:

If an alleged trade secret or confidential information does not have independent economic value, the information is not entitled to confidential information or trade secret protection under Nebraska law. To be considered confidential and trade secret information, possession of the secret information must confer a competitive advantage.

Information disclosed to customers without any confidentiality requirement, including pricing information, is not confidential information.

Instruction No. 14 set forth the definition of the term “misappropriation” under Nebraska’s Trade Secrets Act.

In addition to general instructions, the court gave the jury the following 11 special verdict forms:

(a) Dick’s Claim for Stock
Repurchase (Form 1)

The jury was asked in special verdict form 1 to determine Dick’s claims against KPG for stock repurchase pursuant to the Shareholder Agreement.

(b) KPG’s Claims Against Dick
(Forms 2 Through 4)

The jury was asked in special verdict forms 2 through 4 to determine KPG’s claims against Dick for (1) breach of fiduciary duty, (2) tortious interference with a business relationship or expectancy, (3) misappropriation of trade secrets or confidential information, (4) unjust enrichment, and (5) civil conspiracy.

(c) KPG’s Conspiracy Claim Against
Dick and Bland (Form 5)

The jury was asked in special verdict form 5 to determine KPG’s claim of civil conspiracy against Dick and Bland.

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(d) KPG's Claims Against Bland
(Forms 6 Through 9)

The jury was asked in special verdict forms 6 through 9 to determine KPG's claims against Bland for (1) tortious interference with a business relationship or expectancy, (2) misappropriation of trade secrets or confidential information, and (3) unjust enrichment.

(e) KPG's Damages Calculations
(Forms 10 and 11)

Special verdict forms 10 and 11 were simple damages forms with blanks for the jury to fill in the amount of damages in the event the jury found for KPG on "any of its claims." Instruction No. 10 referred generally to claims by KPG against Dick, while instruction No. 11 referred generally to claims by KPG against Bland.

13. JURY VERDICT

On October 15, 2018, the jury found against KPG on all claims presented by the special verdict forms and in favor of Dick on his claim for stock repurchase, awarding Dick \$470,312.51, which the jury determined to be the repurchase price.

KPG timely filed a notice of appeal following entry of the final judgment. Dick and Bland cross-appeal.

III. ASSIGNMENTS OF ERROR

KPG assigns that the district court erred by (1) granting Dick and Bland twice as many peremptory strikes as KPG; (2) denying KPG's motion for directed verdict on the ground that Dick had breached his fiduciary duty; (3) denying KPG's motion for directed verdict on the ground that Dick failed to prove he acted in good faith; (4) excluding evidence of Dick's breach of fiduciary duty after his resignation as a KPG officer or, alternatively, refusing to allow KPG to amend its pleadings to conform to the evidence; (5) refusing to instruct the jury on KPG's affirmative defense that Dick's breach of

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fiduciary duty could constitute a prior material breach of the Shareholder Agreement that excused KPG from performance; (6) refusing to instruct the jury on KPG's affirmative defense that Dick's breach of KPG's bylaws could constitute a prior material breach of the Shareholder Agreement that excused KPG from performance; (7) refusing to instruct the jury on KPG's affirmative defense that Dick's breach of the covenant of good faith and fair dealing could constitute a prior material breach of the Shareholder Agreement that excused KPG from performance; (8) refusing to instruct the jury that it must find Dick satisfied all conditions precedent in order to find the Shareholder Agreement enforceable; (9) refusing to instruct the jury on the corporate opportunity doctrine; (10) refusing to instruct the jury on equitable clawback damages; (11) instructing the jury that KPG bore the entire burden of proving Dick breached his fiduciary duty to KPG; (12) instructing the jury on the lower duty of loyalty owed by an employee, instead of the fiduciary duty owed by an officer and shareholder in a close corporation; (13) instructing the jury that KPG's claim for breach of fiduciary duty was based on two grounds only, the violation of KPG's bylaws and Dick's failure to send an engagement letter to KPG clients before his resignation, when KPG pled and offered evidence at trial of Dick's concealment, sharing confidential information with a competitor, and other actions demonstrating a failure to exercise the utmost good faith; (14) instructing the jury that KPG's confidential information must satisfy the legal definition of a trade secret to be protected; and (15) holding as a matter of law that Bland's payment of the commissions to Dick did not violate the rules of professional conduct of the NSBPA and excluding evidence of the improper commissions from trial.

Dick and Bland asserted cross-appeals in their briefs. Dick assigned in his brief on cross-appeal that the district court erred by overruling his motion for directed verdict against KPG on its counterclaims against him, because KPG failed to prove that any alleged misconduct by Dick proximately caused KPG damages and also because KPG had failed to establish

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damages with reasonable certainty. Bland similarly assigned on cross-appeal in its brief that the district court erred by overruling its motion for directed verdict against KPG on its third-party claims against it, because KPG failed to prove that any alleged misconduct by Bland proximately caused damages and failed to establish any damages with reasonable certainty.

IV. STANDARD OF REVIEW

[1] The allocation of peremptory challenges in a multiparty civil suit is left to the discretion of the trial court and will be reviewed for an abuse of discretion.²

[2] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.³

[3] To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.⁴

[4] A party may not complain of the failure of the trial court to instruct on issues that are outside the scope of the pleadings.⁵

² See, *Tidemann v. Nadler Golf Car Sales, Inc.*, 224 F.3d 719 (7th Cir. 2000); *Blount v. Plovdba*, 567 F.2d 583 (3d Cir. 1977); *Globe Indemnity Co. v. Stringer*, 190 F.2d 1017 (5th Cir. 1951); *Sommerkamp v. Linton*, 114 S.W.3d 811 (Ky. 2003); *Premier Therapy, LLC v. Childs*, 75 N.E.3d 692 (Ohio App. 2016); *Gallegos v. Southwest Com. Health Services*, 117 N.M. 481, 872 P.2d 899 (N.M. App. 1994).

³ *Krejci v. Krejci*, 304 Neb. 302, 934 N.W.2d 179 (2019).

⁴ *Foundation One Bank v. Svoboda*, 303 Neb. 624, 931 N.W.2d 431 (2019).

⁵ *Deck v. Sherlock*, 162 Neb. 86, 75 N.W.2d 99 (1956).

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[5] Jury instructions must be read together; they must be read conjunctively, rather than separately in isolation.⁶

[6] If the jury instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.⁷

[7] When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and where the issues should be decided as a matter of law.⁸

[8] 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.⁹

V. ANALYSIS

KPG argues that the jury's verdict in Dick's breach of contract claim should be reversed because KPG was deprived of a fair trial by virtue of the district court's allocation of three peremptory strikes each to Dick and Bland, rather than three shared peremptory strikes. In the event we are unpersuaded that the allocation of peremptory challenges requires a new trial, KPG asserts that a new trial on Dick's breach of contract claim is necessary because KPG was prejudiced by the district court's failure to instruct the jury that prior material breaches by Dick of his fiduciary duty, corporate bylaws, or his obligations of good faith and fair dealing would excuse KPG's performance under the Shareholder Agreement and that there

⁶ *Malone v. American Bus. Info.*, 264 Neb. 127, 647 N.W.2d 569 (2002).

⁷ *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012).

⁸ See *United Gen. Title Ins. Co. v. Malone*, 289 Neb. 1006, 858 N.W.2d 196 (2015).

⁹ *Id.*

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can be no breach of a promise until all conditions precedent have been performed.

KPG argues that the judgments against it on its counterclaims for breach of fiduciary duty and for breach of corporate bylaws should also be reversed. On KPG's counterclaim for breach of fiduciary duty, KPG asserts that the court should have granted its motion for a directed verdict. Alternatively, KPG asserts that a new trial is required on its counterclaim for breach of fiduciary duty because the court (1) instructed that Dick's fiduciary duty ended upon his resignation and excluded evidence of Dick's postresignation conduct; (2) failed to instruct that Dick's conduct presumptively breached his fiduciary duty and that therefore, the burden shifted to Dick to prove his actions were in good faith; (3) failed to instruct on the corporate opportunity doctrine; and (4) failed to instruct on equitable clawback damages. On KPG's counterclaim for breach of the corporate bylaws, KPG argues that it was prejudiced by jury instructions that defined a trade secret and confidential information the same way.

Lastly, KPG argues that we should reverse the judgment against it on its cross-claim against Bland for tortious interference. KPG argues it was prejudiced by the court's exclusion of expert testimony that the 10-percent commission paid to Dick by Bland on all new clients was unethical under the NSBPA.

1. PEREMPTORY CHALLENGES
(ASSIGNMENT OF ERROR NO. 1)

We first address KPG's assertion that the judgment in favor of Dick on his breach of contract claim must be reversed and that the cause must be remanded for a new trial due to the unwarranted allowance of peremptory challenges. KPG argues that Dick and Bland were on the "same side" of the lawsuit, that their interests were not adverse to each other, and that thus, both error and prejudice must be presumed by their six-to-three advantage in peremptory challenges.

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[9-11] In Nebraska, the number of peremptory challenges allowable in civil actions is governed by case law and ““unwritten rules of court.””¹⁰ A party can exercise the peremptory challenge to remove a potential juror on the basis of that party’s belief that the juror’s status as a member of some cognizable group will prejudice his or her attitude toward that party’s case.¹¹ We have said that under these rules, where there are multiple parties on the same side of a lawsuit, each side of the lawsuit is entitled to a total of three peremptory challenges, unless the multiple parties’ interests are adverse to each other.¹²

[12,13] In *Gestring v. Mary Lanning Memorial Hosp.*,¹³ we reversed the judgment obtained after the trial court granted three peremptory challenges to the plaintiff, who was a deceased patient’s personal representative, while also granting three peremptory challenges each to multiple defendants involved in the deceased’s care. We explained that additional peremptory challenges should be granted to multiple parties on the same side of a civil lawsuit only after the trial court has considered all of the circumstances of the case and determined that the interests of those multiple parties are adverse to each other. We elaborated that multiple parties on the same side of a civil lawsuit are adverse to each other when a good-faith controversy exists between them over an issue of fact that the jury will decide.¹⁴ The fact that one party may have to defend against a theory of recovery not asserted against the other does not in itself mean that the two parties’ interests are adverse.¹⁵

¹⁰ *Gestring v. Mary Lanning Memorial Hosp.*, 259 Neb. 905, 912, 613 N.W.2d 440, 448 (2000).

¹¹ See *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965).

¹² *Gestring v. Mary Lanning Memorial Hosp.*, *supra* note 10.

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See *id.*

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[14] Focusing on multiple defendants who are on the same side of a civil lawsuit, we held in *Gestring* that relevant circumstances to determine whether the defendants' interests are adverse to each other include but are not limited to (1) whether separate acts of misconduct were alleged against the separate defendants, (2) whether comparative negligence principles applied to the case, (3) the type of relationship among the defendants, (4) whether cross-claims or third-party complaints had been filed and the positions taken therein, (5) information disclosed on pretrial discovery, and (6) representations made by the parties.¹⁶ Other jurisdictions allow additional peremptory challenges to multiple parties whose interests are "'diverse,'" considering similar factors and including whether the parties' interests are antagonistic as one of the factors to be considered.¹⁷

We have never directly addressed a circumstance such as that presented here where the parties that were each granted three peremptory strikes are a plaintiff and a third-party defendant who are on the "same side" of the defendant's counterclaims and third-party claims. The lawsuit was brought by Dick against KPG, alleging breach of contract and violations of the Nebraska Wage Payment and Collection Act (a claim that was later dismissed). Bland had no interest in those claims and was brought into the action by KPG, which asserted jointly against Bland and Dick tortious interference, conspiracy to commit tortious interference, misappropriation of trade secrets, and unjust enrichment. KPG also asserted a claim for tortious interference against Dick and asserted a claim against Bland for aiding and abetting that breach. But KPG asserted third-party claims of malicious prosecution and unlawful commissions against Bland, which KPG did not assert against Dick. Further, KPG asserted counterclaims of breach of the Shareholder

¹⁶ See *id.*

¹⁷ See *Carraro v. Wells Fargo Mortg. & Equity*, 106 N.M. 442, 443, 744 P.2d 915, 916 (N.M. App. 1987).

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Agreement and breach of corporate bylaws, which were not asserted against Bland. To summarize, separate acts of misconduct were alleged against Dick and Bland.

Nevertheless, in support of its assertion that the court erred in its allocation of peremptory challenges, KPG points out that Dick and Bland had a joint defense agreement whereby the attorneys could share information. This is not disputed. At issue is its import in an inquiry regarding allocation of peremptory challenges.

We do not decide that question here, however, because KPG has failed to preserve in the record evidence that it exhausted all its peremptory challenges, thereby leaving the record insufficient to support its assignment of error even if we found merit to KPG's legal premise. In *Steele v. Encore Mfg. Co.*,¹⁸ the Nebraska Court of Appeals held that because there was no record concerning the number of peremptory challenges that the plaintiff had actually utilized, it could not address the plaintiff's allegation that the trial court erred by refusing his request to give him the same number of peremptory strikes as each of the codefendants. Similarly, in *Petsch & McDonald v. Hines*,¹⁹ we held that we could not address a defendant's argument that the trial court erred by failing to grant it and its codefendant each the full number of three peremptory challenges, because the record did not demonstrate the extent to which either defendant exercised the peremptory challenges allotted.

It is true that in *Gestring*, we held that prejudice was presumed when the court granted the codefendants three peremptory strikes each despite their not adverse interests.²⁰ We reasoned that when no good-faith controversy exists between multiparty defendants and they are awarded extra peremptory challenges, the defendants can pool their challenges against the plaintiff, affording them undue influence over the composition

¹⁸ *Steele v. Encore Mfg. Co.*, 7 Neb. App. 1, 579 N.W.2d 563 (1998).

¹⁹ *Petsch & McDonald v. Hines*, 110 Neb. 1, 192 N.W. 963 (1923).

²⁰ *Gestring v. Mary Lanning Memorial Hosp.*, *supra* note 10.

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of the jury and placing the single-party plaintiff at a distinct tactical disadvantage that implicates the plaintiff's right to a fair trial.²¹ And when additional challenges are granted to a party absent a showing that his or her interests are adverse to other parties on the same side of a civil lawsuit, prejudice will be presumed and the judgment must be reversed.²² We explained that the proper allocation of peremptory challenges is a substantial right pervading the trial process and that it would be impossible for a complaining litigant to prove prejudice by reconstructing what might have been had the jury been properly constituted.²³

[15] But we did not discuss in *Gestring* whether the record reflected if the plaintiff actually utilized all the peremptory strikes allocated. To the contrary, our opinion appears to reflect an understanding that the parties utilized all their peremptory challenges. We do not read *Gestring* as calling into question the longstanding rule in Nebraska that a party raising on appeal a denial of due process based on a disparate number of peremptory challenges must demonstrate through the record that the objecting party utilized the allotted peremptory challenges. This rule is supported by other jurisdictions that hold that in order to establish reversible error in the allocation of peremptory challenges, a "minimal showing" of prejudice must be made by demonstrating on the record that the appellant exercised the peremptory challenges allotted.²⁴ It is well established in the case law that one who does not exercise all of his or her peremptory challenges cannot assign as error the court's refusal to allow a greater number or a lesser number to the opposing parties.²⁵ The assignment of error is

²¹ See *id.*

²² See *id.*

²³ See *id.*

²⁴ See *Goldstein v. Kelleher*, 728 F.2d 32, 37 (1st Cir. 1984). Accord *State v. Greer*, 39 Ohio St. 3d 236, 530 N.E.2d 382 (1988).

²⁵ See, *Conn. Mut. Life Ins. Co. v. Hillmon*, 188 U.S. 208, 23 S. Ct. 294, 47 L. Ed. 446 (1903); *Kloss v. United States*, 77 F.2d 462 (8th Cir. 1935).

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based on the inequality of the challenges, but if the appellant has failed to exhaust the challenges allotted, then the inequality was the appellant's choice.

We find no merit to KPG's contention that the allocation of peremptory challenges requires a new trial.

2. DICK'S BREACH OF CONTRACT CLAIM
(ASSIGNMENTS OF ERROR NOS. 5 THROUGH 8)

We turn next to KPG's arguments that we should reverse the judgment in favor of Dick on his breach of contract claim due to the court's refusal to give KPG's requested jury instructions on prior material breach and failure to satisfy a condition precedent. KPG argues that it was prejudiced by the court's refusal to instruct the jury on KPG's affirmative defenses of prior material breach based on either Dick's prior breach of fiduciary duty, Dick's prior breach of KPG's bylaws, or Dick's prior breach of the covenant of good faith and fair dealing. Further, based on Dick's failure to deliver written shares free and clear of all liens, KPG asserts that the district court erred by refusing to instruct the jury that it must find that Dick satisfied all conditions precedent in order to find the Shareholder Agreement enforceable.

To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.²⁶ Furthermore, a party may not complain of the failure of the trial court to instruct on issues that are outside the scope of the pleadings.²⁷ On appellate review, jury instructions must be read together; they must be read conjunctively, rather than separately in isolation.²⁸ If the instructions given, which are taken as a whole, correctly

²⁶ *Foundation One Bank v. Svoboda*, *supra* note 4.

²⁷ *Deck v. Sherlock*, *supra* note 5.

²⁸ *Malone v. American Bus. Info.*, *supra* note 6.

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state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.²⁹

[16-19] Shareholder agreements are construed according to the principles of the law of contracts.³⁰ A suit for damages arising from breach of a contract presents an action at law.³¹ The meaning of an unambiguous shareholder agreement, like any contract, is a question of law.³² Matters seeking avoidance of a valid contract are affirmative defenses.³³

(a) Failure to Satisfy All
Conditions Precedent

The alleged condition precedent KPG wished the jury to consider was Dick's obligation under the Shareholder Agreement to deliver, in exchange for payment of the purchase price, the certificates of any shares of the stock purchased, free and clear of all liens, claims, security interests, and encumbrances, duly endorsed. KPG tendered the following instruction:

To recover for breach of contract, . . . Dick must prove that KPG made a promise, breached the promise, and caused him damage and that any conditions precedent were satisfied. Generally[,] there can be no breach of a promise until all the conditions qualifying it have happened or been performed.

Further, KPG tendered a special verdict form for the jury to state whether Dick had met his burden to show by a greater weight of the evidence that he had satisfied a condition precedent to enforcement of the Shareholder Agreement. We agree

²⁹ *InterCall, Inc. v. Egenera, Inc.*, *supra* note 7.

³⁰ 18A Am. Jur. 2d *Corporations* § 567 (2015).

³¹ *Goes v. Vogler*, 304 Neb. 848, 937 N.W.2d 190 (2020).

³² See, *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016); *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010); *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 720 N.W.2d 886 (2006).

³³ 17B C.J.S. *Contracts* § 891 (2011).

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with the district court that KPG's tendered instruction on failure to satisfy conditions precedent was not warranted by the evidence.

Dick's claim against KPG was based on the provision of the Shareholder Agreement entitled "Mandatory Sales and Purchases," found in article III. Under that provision, read together with the definition of "Operative Event" in article I and that of "Determination of Purchase Price on Account of Other Operative Events" in article V, "[u]pon the occurrence of" the "Operative Event" of "termination of a Shareholder's status as an employee of [KPG] occurring by reason of . . . such Shareholder's voluntary act," the shareholder "shall be required to sell and [KPG] shall be required to purchase all of the Disposing Shareholder's Stock of [KPG]" at "80% of the adjusted book value per share of Stock as of the end of [KPG's] most recently completed fiscal year."

"Adjusted Book Value" was defined as the sum of the book value per share of stock of KPG, computed exclusive of goodwill, and the difference, divided by the number of outstanding shares, between the retained annual billings and deferred tax liability.

"Retained Annual Billings" were defined as "the total professional fees billed by [KPG] during [its] most recently completed fiscal year less all professional fees billed to clients who are no longer clients of [KPG] and are now being served by the Disposing Shareholder one year subsequent to the Operative Event."

Under article V of the Shareholder Agreement,

the estimated purchase price shall be paid by the delivery of a promissory note, in negotiable form, to the order of the Disposing Shareholder, in which [KPG] engages to pay the balance of such purchase price in one hundred twenty (120) equal monthly installments, with interest on the unpaid balance at the rate of five percent (5%) per annum as of the closing date.

Further under article V, "The promissory note shall be secured by the pledge of stock purchased thereby, with [KPG]

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agreeing to execute security instruments covering such pledged stock, unless such pledge arrangement is waived by the disposing shareholder.”

The condition precedent KPG alleged had not been satisfied is contained under “Closing Date” in article VI. The provision states in full:

Section 6.1. Delivery Of Written Documents; Closing Date. *Upon the closing of any purchase and sale pursuant to this Agreement, the Disposing Shareholder, or his legal representative, shall deliver to [KPG] or the Nondisposing Shareholders, or both, as the case may be, in exchange for payment of the purchase price, the certificate(s) of shares of the Stock being purchased, free and clear of all liens, claims, security interests and encumbrances, duly endorsed for transfer and bearing any necessary documentary stamps, and such assignments, certificates of authority, tax releases, consents to transfer by a fiduciary or representative of the Disposing Shareholder, and any instruments in evidence of the title of the Shareholder and of the parties’ compliance with this Agreement, the Federal and State securities laws, and any other agreements or regulations, as may be recommended by legal counsel for [KPG].*

The closing date shall be within sixty (60) days after the Operative Event giving rise to the transaction but otherwise to be determined by [KPG] on ten (10) days prior written notice to the Disposing Shareholder.

(Emphasis supplied.)

A provision for “General Compliance” under article VII, “Shareholder Compliance and Consent,” states:

The parties hereto shall not hinder or interfere with, or cause to be interfered with in any manner whatsoever, the purchase or sale of the Stock of a deceased or Disposing Shareholder pursuant to this Agreement, or the carrying out of any of the terms of this Agreement to the prejudice of any Disposing Shareholder or his estate as the case may be.

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A provision for “Shareholder Indebtedness to be Offset,” also under “Shareholder Compliance and Consent,” states:

Notwithstanding anything appearing to the contrary in this Agreement, the purchase price payable to the Disposing Shareholder may be paid, partly or wholly, at [KPG’s] option, by cancellation or offset of all or any portion of any then outstanding indebtedness of such Disposing Shareholder to [KPG]. Notwithstanding anything appearing to the contrary in this agreement, the purchase price payable to the Disposing Shareholder may be paid partly or wholly, at [KPG’s] option, by payment to any third party secured creditor of all or any portion of any then outstanding indebtedness of such Disposing Shareholder which is secured by the pledge of stock of [KPG] and any payment to the third party secured creditor shall reduce the amount of the purchase price herein.

[20,21] Courts have struggled for centuries with differentiating between conditions and promises.³⁴ A condition precedent is a condition that must be performed before the parties’ agreement becomes a binding contract or a condition which must be fulfilled before a duty to perform an existing contract arises.³⁵ This is in contrast to a promise in a contract, the nonfulfillment of which is a breach, i.e., the failure to perform that which was required by a legal duty, and the remedy lies in an action for damages.³⁶

[22,23] Whether language in a contract is a condition precedent depends on the parties’ intent as gathered from the language of the contract.³⁷ The words “as a condition for” are

³⁴ *Harmon Cable Communications v. Scope Cable Television*, 237 Neb. 871, 468 N.W.2d 350 (1991).

³⁵ *Cimino v. FirstTier Bank*, 247 Neb. 797, 530 N.W.2d 606 (1995).

³⁶ See *Harmon Cable Communications v. Scope Cable Television*, *supra* note 34.

³⁷ *Weber v. North Loup River Pub. Power*, 288 Neb. 959, 854 N.W.2d 263 (2014).

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clearly language intended to create a condition precedent.³⁸ Terms such as “if,” “provided that,” “when,” “after,” “as soon as,” “subject to,” “on condition that,” or some similar phrase are evidence that performance of a contractual provision is a condition; however, an intention to make a duty conditional may be manifested by the general nature of an agreement, as well as by specific language.³⁹ Where the parties’ intent is not clear, the language is generally interpreted as promissory rather than conditional.⁴⁰

There is nothing in the Shareholder Agreement suggesting that delivery of certificates of shares of KPG stock, free and clear of all liens, claims, security interests, and encumbrances, was a condition precedent to KPG’s duty to purchase the shares of the disposing shareholder, which is the general duty upon which Dick’s breach of contract claim rests. Rather, KPG’s duty to purchase was expressly triggered under the Shareholder Agreement by “any Operative Event,” which expressly included a shareholder employee’s voluntary departure.

Focusing on KPG’s more specific obligation to deliver a promissory note, described under “Payment,” such obligation is “at the closing of such purchase.” And the delivery of written shareholder documents, upon which KPG’s affirmative defense of failing to satisfy a condition precedent rests, is triggered under the Shareholder Agreement “[u]pon the closing of any purchase and sale pursuant to this Agreement” and “in exchange for payment of the purchase price.”

[24,25] This is, at best, a description of a simultaneous exchange, entailing mutual conditions precedent.⁴¹ In such a situation, liability under the contract by the first party is

³⁸ *Lee Sapp Leasing v. Catholic Archbishop of Omaha*, 248 Neb. 829, 540 N.W.2d 101 (1995).

³⁹ See *id.*

⁴⁰ *Weber v. North Loup River Pub. Power*, *supra* note 37.

⁴¹ 13 Richard A. Lord, *A Treatise on the Law of Contracts* by Samuel Williston § 38:8 (4th ed. 2003 & Supp. 2020).

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triggered by an offer of tender by the second party, which is conditional upon contemporaneous performance of the first.⁴² Tender is an offer to perform a condition or obligation, coupled with the present ability of immediate performance, so that, were it not for the refusal of cooperation by the party to whom tendered, the condition or obligation would be immediately satisfied.⁴³

[26,27] Thus we have noted that a formal tender of shares is not necessary in order to fix liability on a purchaser for the breach of the purchaser's contract when the contract provides that the seller is to hold the stock and deliver it when called upon.⁴⁴ We have also noted that a formal tender of shares is not required when the buyer declares his intention not to perform; in such cases, it is sufficient that the seller is ready, willing, and able to deliver the stock.⁴⁵ Tender before suit is filed is waived where the party entitled to payment, by conduct or declaration, proclaims that if a tender should be made, acceptance would be refused.⁴⁶ Furthermore, acts which, in themselves, are insufficient to make a complete tender may constitute proof of readiness to perform, so as to protect the rights of a party under a contract, where a proper tender is rendered impossible by circumstances not due to the fault of the tenderer.⁴⁷

The evidence was undisputed that there were no written certificates of shares Dick could have tendered. Additionally, Koski clearly communicated his opinion that KPG had no duty to purchase under the Shareholder Agreement because Dick had stolen KPG's clients—not because Dick had failed to satisfy any condition precedent under the Shareholder

⁴² See *id.*, §§ 38:8 and 47:1.

⁴³ *Caha v. Nelson*, 195 Neb. 333, 237 N.W.2d 870 (1976).

⁴⁴ See *Cox v. Cox*, 124 Neb. 706, 247 N.W. 898 (1933).

⁴⁵ See *id.*

⁴⁶ See *Canaday v. Krueger*, 156 Neb. 287, 56 N.W.2d 123 (1952).

⁴⁷ *Cox v. Cox*, *supra* note 44.

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Agreement. Koski's blanket refusal to acknowledge any duty to purchase under the Shareholder Agreement clearly communicated that any tender by Dick would be futile. To the extent Koski spoke for KPG, this proclamation was a waiver of tender.⁴⁸

Regardless, Dick was obligated only to make an offer of tender that was conditional upon KPG's contemporaneous performance. Undisputed facts in the record demonstrate that Dick made such an offer of tender to Koski as a representative of KPG, but KPG never performed. Dick manifested that he was ready and willing to perform his obligations under the buyout provisions of the Shareholder Agreement. At that time, some of Dick's shares were encumbered by a debt to Koski, but there is no evidence that Dick was unable to pay the remainder owed on the loan. Further, until KPG communicated whether KPG would be reducing the purchase price by offsetting Dick's indebtedness to Koski under the provision for "Shareholder Indebtedness to be Offset," Dick could not know whether he was required to pay the balance of the loan directly to Koski before closing.

There was no basis under these facts to instruct the jury on the affirmative defense of failure to satisfy a condition precedent.

(b) Prior Material Breaches of Covenant of
Good Faith and Fair Dealing
and Fiduciary Duty

We also find no reversible error based on the court's refusal to instruct the jury on affirmative defenses of prior material breaches of fiduciary duty or breaches of the covenant of good faith and fair dealing.

First, KPG did not allege that a prior breach of fiduciary duty or good faith and fair dealing operated as an affirmative defense to Dick's breach of contract claim. And a party may not complain of the failure of the trial court to instruct on

⁴⁸ See *Canaday v. Krueger*, *supra* note 46.

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issues that are outside the scope of the pleadings.⁴⁹ The court's refusal to instruct on these matters can be affirmed for that reason alone.

[28,29] We also note that the instructions were not warranted. To constitute a defense to an action based on contract, the matters must generally be germane to the cause of action pleaded, in addition to presenting a legal reason why the plaintiff will not recover.⁵⁰ A claim of defense arising out of tort concepts is not generally available where the claim of plaintiff is premised upon contract.⁵¹

As the district court noted in denying instructions on prior material breach of fiduciary duty or good faith and fair dealing, "the object of the agreement is what has [been] breached" in the case law excusing performance. Here, there was no relation between the duties set forth in the Shareholder Agreement regarding the repurchase of stock and the acts KPG alleged constituted breaches of fiduciary duty and good faith and fair dealing.

[30] Fiduciary duties arise from the relationship and not from the terms of the agreement.⁵² Thus, while a breach of fiduciary duty may form the basis of a counterclaim, it is not ordinarily an affirmative defense to a claim for a breach of contract.⁵³

It is true that breaches of fiduciary duty can, in certain circumstances, be grounds for alleging that a contract is void.⁵⁴ For example, a corporate officer's or director's right to compensation can be forfeited through a breach of fiduciary duty to the corporation, and thus provide a defense to an action by

⁴⁹ *Deck v. Sherlock*, *supra* note 5.

⁵⁰ 17A C.J.S. *Contracts* § 859 (2011).

⁵¹ See *id.*

⁵² See *Top of Iowa Co-op. v. Schewe*, 149 F. Supp. 2d 709 (N.D. Iowa 2001).

⁵³ See *Anderson v. Burton Associates, Ltd.*, 218 Ill. App. 3d 261, 578 N.E.2d 199, 161 Ill. Dec. 72 (1991).

⁵⁴ 17B C.J.S., *supra* note 33.

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the agent against the principal for compensation for services.⁵⁵ But we can find no support for the proposition that a breach of an officer and shareholder's general fiduciary duty to a corporation is an affirmative defense to a claim for breach of performance of a buyout provision in a shareholder agreement.

The case of *Anderson v. Burton Associates, Ltd.*,⁵⁶ is instructive. The plaintiff in *Anderson* brought suit to have his stock redeemed under a shareholder agreement for an accounting firm, and the court rejected the alleged affirmative defense of breach of fiduciary duty. The court noted that the defendant did not challenge the existence of sufficient consideration or assert that the plaintiff did not pay for his shares. The court held that whether the plaintiff had breached a fiduciary duty to the corporation by soliciting clients would not defeat his right to his money under the stock redemption provision of the shareholder agreement.⁵⁷ The court in the instant case correctly concluded that an instruction on the affirmative defense of breach of fiduciary duty was not warranted, because Dick's acts that KPG takes issue with bore no relation to the buyout provisions under which Dick brought suit against KPG.

[31,32] As for the implied covenant of good faith and fair dealing, KPG is correct that it exists in every contract and

⁵⁵ See, e.g., *Wadsworth v. Adams*, 138 U.S. 380, 11 S. Ct. 303, 34 L. Ed. 984 (1891); *Wilshire Oil Company of Texas v. Riffe*, 406 F.2d 1061 (10th Cir. 1969); *Flint River Pecan Co. v. Fry*, 29 F.2d 457 (5th Cir. 1928); *Backus v. Finkelstein*, 23 F.2d 357 (D. Minn. 1927); *T.A. Pelsue Co. v. Grand Enterprises, Inc.*, 782 F. Supp. 1476 (D. Colo. 1991); *Kassab v. Ragnar Benson, Inc.*, 254 F. Supp. 830 (W.D. Pa. 1966); *Chelsea Industries, Inc. v. Gaffney*, 389 Mass. 1, 449 N.E.2d 320 (1983); *Toy v. Lapeer Farmers Mut. Fire Ins. Ass'n*, 297 Mich. 188, 297 N.W. 230 (1941); *Venie v. Harriet State Bank of Minneapolis*, 146 Minn. 142, 178 N.W. 170 (1920); *American Timber & Trading Co. v. Niedermeyer*, 276 Or. 1135, 558 P.2d 1211 (1976); *Ranch Hand Foods v. Polar Pak Foods, Inc.*, 690 S.W.2d 437 (Mo. App. 1985) (applying Kansas law). See, also, 2 Restatement (Second) of Agency § 469 (1958).

⁵⁶ *Anderson v. Burton Associates, Ltd.*, *supra* note 53.

⁵⁷ See *id.*

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requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract.⁵⁸ However, KPG overlooks the fact that the scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract.

[33] “The law does not allow the implied covenant of good faith and fair dealing to be an everflowing cornucopia of wished-for legal duties; indeed, the covenant cannot give rise to new obligations not otherwise contained in a contract’s express terms.”⁵⁹ Instead, a violation of the covenant of good faith and fair dealing occurs only when a party violates, nullifies, or significantly impairs any benefit of the contract.⁶⁰ Similarly to the alleged breach of fiduciary duty, KPG failed to identify any express terms of the Shareholder Agreement tied to the alleged breach of an implied covenant of good faith and fair dealing. An instruction on the affirmative defense of breach of the implied covenant of good faith and fair dealing was not warranted by the evidence.

We find no merit to KPG’s arguments that the trial court erred by refusing to instruct on the affirmative defense of breach of either a fiduciary duty or the implied covenant of good faith and fair dealing.

(c) Prior Material Breach of Bylaws

KPG tendered the instruction that a breach of the bylaws in force at the time of purchase of stock in a corporation can constitute a material breach excusing the nonbreaching party from performance under the Shareholder Agreement. A material breach was defined in the tendered instruction as “something that is so fundamental to a contract that the failure to

⁵⁸ *Coffey v. Planet Group*, 287 Neb. 834, 845 N.W.2d 255 (2014).

⁵⁹ *Comprehensive Care Corp. v. RehabCare*, 98 F.3d 1063, 1066 (8th Cir. 1996).

⁶⁰ *Coffey v. Planet Group*, *supra* note 58.

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perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract.” The tendered instruction directed that if the jury found a material breach of the contract, it “must find that KPG is excused from performance under the Shareholder Agreement.”

Additionally, KPG tendered the following instruction:

The management and internal affairs of a voluntary association are governed by its constitution and bylaws, which constitute a contract between the members of the association. The members of a corporation are as a general rule conclusively presumed to have knowledge of its bylaws and cannot escape a liability arising thereunder, or otherwise avoid their operation, on a plea of ignorance of them. This is also true of directors and other officers of the corporation. Bylaws ordinarily are binding on the shareholders or members whether they expressly consent to them or not. Bylaws in force at the time of a purchase of stock in a corporation form part of the contract between the corporation and its shareholders. The corporate articles, bylaws, and the shareholder agreement must be read together.

KPG then tendered a special verdict form for the jury to set forth whether, in regard to Dick’s complaint against KPG, KPG had met its burden to show by the greater weight of the evidence that Dick “committed a prior material breach of the Shareholder Agreement.”

KPG’s theory for these instructions was that Dick had breached the provision of the bylaws stating that “[a]ll officers, agents, and employees of [KPG] shall be required . . . to maintain and preserve confidentiality as to all business techniques, commercial data, formulas, good will, operational methods, product identifications, [etc.]” KPG asserted that the disclosure of the information on the spreadsheet emailed to Bland violated this provision—though KPG has never made its theory entirely clear as to which of the specified items Dick failed

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to maintain and preserve the confidentiality of. KPG believed that such a breach of the bylaws excused its failure to perform under the buyout provisions of the Shareholder Agreement.

[34] The “prior material breach” doctrine upon which KPG relies applies when a contract contemplates an exchange of performances between the parties, and the doctrine holds that one party’s failure to perform allows the other party to cease its own performance. In order to constitute a possible prior material breach, the obligation upon which a plaintiff has sued in the breach of contract claim must have been dependent upon the other thing that the plaintiff was to do and failed to do.⁶¹ In other words, prior material breach is

based on the principle that where performances are to be exchanged under an exchange of promises, each party is entitled to the assurance that he will not be called upon to perform his remaining duties . . . if there has already been an uncured material failure of performance by the other party.⁶²

[35,36] “A duty under a separate contract is not affected . . . , nor is a duty under the same contract affected if it was not one to render a performance to be exchanged under an exchange of promises Furthermore, only duties to render performance are affected.”⁶³ And the contention that a party to a contract is excused from performance because of a prior material breach by the other contracting party is an affirmative defense that applies only when the breaching party breaches the same contract on which he or she is suing.⁶⁴

KPG provides law in support of the idea that corporate bylaws constitute a contract between the shareholders. We agree that, broadly speaking, bylaws are also shareholders’

⁶¹ *Eager v. Berke*, 11 Ill. 2d 50, 142 N.E.2d 36 (1957).

⁶² 2 Restatement (Second) of Contracts § 237 comment *b.* at 217 (1981).

⁶³ See *id.*, comment *e.* at 221.

⁶⁴ *Blackstone Medical v. Phoenix Surgicals*, 470 S.W.3d 636 (Tex. App. 2015).

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agreements.⁶⁵ And we agree with KPG that the Randall K. Koski, P.C., bylaws appear to be the bylaws of KPG, as the amendment to the articles of incorporation effected a name change for the corporation. We thus deny as moot KPG's motion for this court to take judicial notice of allegations made by Dick in a separate suit, in which Dick allegedly acknowledged that the Randall K. Koski, P.C., bylaws governed KPG.

KPG fails, though, to support its assertion that the Randall K. Koski, P.C., bylaws are part of the Shareholder Agreement under which Dick brought his breach of contract claim. We disagree with KPG's claim that the bylaws and Shareholder Agreement should be read together for purposes of determining the applicability of the doctrine of prior material breach.

[37] Shareholder agreements may be freestanding of corporate bylaws.⁶⁶ The Randall K. Koski, P.C., bylaws did not purport to incorporate the Shareholder Agreement. Nor did the Shareholder Agreement incorporate the Randall K. Koski, P.C., bylaws. To the contrary, the Shareholder Agreement provided that it "contains the entire understanding among the parties and supersedes any prior understanding among the parties and agreements between them respecting the within subject matter." The Shareholder Agreement stated further that there were "no representations, agreements, arrangements or understandings, oral or written, between or among the parties hereto relating to the subject matter of this Agreement which are not fully expressed herein."

Under the express terms of the Shareholder Agreement, it was freestanding. The promise in the bylaws relating to maintaining confidentiality of items such as "commercial data" and "good will" was an independent promise that bore no relationship to the mutual promises of the buyout provisions of the Shareholder Agreement. Thus, the prior material breach

⁶⁵ 18A Am. Jur. 2d *Corporations* § 254 (2015).

⁶⁶ 1 F. Hodge O'Neal & Robert B. Thompson, O'Neal's Close Corporation and LLCs: Law and Practice § 4:33 (rev. 3d ed. 2018).

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doctrine, based on Dick's alleged breach of the confidentiality provision of the bylaws, was inapplicable as an affirmative defense to Dick's claim that KPG breached the buyout provisions of the Shareholder Agreement.

[38] We also note that the jury found against KPG in its counterclaim for breach of the bylaws. Factual issues necessarily determined by a jury's verdict on one claim in a case are also deemed resolved with respect to other claims in the same case.⁶⁷ And, as we will explain, we find no merit to KPG's contention that the jury rejected its breach of bylaws claim because it was improperly instructed on the definition of confidential information.

KPG was not prejudiced by the district court's refusal to instruct on prior material breach as an affirmative defense to Dick's breach of contract claim.

3. KPG'S COUNTERCLAIM AGAINST DICK FOR BREACH
OF FIDUCIARY DUTY (ASSIGNMENTS OF ERROR
NOS. 2 THROUGH 4 AND 9 THROUGH 15)

We turn next to KPG's assignments of error relating to the jury's verdict against KPG in its counterclaim for breach of fiduciary duty.

KPG asserts that the court erred by failing to grant its motion for directed verdict on this counterclaim. KPG asserts that the undisputed evidence of Dick's (1) use of his wife's email to communicate with Bland to avoid KPG's discovering his negotiations with Bland, (2) meeting with Bland without informing KPG, (3) sharing with Bland certain billing information, and (4) accepting from Bland a 10-percent commission on new clients brought to Bland by Dick were all transactions that shifted the burden to Dick to demonstrate good faith. KPG then asserts that there was no evidence presented

⁶⁷ See *Lindsay Internat. Sales & Serv. v. Wegener*, 301 Neb. 1, 917 N.W.2d 133 (2018). See, also, e.g., *Zakibe v. Ahrens & McCarron, Inc.*, 28 S.W.3d 373 (Mo. App. 2000).

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by Dick that he acted in good faith and that thus, as a matter of law, before his resignation, Dick breached his fiduciary duties as both a vice president and a shareholder of KPG and the district court erred in failing to grant KPG's motion for directed verdict.

In the event we disagree with KPG's contention that the district court should have granted its motion for a directed verdict on its counterclaim against Dick for breach of fiduciary duty, KPG asserts that we should reverse the decision and remand the cause for a new trial because of several alleged trial errors.

First, KPG asserts that the district court erred by failing to instruct the jury on the same burden shifting that KPG believes justified a directed verdict.

Second, KPG asserts it was prejudiced by the trial court's instructions that the breach of fiduciary duty claim was based only on the purported breach of bylaws and Dick's failure to send engagement letters to KPG clients before resigning.

Third, KPG asserts that it was prejudiced by the court's exclusion of Dick's breach of an allegedly ongoing, postresignation fiduciary duty by virtue of Dick's continuing status as a shareholder, and, relatedly, by instructing that the fiduciary duty ends upon the termination of the employment relationship. To the extent the court precluded KPG from litigating a claim based on postresignation conduct because it was not pleaded, KPG argues that the court erred in its reading of the operative pleading and, alternatively, that the court abused its discretion in denying KPG's motion to amend.

Finally, KPG argues it was prejudiced by the court's refusal to instruct the jury on the corporate opportunity doctrine and equitable clawback damages.

[39-41] The existence of a fiduciary duty and scope of that duty are questions of law for the court to decide.⁶⁸ The law of trusts forms the basis for fiduciary duties. Fiduciaries in

⁶⁸ *Strohmyer v. Papillion Family Medicine*, 296 Neb. 884, 896 N.W.2d 612 (2017).

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a corporation are not trustees in the strict sense because they do not have title to the estate; they are instead fiduciaries to the extent that they control the corporation's property.⁶⁹ The scope of fiduciary duties is flexible, reflecting the historical approach of the courts of equity.⁷⁰

[42-44] The traditional rule has been that corporate shareholders do not owe one another a fiduciary duty; rather, corporate officers and directors owe shareholders such a duty.⁷¹ Exceptions have been found for majority shareholders of closely held corporations.⁷² Minority shareholders do not generally owe a fiduciary duty to each other or to the corporation,⁷³ but some cases have imposed a fiduciary duty on a minority shareholder in a close corporation who has control over corporate actions.⁷⁴ An officer of a corporation occupies a fiduciary relationship toward the corporation and its stockholders.⁷⁵ The existence of a fiduciary duty of an officer in a closely held corporation depends on the ability to exercise the status that creates it, and nominal corporate officers with no management authority generally do not owe fiduciary duties to the corporation.⁷⁶ Dick does not dispute that he was more

⁶⁹ See John R. Van Winkle & Gary R. Welsh, *Origin, Development, and Current Status of Fiduciary Duties in Close Corporations: Has Indiana Adopted a Strict Good Faith Standard?*, 26 Ind. L. Rev. 1215 (1993).

⁷⁰ See 2 Robert B. Thompson, O'Neal and Thompson's Oppression of Minority Shareholders and LLC Members § 7:3 (2009 & Supp. 2020).

⁷¹ Annot., 39 A.L.R.6th 1 (2008).

⁷² *Id.*; 3 William Wilson Cook, *Treatise on the Law of Corporations Having a Capital Stock* § 14:16 (3d ed. 2010 & Supp. 2019).

⁷³ See N.C. Corp. Law and Prac. § 18:27 (West 4th ed. 2019).

⁷⁴ See 3 Cook, *supra* note 72.

⁷⁵ See *Rettinger v. Pierpont*, 145 Neb. 161, 15 N.W.2d 393 (1944). See, also, e.g., 2 Thompson, *supra* note 70.

⁷⁶ *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 748 N.W.2d 626 (2008); Edwin W. Hecker, Jr., *Fiduciary Duties in Business Entities Revisited*, 61 U. Kan. L. Rev. 923 (2013).

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than a nominal corporate officer, though the extent to which he controlled KPG was unclear. Dick concedes he owed KPG a fiduciary duty prior to his resignation.

(a) Burden Shifting: Directed
Verdict and Instructions

[45] The plaintiff in an action for breach of fiduciary duty has the burden to prove that (1) the defendant owed the plaintiff a fiduciary duty, (2) the defendant breached the duty, (3) the defendant's breach was the cause of the injury to the plaintiff, and (4) the plaintiff was damaged.⁷⁷ In the law of trusts, while the beneficiary has the initial burden of proving the existence of the fiduciary duty and the trustee's failure to perform it, once the trust beneficiary has established a prima facie case by demonstrating the trustee's breach of fiduciary duty, the burden of explanation or justification shifts to the fiduciaries.⁷⁸

[46] In an action for breach of fiduciary duty toward a corporation, the plaintiff must establish a prima facie case of both the existence of a fiduciary duty and its breach before the burden shifts to the defendant to prove the defendant acted in an open, fair, and honest manner such that no breach of fiduciary duty occurred.⁷⁹ Only once a plaintiff demonstrates a breach of the duty of care does the burden shift to the fiduciary to prove that, notwithstanding the breach, the challenged transaction was entirely fair.⁸⁰

It has been described that only the burden of production shifts, not the burden of proof, otherwise known as the burden

⁷⁷ See *McFadden Ranch v. McFadden*, 19 Neb. App. 366, 807 N.W.2d 785 (2011).

⁷⁸ 76 Am. Jur. 2d *Trusts* § 618 (2016 & Supp. 2020).

⁷⁹ See, e.g., *Norlin Corp. v. Rooney, Pace Inc.*, 744 F.2d 255 (2d Cir. 1984); *Collier v. Bryant*, 216 N.C. App. 419, 719 S.E.2d 70 (2011).

⁸⁰ *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345 (Del. 1993).

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of persuasion.⁸¹ In any event, there is with certain transactions, once proved, a presumption that the fiduciary acted in self-interest, which shifts the burden to the fiduciary to show that he or she did not obtain secret profits and that the transaction was conducted fairly, honestly, and openly.⁸² However, for the burden to be placed on the fiduciary, the plaintiff must prove that the fiduciary engaged in a transaction with the principal that gives rise to the presumption of unfairness.⁸³ Contrary to KPG's assertion, the mere allegation of such a transaction is not enough.⁸⁴

KPG points out that we have said the burden of proof is upon a party holding a confidential or fiduciary relation to establish the perfect fairness, adequacy, and equity of a transaction with the party with whom he holds such relation.⁸⁵ Thus, for instance, we have held that it is the burden of an officer, who sets his or her own salary, to prove that such salary is reasonable.⁸⁶ But that is a transaction with the party with whom the officer holds a fiduciary relationship.⁸⁷ Here, the "transaction" at issue was not with KPG, but with Bland.

Typically, a transaction with a third party that shifts the burden to the fiduciary is one of self-dealing—a factual situation in which a corporate fiduciary appears on both sides of a contract or transaction with the fiduciary's corporation.⁸⁸ Because

⁸¹ See Charles M. Yablon, *On the Allocation of Burdens of Proof in Corporate Law: An Essay on Fairness and Fuzzy Sets*, 13 Cardozo L. Rev. 497 (1991).

⁸² *Simpson v. Spellman*, 522 S.W.2d 615 (Mo. App. 1975).

⁸³ *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277 (5th Cir. 2007).

⁸⁴ 1 Roger J. Magnuson, *Shareholder Litigation* § 10:20 (2012 & Supp. 2020).

⁸⁵ See *Evans v. Engelhardt*, 246 Neb. 323, 518 N.W.2d 648 (1994). See, also, e.g., *Rettinger v. Pierpont*, *supra* note 75.

⁸⁶ *Evans v. Engelhardt*, *supra* note 85.

⁸⁷ See *id.* See, also, e.g., *Rettinger v. Pierpont*, *supra* note 75.

⁸⁸ See *Sinclair Oil Corporation v. Levien*, 280 A.2d 717 (Del. 1971).

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the business judgment rule is a rebuttable presumption, it places an initial burden on the party challenging a corporate decision to demonstrate the decisionmaker's self-dealing or other disabling factor; and if a challenger sustains that initial burden, then the presumption of the rule is rebutted, and the burden of proof shifts to the defendants to show that the transaction was, in fact, fair to the company.⁸⁹

For example, in *Anderson v. Clemens Mobile Homes*,⁹⁰ the plaintiff proved that an officer had realized a personal profit on the sale of land and business ventures financed with corporate funds, and we held it was the officer's burden to prove by a preponderance of the evidence that he did so in good faith and did not act in such a manner as to cause or contribute to the injury or damage of the corporation, or deprive it of business.⁹¹ Likewise, in *Sadler v. Jorad, Inc.*,⁹² we shifted the burden to the defendant majority shareholders to establish fairness and reasonableness where the plaintiff had proved that they had withdrawn excess salaries and distributions from the corporation. In these cases applying burden shifting, which were accounting actions, we noted that ordinarily the burden would be entirely on the plaintiff, but that it would be unfair to impose such a burden when the defendants had control of the books and managed the business.⁹³

[47] As the district court noted, negotiating to leave one's fiduciary position with a closely held corporation and to enter into competing employment elsewhere is not a transaction that shifts the burden to the fiduciary to prove the negotiation's fairness. It is not, standing alone, a violation of fiduciary

⁸⁹ 19 Am. Jur. 2d *Corporations* § 2104 (2015).

⁹⁰ *Anderson v. Clemens Mobile Homes*, 214 Neb. 283, 333 N.W.2d 900 (1983).

⁹¹ See, also, e.g., *Qualsett v. Abrahams*, 23 Neb. App. 958, 879 N.W.2d 392 (2016).

⁹² *Sadler v. Jorad, Inc.*, 268 Neb. 60, 680 N.W.2d 165 (2004).

⁹³ See, *id.*; *Anderson v. Clemens Mobile Homes*, *supra* note 90.

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duty.⁹⁴ This is true regardless of whether the fiduciary in question was a shareholder and officer.⁹⁵ Indeed, KPG does not challenge the court's instruction that employees, including employees with fiduciary duties, may plan and prepare for their competing business while still employed without breaching the duty of loyalty and that employees are allowed to discuss job offers that would involve engaging in future competition with their current employer without incurring liability.

[48] It is well settled that “[a]n employer’s right to demand and receive loyalty must be tempered by society’s legitimate interest in encouraging competition.”⁹⁶ An at-will employee with a fiduciary relationship with his or her employer may properly plan to go into competition with the employer and may take active steps to do so while still employed, and such an employee has no general duty to disclose such plans to the employer.⁹⁷ According to the Restatement (Third) of Agency:

In general, an employee or other agent who plans to compete with the principal does not have a duty to disclose this fact to the principal. To be sure, the fact that an agent has such a plan is information that a principal would find useful, but the agent’s fiduciary duty to the principal does not oblige the agent to make such disclosure. . . . In this respect, the social benefits of furthering competition outweigh the principal’s interest in full disclosure by its agents.⁹⁸

⁹⁴ 2 Restatement (Third) of Agency § 8.04, comment c. (2006).

⁹⁵ See, e.g., *Bancroft-Whitney Co. v. Glen*, 64 Cal. 2d 327, 411 P.2d 921, 49 Cal. Rptr. 825 (1966); 2 Restatement (Third), *supra* note 94; 3 William Meade Fletcher, *Fletcher Cyclopedic of the Law of Corporations* § 856 (2008); 8 Illinois Practice Series, *Business Organizations* § 14:17 (2d ed. 2010); Christopher Lyle McIlwain, *Backstab: Competing With the Departing Employee*, 29 Cumb. L. Rev. 615 (1999).

⁹⁶ *Navigant Consulting, Inc. v. Wilkinson*, *supra* note 83, 508 F.3d at 284. Accord *Augat, Inc. v. Aegis, Inc.*, 409 Mass. 165, 565 N.E.2d 415 (1991).

⁹⁷ *Id.*

⁹⁸ 2 Restatement (Third), *supra* note 94 at 306.

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Thus, the fact that Dick used his wife's email to communicate with Bland and met with other Bland shareholders without telling anyone at KPG was not, as KPG contends, a breach of Dick's fiduciary duty as a matter of law.

KPG relies on statements made in *Bode v. Prettyman*⁹⁹ and *I. P. Homeowners v. Radtke*¹⁰⁰ that partners must not "take advantage" of one another "by the slightest concealment or misrepresentation of any kind."¹⁰¹ This statement is taken out of context and ignores that part of the proposition referring to taking advantage of one another. Certainly, there were many things that Dick may have "concealed" from KPG but which KPG had no right to know. Dick's intention to leave his employment at KPG was one such thing, and Dick did not "take advantage" of KPG by concealing those plans. As the district court noted in relation to its instructions, "even a fiduciary . . . has the right to do certain things. He isn't blindly loyal, and he doesn't have to disclose everything in the world to his partners"

[49] There are, of course, limitations on the conduct of an employee who plans to compete with an employer: The employee may not (1) appropriate the employer's trade secrets, (2) solicit the employer's customers while still working for the employer, (3) solicit the departure of other employees while still working for the employer, or (4) carry away confidential information, such as customer lists.¹⁰² The district court correctly instructed:

While planning and preparing for a competing business is permissible, an employee may not act in direct competition with his or her employer while still employed. Factors showing that an employee acted in direct competition

⁹⁹ *Bode v. Prettyman*, 149 Neb. 179, 30 N.W.2d 627 (1948), modified 149 Neb. 469, 31 N.W.2d 429.

¹⁰⁰ *I. P. Homeowners v. Radtke*, 5 Neb. App. 271, 558 N.W.2d 582 (1997).

¹⁰¹ *Bode v. Prettyman*, *supra* note 99, 149 Neb. at 188, 30 N.W.2d at 632.

¹⁰² See *Navigant Consulting, Inc. v. Wilkinson*, *supra* note 83.

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during his or her employment include the following: use of confidential and trade secret information acquired from the employer to compete; soliciting customers and clients to join the competing business before the end of the employment relationship; or committing some other fraudulent or unlawful act aimed at destroying the employer's business. To give rise to liability, the alleged disloyal acts must substantially hinder the employer in the continuation of its business.

Neither party takes issue with this instruction.

But such improper conduct in the pursuit of new employment is not the kind of "transaction" that results in burden shifting. Indeed, in such circumstances, there would be no need to shift the burden to show that the "transaction" complied with the business judgment rule or was otherwise fair to the corporation. They are acts that, if proved, are inherently against the corporation's interests.

The jury was presented with evidence that Dick shared with Bland certain billing information and then profited from that by being offered and accepting from Bland employment that included a 10-percent commission on new clients. The jury could have found that such acts constituted breaches of Dick's fiduciary duty. It ultimately determined that they did not. However, these acts did not shift the burden to Dick to show they were done fairly.

There is no merit to KPG's argument that the court should have granted KPG's motion for directed verdict based on Dick's alleged failure to satisfy his alleged burden to prove good faith in his (1) use of his wife's email to communicate with Bland to avoid KPG's discovering his negotiations with Bland, (2) meeting with Bland without informing KPG, (3) sharing with Bland certain billing information, and (4) accepting from Bland a 10-percent commission on new clients brought to Bland by Dick.

Likewise, the jury's verdict is not called into question because the court refused to give KPG's proposed instruction

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on burden shifting in relation to these acts. KPG's proposed instruction stated in relevant part:

Once evidence was presented by KPG that certain transactions existed that allegedly breached . . . Dick's fiduciary duty, the burden shifted to . . . Dick to prove the fairness of the transactions. . . . Dick therefore must prove by a preponderance of the evidence that his actions were taken in good faith and he did not act in such a manner as to cause or contribute to the injury or damage of KPG, or deprive it of business.

This instruction was not warranted by the evidence, because there was no evidence of a burden-shifting transaction, as already discussed.

Furthermore, the proposed instruction is overly broad and is misleading. It fails to define what the "certain transactions" could be. The prior paragraphs of the instruction do not tie directly to the "certain transactions" and are themselves overly broad by stating that the fiduciary "must at all times act for the common benefit of all" and "must not take advantage of a partner by the slightest concealment or misrepresentation of any kind"—again, a point already discussed. Lastly, KPG's proposed instruction portrays as a foregone conclusion that Dick engaged in those "certain transactions" inasmuch as it stated, without condition, that Dick "must prove" that his actions were taken in good faith.

We find no merit to KPG's assertion that the district court either should have granted its motion for directed verdict on its claim for breach of fiduciary duty or should have given its proposed instructions on burden shifting.

(b) Instruction That Breach Was
Based on Two Grounds Only

KPG assigned as error the court's instruction that KPG's claim for breach of fiduciary duty was based on two grounds only, the violation of KPG's bylaws and Dick's failure to send engagement letters to KPG clients before his resignation.

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Instruction No. 9 informed the jury that KPG asserted that Dick breached his fiduciary duty to KPG “in one or more of the following ways: . . . Violat[ing] [KPG’s] bylaws by disclosing [KPG’s] alleged confidential information to Bland; . . . Fail[ing] to send out an Engagement Letter to [two named entities] in an effort to undermine [KPG’s] relationships with clients.” KPG asserts that it was prejudiced by this instruction because it had pleaded and offered evidence at trial of Dick’s concealment, sharing confidential information with a competitor, and other actions demonstrating a failure to exercise the utmost good faith.

KPG did not argue this assignment of error in the argument section of its brief. Errors that are assigned but not argued will not be addressed by an appellate court.¹⁰³

For the sake of completeness, however, we also point out that we have concluded that the concealment of negotiations for new employment, upon which KPG based its claims, was not actionable. And there were many instructions that touched upon other aspects of KPG’s claim for breach of fiduciary duty. These instructions included that Dick had a duty to “always act for the common benefit of all,” “deal fairly and honestly with [KPG],” “disclose any conflicts between Dick’s interests and [KPG’s] interests that might make him act in his own best interests at the expense or [to] the detriment of [KPG],” and not “use . . . confidential [or] trade secret information acquired from [KPG] to compete” during the employment relationship. If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.¹⁰⁴ KPG was not prejudiced by the court’s instruction No. 9.

¹⁰³ *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005).

¹⁰⁴ *InterCall, Inc. v. Egenera, Inc.*, *supra* note 7.

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(c) Conduct After Departure

Next, KPG asserts that it was prejudiced by the district court's order excluding evidence of Dick's postresignation breach. Relatedly, KPG asserts that the court erred by instructing on what KPG describes as "the lesser duty of loyalty, not fiduciary duty,"¹⁰⁵ which was an instruction stating that "fiduciary duty ends upon termination of the employment relationship." KPG argues we should remand the cause for a new trial wherein it can offer evidence and argument related to Dick's alleged breach of fiduciary duty to KPG through Dick's postresignation conduct. KPG presumes that because KPG did not buy back Dick's shares, Dick never stopped owing KPG a fiduciary duty as a shareholder, despite his resignation. KPG also asserts that because the "closing date" of a buyout under the Shareholder Agreement was 60 days after the operative event of Dick's departure, Dick would owe a postresignation fiduciary duty "for up to 60 days after resignation," even if KPG had bought back Dick's shares.¹⁰⁶ We find no merit to KPG's assignments of error relating to Dick's postresignation conduct.

The court excluded evidence of Dick's postresignation conduct on the ground that KPG did not plead such conduct sufficiently to put Dick on notice that it would be the subject of litigation. KPG points out that in the "Introduction" section of its amended counterclaim, KPG referred to how "immediately after Dick's departure," Dick "used KPG's confidential business techniques and commercial data to raid KPG's client base and take over KPG's niche practice." KPG had also alleged under the "Background Facts" section of its counterclaim that "Dick has solicited current KPG clients by using his knowledge of KPG's confidential business techniques and commercial data to attempt to underbid KPG's services for KPG's existing clients and co-opt the niche developed by

¹⁰⁵ Brief for appellant at 31.

¹⁰⁶ *Id.* at 28.

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KPG.” Finally, KPG further alleged under the “Background Facts” section of its amended third-party complaint that Dick “instructed former KPG clients not to pay outstanding invoices issued by KPG,” after Dick’s departure. But, as the district court noted, while KPG carefully set forth in its amended counterclaim numerous specific allegations as to how Dick had breached his fiduciary duty, KPG did not therein allege any postresignation conduct. Under the circumstances, we find no error in the court’s conclusion that KPG had not given Dick notice that its claim of breach of fiduciary duty was based on postresignation conduct.

We also find that the district court did not abuse its discretion in denying KPG’s request for leave to amend the pleadings. KPG did not move to amend until well into trial.

Moreover, the specific allegations of postresignation conduct that KPG relies on in its amended counterclaim relate to the alleged use of confidential information and tortious interference with a business relationship. And these claims were presented to and rejected by the jury. They are in effect the same acts presented to the jury with regard to Dick’s preresignation conduct. We cannot conclude that the jury would have viewed these allegations differently if presented with the fact that Dick continued these acts after his resignation.

[50] To the extent any other acts would have been presented to the jury but for the court’s order excluding postresignation conduct, the substance of such evidence was not presented through an offer of proof and it is not apparent from the context. Neb. Rev. Stat. § 27-103(1) (Reissue 2016) provides in relevant part that “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected,” and that “[i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.” Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered

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by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked.¹⁰⁷

Having found no merit to the contention that the court erred in excluding postresignation conduct, we also conclude that the evidence failed to warrant an instruction on postresignation conduct.

Furthermore, we find the jury instruction given by the court correctly stated the law and was not misleading, while KPG's proposed instruction would have been misleading. KPG takes issue with that portion of instruction No. 8 stating "[a]n individual's fiduciary duty ends upon termination of the employment relationship." Instruction No. 8 provided in full:

Shareholder employees in a close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another, to act among themselves in the utmost good faith and loyalty.

An individual's fiduciary duty ends upon termination of the employment relationship. Under Nebraska law, every employee, including employees with fiduciary duties, owes his or her employer a duty of loyalty until the employment relationship is terminated. During employment, an employee has a duty not to compete with his employer concerning the subject matter of the employment. However, employees, including employees with fiduciary duties, may plan and prepare for their competing business while still employed without breaching the duty of loyalty. Employees, including employees with fiduciary duties, are allowed to discuss job offers, while still employed, to engage in future competition with their employer without incurring liability.

¹⁰⁷ *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 253 Neb. 813, 572 N.W.2d 362 (1998). See, also, *Intercall, Inc. v. Egenera, Inc.*, *supra* note 7; *Sherman County Bank v. Kallhoff*, 205 Neb. 392, 288 N.W.2d 24 (1980).

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While planning and preparing for a competing business is permissible, an employee may not act in direct competition with his or her employer while still employed. Factors showing that an employee acted in direct competition during his or her employment include the following: use of confidential and trade secret information acquired from the employer to compete; soliciting customers and clients to join the competing business before the end of the employment relationship; or committing some other fraudulent or unlawful act aimed at destroying the employer's business. To give rise to liability, the alleged disloyal acts must substantially hinder the employer in the continuation of its business.

The court refused to give the jury KPG's proposed instruction, which stated:

Generally, a shareholder's fiduciary duty continues after he resigns as an officer, director, or employee of a close corporation. Resignation by a shareholder from the position of officer and director does not relieve that person of a fiduciary duty to the fellow shareholders because the resignation does not change that person's status as a shareholder in the close corporation.

In arguing that it was prejudiced by instruction No. 8 and the court's refusal to give its proposed instruction on postresignation duty, KPG relies on Neb. Rev. Stat. § 67-424 (Reissue 2018) of the Uniform Partnership Act of 1998,¹⁰⁸ which sets forth a duty to refrain from competing with the partnership until final dissolution.¹⁰⁹ KPG connects this to our case law in which we have said that shareholders in a close corporation owe one another the same fiduciary duty as that owed by one partner to another in a partnership.¹¹⁰ KPG then extrapolates that Dick still owes to this day a fiduciary duty to

¹⁰⁸ Neb. Rev. Stat. §§ 67-401 to 67-467 (Reissue 2018).

¹⁰⁹ See *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007).

¹¹⁰ See *id.* See, also, *Anderson v. Bellino*, 265 Neb. 577, 658 N.W.2d 645 (2003).

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KPG by virtue of the facts that Dick is still a shareholder and that KPG has not dissolved. Again, the cases upon which KPG relies are inapplicable to the facts of the case at bar.

*Bellino v. McGrath North*¹¹¹ was a professional negligence action against a law firm based on advice given in connection with the severance of a business relationship. The client was the president, director, and 50-percent shareholder in a closely held corporation that operated a keno parlor under a lottery operation contract with the city. On his counsel's advice, the president tendered his resignation as officer and director effective upon termination of the city contract. Then, before such termination, and thus before the effective date of his resignation, the president formed a new corporation by himself, through which he won the contract that had been put up for public bidding.

In a separate action, we had affirmed a verdict in favor of the closely held corporation for breach of fiduciary duty, noting that although there was no noncompete agreement, a corporate director may not compete with the corporation if the director's competition causes or contributes to the injury or damage of the corporation, or deprives it of business.¹¹² In *Bellino v. McGrath North*, we subsequently affirmed a judgment in favor of the corporation's president against the law firm on the ground that it was malpractice to advise the former president that he could avoid liability for usurping a corporate opportunity simply by being up front and honest about it. In the course of so concluding, we said that shareholders in a close corporation owe one another the same fiduciary duty as owed by one partner to another in a partnership and that a partner has a duty to refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.¹¹³

¹¹¹ *Bellino v. McGrath North*, *supra* note 109.

¹¹² See *Anderson v. Bellino*, *supra* note 110.

¹¹³ See *Bellino v. McGrath North*, *supra* note 109.

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In the Seventh Circuit case relied on by KPG, *Rexford Rand Corp. v. Ancel*,¹¹⁴ the court held that a minority shareholder violated his fiduciary duty to a closely held corporation by secretly reserving the corporation's trade names when they became available, after an unintentional administrative dissolution of the corporation and a "freeze out" deprived the minority shareholder of his position and the benefit of stock ownership. The court reasoned that the minority shareholder had taken it upon himself to retaliate, which violated his continuing fiduciary duty—as he was technically still a shareholder—to refrain from conduct intended to be detrimental to the enterprise.¹¹⁵ The court found it to be bad policy for frozen-out shareholders to attempt to resolve disputes in this manner rather than seek a judicial remedy.¹¹⁶

Finally, KPG relies on a case from the appellate court of Illinois, *Hagshenas v. Gaylord*.¹¹⁷ In *Hagshenas*, a director, vice president, and 50-percent shareholder of a closely held corporation operating a travel agency resigned as vice president and secretary and, the following day, opened a new travel agency and began competing with the corporation, soliciting the corporation's customers, and hiring several travel agents who had been working for the corporation. At the same time, the former vice president did not give up his 50-percent control over the corporation and continued to express an interest as a shareholder in its ongoing affairs. When the other shareholders and the former vice president could not reach an agreement as to the corporation's ongoing operations, the former vice president sued for dissolution, and the other shareholders counter-claimed for breach of fiduciary duty.

¹¹⁴ See *Rexford Rand Corp. v. Ancel*, 58 F.3d 1215, 1220 (7th Cir. 1995).

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ *Hagshenas v. Gaylord*, 199 Ill. App. 3d 60, 557 N.E.2d 316, 145 Ill. Dec. 546 (1990).

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The court in *Hagshenas* rejected the former vice president's argument that he had ceased to owe a fiduciary duty after his resignation. The court acknowledged that ordinarily an officer or director owes no fiduciary duty to the corporation after resignation and that a mere owner of stock in a company does not owe a fiduciary duty to that company. But the court held that 50-percent shareholders owe a fiduciary duty to each other similar to that of partners. And the former vice president had purposefully maintained his 50-percent shareholder status and control. The court explained that if there were problems that could not be resolved, then the proper course of action would have been to negotiate a sale or buyout of the shares or file for dissolution, and that until a final sale or order of dissolution, the former vice president owed a fiduciary duty to the corporation.¹¹⁸

None of these cases involve shareholder agreements with buyout provisions in the express event of a shareholder's departure, much less buyout provisions that contemplate a purchase price dependent upon the number of clients who decide to continue with the departing shareholder at the new place of employment. And none of these cases involve continuing shareholder status by virtue of the corporation's refusal to buy out the shares. Unlike the shareholder in *Hagshenas*, Dick testified that he had no control over KPG's operations after his resignation, and there was no testimony refuting that statement. Unlike the shareholder in *Rexford Rand Corp.*, Dick was not trying to circumvent legal avenues of relief through retaliatory action.¹¹⁹ He simply changed his place of employment and solicited the clients he had served while at KPG.

We find applicable cases holding that upon termination of employment, a shareholder who is subject to a mandatory buyout is divested of shareholder status immediately, and that any reciprocal fiduciary obligations of the shareholders

¹¹⁸ *Id.*

¹¹⁹ See *Rexford Rand Corp. v. Ancel*, *supra* note 114.

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no longer exist even if the corporation has not yet redeemed the employee's stock.¹²⁰ This is distinct from cases holding in the context of the fiduciary duty of the majority shareholders toward a terminated employee shareholder that the corporation still owes certain duties to the shareholder during the course of an expressly contemplated delay of the buyout or when terminating shareholder status would "unfairly strip a minority shareholder of all shareholder rights while he [or she] remains the legal owner of the shares."¹²¹ We can find no authority for the proposition that a voluntarily departing shareholder is bound by a general fiduciary duty not to compete with a closely held corporation until the closing date of a mandatory buyout provision—much less that such shareholder is bound by virtue of the corporation's unjustified refusal to perform its buyout obligations until the matter can be resolved through litigation.

While it may be true, as KPG points out, that the departing shareholder can eventually recover or force specific performance through legal action, it would be against public policy to allow the corporation to deprive the departing shareholder of competing employment until such legal actions can be taken. As stated, even corporate officers and directors, who have fiduciary duties to the corporation, are free to resign and go into competition as long as they remain loyal prior to resigning.¹²²

We find no reversible error based on either the exclusion of postresignation conduct or the court's refusal to instruct on a postresignation fiduciary duty.

¹²⁰ See, *Riesett v. W.B. Doner & Co.*, 293 F.3d 164 (4th Cir. 2002); *Gallagher v. Lambert*, 74 N.Y.2d 562, 549 N.E.2d 136, 549 N.Y.S.2d 945 (1989). But see *Jenkins v. Haworth, Inc.*, 572 F. Supp. 591 (W.D. Mich. 1983).

¹²¹ See *Drewitz v. Motorwerks, Inc.*, 706 N.W.2d 773, 785 (Minn. App. 2005), *reversed in part on other grounds* 728 N.W.2d 231 (2007). Accord *Stephenson v. Drever*, 16 Cal. 4th 1167, 947 P.2d 1301, 69 Cal. Rptr. 2d 764 (1997).

¹²² *Stuart C. Irby Co., Inc. v. Tipton*, 796 F.3d 918 (8th Cir. 2015).

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(d) Corporate Opportunity Doctrine

Next, KPG argues that it was prejudiced by the district court's refusal to give its proposed instruction on the corporate opportunity doctrine. KPG asserts that the clients Dick served while at KPG were KPG's corporate opportunities.

KPG had proposed that the court instruct:

A business opportunity may "belong" to a corporation. If a director of the corporation breaches his fiduciary duty to the corporation to usurp that opportunity, the corporation is entitled to recover for that loss. The fact that the proceeds from the usurpation may have ended up in the hands of an innocent party does not defeat the corporation's right to recover from those whose breaches of fiduciary duty occasioned the loss.

This statement is derived from *Trieweiler v. Sears*,¹²³ in which we considered the defendant directors' formation of a new corporation to open a new location for the bar business the closely held corporation was in the business of operating and which was financed and operated through an intertwining of corporate affairs with the closely held corporation the plaintiff was a shareholder of. We affirmed the district court's finding that the newly formed corporation had usurped a corporate opportunity.¹²⁴

We described that the doctrine of corporate opportunity prohibits one who occupies a fiduciary relationship to a corporation from acquiring, in opposition to the corporation, property in which the corporation has an interest or tangible expectancy or which is essential to its existence.¹²⁵ The traditional remedy imposed by courts upon a finding of a misappropriation of a corporate opportunity is the equitable impression of a constructive trust in favor of the corporation upon the property. We explained that a party seeking to establish the trust must

¹²³ *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004).

¹²⁴ See *id.*

¹²⁵ See *id.*

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prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained.¹²⁶ We rejected the argument that the percentage of the proceeds of the corporate opportunity distributed to an innocent investor defeated the corporation's right to recover from those whose breaches of fiduciary duty occasioned the loss, holding that

the fact that a director stole valuable assets from a corporation and gave those assets to a presumably innocent third party does not change the fact that the assets properly belonged to the corporation in the first place and that the corporation should be compensated for the theft by the wrongdoer.¹²⁷

[51] It was undisputed that Dick did not solicit any clients until after his resignation, and we have already addressed that such postresignation conduct does not breach a fiduciary duty. More specifically to the doctrine of misappropriation of a corporate opportunity with regard to postresignation conduct, at least one jurisdiction has explained that whether the opportunity rightfully belonged to the corporation is evaluated under an interest or expectancy test.¹²⁸ And a past relationship with customers alone is insufficient to create a reasonable expectancy absent a continuing contractual agreement.¹²⁹ Customers without exclusive contractual arrangements with corporations or with whom a corporation has to annually renew contracts are not corporate business opportunities.¹³⁰ Like with a law

¹²⁶ See *id.*

¹²⁷ *Id.* at 986, 689 N.W.2d at 839.

¹²⁸ See, *In re Pervis*, 512 B.R. 348 (N.D. Georgia 2014); *Ins. Industry Consultants, LLC v. Alford*, 294 Ga. App. 747, 669 S.E.2d 724 (2008).

¹²⁹ See *id.*

¹³⁰ See *id.*

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firm, absent a contract stating otherwise, an accountant's clients have a right to select who will be their accountant; they are not the accountancy firm's property.¹³¹

We agree with this reasoning. The evidence was undisputed that KPG clients had, at most, annually renewable contracts. They were not KPG's property. Thus, they could not be misappropriated.

The facts did not warrant KPG's requested instruction on the corporate opportunity doctrine.

(e) Equitable Clawback

KPG also asserts that it was prejudiced by the district court's refusal to instruct the jury on equitable clawback damages in relation to its counterclaim for breach of fiduciary duty. KPG's proposed instruction stated: "If you find KPG has proven that . . . Dick breached his fiduciary duty to KPG, you may also consider whether KPG is entitled to recover the compensation it paid to . . . Dick during any periods of his breach of fiduciary duty."

KPG derived this instruction from *Neece v. Severa*.¹³² The plaintiff in *Neece* was a psychiatrist who had worked as an independent contractor in the office she later left and sued for an accounting, alleging billing failures under their contract. The Court of Appeals quoted the "Restatement" rule on depriving an agent of compensation:

"An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a wilful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned."¹³³

¹³¹ See Karen J. Dilibert, *Fifty Ways to Leave Your Law Firm*, 89 Ill. B.J. 323 (2001).

¹³² *Neece v. Severa*, 5 Neb. App. 556, 560 N.W.2d 868 (1997).

¹³³ *Id.* at 563, 560 N.W.2d at 873, quoting 2 Restatement (Second) of Agency, *supra* note 55.

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The Court of Appeals did not apply this principle, however, because the plaintiff did not allege the office had willfully breached its contract with her.

[52] Our appellate courts have not otherwise addressed the concept of equitable clawback. Equitable clawback is a restitutionary remedy based on principles of unjust enrichment and the faithless servant doctrine.¹³⁴ The doctrine establishes a mandate that an agent who engages in activities that breach the agent's fiduciary duties to the principal is not entitled to and must forfeit any compensation for services rendered during the period of the breach.¹³⁵ The majority of the jurisdictions adopt a bright-line rule that the agent must forfeit all compensation paid or payable over the entire period of the agent's disloyalty, presuming, in effect, that the agent's misconduct tainted or otherwise permeated his or her entire relationship with the principal from the original point of the breach going forward.¹³⁶

Again, the jury was presented with the question of whether Dick breached his fiduciary duty, which the court explained he could do by:

act[ing] in direct competition with his or her employer while still employed. Factors showing that an employee acted in direct competition during his or her employment include the following: use of confidential and trade secret information acquired from the employer to compete; soliciting customers and clients to join the competing business before the end of the employment relationship; or committing some other fraudulent or unlawful act aimed at destroying the employer's business. To give rise to liability, the alleged disloyal acts must substantially hinder the employer in the continuation of its business.

¹³⁴ See Manning Gilbert Warren III, *Equitable Clawback: An Essay on Restoration of Executive Compensation*, 12 U. Pa. J. Bus. L. 1135 (2010).

¹³⁵ See *id.*

¹³⁶ See *id.*

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KPG has not challenged on appeal this portion of the instruction.

While the jury was not specifically instructed on equitable clawback damages, KPG's expert witness testified as to the amount of such damages and the jury was given a general verdict form for damages. There was no instruction that negated the possibility of equitable clawback damages.

[53] Any jury instruction is subject to the harmless error rule, which requires a reversal only if error adversely affects the substantial rights of the complaining party.¹³⁷ The appellant has the burden of establishing the prejudicial effect.¹³⁸ We conclude that KPG has failed to establish it was prejudiced by the district court's refusal to instruct the jury on equitable clawback.

4. BREACH OF BYLAWS AND DEFINITION
OF CONFIDENTIAL INFORMATION

Turning to its claim against Dick for breach of bylaws, KPG argues it was prejudiced by the court's jury instructions that conflated "trade secret" with "confidential information." Instruction No. 12 set forth:

Confidential information and trade secrets are defined as information including, but not limited to, a drawing, formula, pattern, compilation, program, device, method, technique, code, or process that:

(a) derives economic value, actual or potential, from not being known to, and not being ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Confidential

¹³⁷ See *Plambeck v. Union Pacific RR. Co.*, 232 Neb. 590, 441 N.W.2d 614 (1989).

¹³⁸ See *id.*

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and trade secret information must have independent economic value. To be considered confidential and trade secret information, possession of the secret information must confer a competitive advantage.

Matters of public knowledge or of general knowledge in an industry are not confidential information or trade secrets; confidential information or a trade secret is something known to only a few and not susceptible of general knowledge. Confidential information and trade secrets must be particular secrets of [KPG] and not the general secrets of the trade in which [KPG] is engaged. If information is ascertainable at all by any means that are not improper, the information is not confidential information or a trade secret.

Instruction No. 13 stated:

If an alleged trade secret or confidential information does not have independent economic value, the information is not entitled to confidential information or trade secret protection under Nebraska law. To be considered confidential and trade secret information, possession of the secret information must confer a competitive advantage.

Information disclosed to customers without any confidentiality requirement, including pricing information, is not confidential information.

KPG fails to delineate what parts of these descriptions of confidential information were inaccurate and misleading. KPG merely insists that not all confidential information constitutes a trade secret and that the bylaws somehow presented something broader.

The "Bylaws of Randall K. Koski, P.C." stated that it shall be required to "maintain and preserve confidentiality as to all business techniques, commercial data, formulas, good will, operational methods, product identifications, service marks, trademarks, trade names, and trade secrets." It does not define those terms. KPG does not identify how these specific concepts relate to its allegations against Dick.

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Most notably, the bylaws do not define “confidential information” or “confidentiality.” They merely state that the “confidentiality” of the items in the list shall be “preserve[d]” and “maintain[ed].” Logically, to preserve and maintain confidentiality, the information must have been confidential in the first instance. And, on their face, the bylaws do not set forth any new, broader definition of “confidential information” or confidentiality.

As Dick points out, our case law reflects that we have often treated “confidential information” and “trade secrets” interchangeably.¹³⁹ There is nothing in the bylaws that convinces us that the court should have presented a different definition than that set forth in jury instructions Nos. 12 and 13.

No conceivable definition of “confidential information” changes the requirement in a breach of contract action that the claimant prove both proximate causation and foreseeable damages of a “kind which naturally follow a breach.”¹⁴⁰ Dick argued at trial that the spreadsheet containing the summary of Dick’s billings and fees, the types of services he provided, and the states in which he worked was not confidential information because it could be obtained through proper means. The jury either so found or found that it did not confer a competitive advantage or that KPG was not harmed by the disclosure of the information.

We find no merit to KPG’s assertion that the verdict in its counterclaim for breach of bylaws should be reversed because of jury instructions that addressed trade secrets and confidential information interchangeably.

¹³⁹ See, *Gaver v. Schneider’s O.K. Tire Co.*, 289 Neb. 491, 856 N.W.2d 121 (2014); *Brockley v. Lozier Corp.*, 241 Neb. 449, 488 N.W.2d 556 (1992); *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 472 N.W.2d 391 (1991); *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986); *Securities Acceptance Corp. v. Brown*, 171 Neb. 701, 107 N.W.2d 540 (1961).

¹⁴⁰ *Birkel v. Hassebrook Farm Serv.*, 219 Neb. 286, 290, 363 N.W.2d 148, 152 (1985).

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5. KPG'S COUNTERCLAIM AGAINST BLAND
FOR TORTIOUS INTERFERENCE

As for its counterclaim against Bland for tortious interference, KPG asserts that the district court erred in holding as a matter of law that Bland's payment of commissions to Dick did not violate the rules of professional conduct of the NSBPA and thus excluding KPG's proffered expert opinion that the commissions violated the NSBPA. There was no evidence submitted that the NSBPA itself has determined Bland's commission structure violates its rules of professional conduct or that Bland is under investigation for the same. The jury was presented with the theory that through the 10-percent commission, among other things, Bland had tortiously interfered with KPG's business expectations. Nevertheless, KPG claims it was prejudiced by the exclusion of expert testimony on the alleged NSBPA violation, because, without such testimony, KPG was "required to prove that Dick and Bland committed 'an unjustified intentional act of interference' with KPG's business relationships to prove its claim for tortious interference with a business relationship."¹⁴¹

[54] 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.¹⁴² In order to be actionable, interference with a business relationship must be both intentional and unjustified.¹⁴³

[55] Factors to consider in determining whether interference with a business relationship was unjustified include: (1) the

¹⁴¹ Brief for appellant at 41.

¹⁴² *Aon Consulting v. Midlands Fin. Benefits*, *supra* note 76.

¹⁴³ See *Recio v. Evers*, 278 Neb. 405, 771 N.W.2d 121 (2009).

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nature of the actor's conduct, (2) the actor's motive, (3) the interests of the other with which the actor's conduct interferes, (4) the interests sought to be advanced by the actor, (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (6) the proximity or remoteness of the actor's conduct to the interference, and (7) the relations between the parties.¹⁴⁴ The issue is whether, upon a consideration of the relative significance of the factors involved, the conduct should be permitted without liability, despite its effect of harm to another.¹⁴⁵

[56] This determination depends upon a judgment and choice of values in each situation.¹⁴⁶ An individual's interest in prospective economic advantage receives less protection than his or her enforceable contract rights.¹⁴⁷ The rationale for the distinction is that an individual with a prospective business relationship has a mere expectancy of future economic gain, whereas a party to a contract has a certain and enforceable expectation of receiving the benefits of his contract.¹⁴⁸

Furthermore, in the context of claims of tortious interference with a business relationship or expectancy, we have recognized the privilege of a competitor as described in the Restatement of Torts.¹⁴⁹ "[V]alid competition," including inducement of third persons to do their business with oneself rather than with a particular competitor, "cannot be the

¹⁴⁴ *Id.*

¹⁴⁵ *Aon Consulting v. Midlands Fin. Benefits*, *supra* note 76.

¹⁴⁶ *Id.*

¹⁴⁷ 12 Robert L. Haig, *Business and Commercial Litigation in Federal Courts* § 121:39 (4th ed. 2016).

¹⁴⁸ *Lamar Co. v. City of Fremont*, 278 Neb. 485, 771 N.W.2d 894 (2009). See, also, *Miller Chemical Co., Inc. v. Tams*, 211 Neb. 837, 320 N.W.2d 759 (1982), *disapproved on other grounds*, *Matheson v. Stork*, 239 Neb. 547, 477 N.W.2d 156 (1991); Restatement of Torts § 768 (1939).

¹⁴⁹ Restatement of Torts, *supra* note 148.

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basis for a tortious interference claim,” because such conduct is justified.¹⁵⁰

[57,58] The party alleging tortious interference has the burden of proving that the conduct did not fall within the competitor’s privilege.¹⁵¹ One is privileged purposely to cause a third person not to enter into or continue a business relation with a competitor of the actor if (1) the relation concerns a matter involved in the competition between the actor and the competitor, (2) the actor does not employ improper means, (3) the actor does not intend thereby to create or continue an illegal restraint of competition, and (4) the actor’s purpose is at least in part to advance his or her interest in the competition with the other.¹⁵²

[59] KPG argues that offering a commission allegedly in violation of the rules of professional conduct of the NSBPA constitutes improper means of competition; therefore, Bland’s interference was unjustified. Improper means of competition has been described as physical violence, fraud, civil suits, and criminal prosecutions—though even these means may not be forbidden, depending upon the relation between the actor and the person induced, and the object sought to be accomplished by the actor.¹⁵³

KPG’s only support for the contention that a violation of the rules of professional conduct of the NSBPA constituted improper means is a comment to the Restatement (Second) of Torts dealing with intentional interference with a contract or prospective contractual relation of another:

Business ethics and customs. Violation of recognized ethical codes for a particular area of business activity

¹⁵⁰ *Lamar Co. v. City of Fremont*, *supra* note 148, 278 Neb. at 498, 771 N.W.2d at 906.

¹⁵¹ See *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483 (8th Cir. 1992).

¹⁵² *Miller Chemical Co., Inc. v. Tams*, *supra* note 148.

¹⁵³ See, 4 Restatement (Second) of Torts § 767, comment on clause (a) (1979); Restatement of Torts, *supra* note 148, comment on clause (b).

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or of established customs or practices regarding disapproved actions or methods may also be significant in evaluating the nature of the actor's conduct as a factor in determining whether his interference with the plaintiff's contractual relations was improper or not.¹⁵⁴

This comment was not directly made in relation to the privilege to compete.

We addressed professional ethics in the context of a claim for tortious interference with a business expectancy in *Macke v. Pierce*.¹⁵⁵ We explained that the uncontroverted evidence of the defendant's breach of his physician's duty of confidentiality toward his patient did not, standing alone, establish that such unauthorized disclosure of his patient's medical condition to her employer constituted tortious interference with a business expectancy.¹⁵⁶ The physician testified that he had breached the duty of confidentiality out of concern for the patient's well-being. We said that this testimony was sufficient to support the jury's conclusion that the physician had not tortiously interfered with the plaintiff's business expectancy.¹⁵⁷

In this case, we agree with the district court that the evidence does not support the possible conclusion that Bland violated the rules of professional conduct of the NSBPA by offering the 10-percent commission compensation structure to its employees. Leaving aside whether the compensation structure at issue constituted a prohibited "commission" under the NSBPA rules, their plain language prohibits a certified public accountant from "accepting" certain commissions, which Bland clearly did not do.

Section 007 of the rules of professional conduct of the NSBPA provides:

¹⁵⁴ 4 Restatement (Second) of Torts, *supra* note 153 at 32.

¹⁵⁵ *Macke v. Pierce*, 266 Neb. 9, 661 N.W.3d 313 (2003).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

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007.01 Acts discreditable. A licensee shall not commit an act that reflects adversely on his fitness to engage in the practice of public accountancy.

007.02 Commissions and referral fees.

007.02A Prohibited Commissions. *A licensee in public practice shall not* for a commission recommend or refer to a client any product or service, or for a commission recommend or refer any product or service to be supplied by a client, *or receive a commission*, when the licensee or the licensee's firm also performs for that client:

007.02A1 an audit or review of a financial statement; or

007.02A2 a compilation of a financial statement when the licensee expects, or reasonably might expect, that a third party will use the financial statement and the licensee's compilation report does not disclose a lack of independence; or

007.02A3 an examination of prospective financial information.

This prohibition applies during the period in which the licensee is engaged to perform any of the services listed above and the period covered by any historical financial statements involved in such listed services.

007.02B Disclosure of Permitted Commissions. A licensee in public practice who is not prohibited by this rule from performing services for or receiving a commission and who is paid or expects to be paid a commission shall provide written disclosure of that fact and the basis for determining such commission to any person or entity to whom the licensee recommends or refers a product or service to which the commission relates.

007.02C Referral Fees. Any licensee who accepts a referral fee for recommending or referring any service of a CPA to any person or entity or who pays a referral fee to obtain a client shall provide written disclosure of

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such acceptance or payment and the basis for determining such fee to the client.

007.02D Written Disclosure Statements. Written disclosure statements, as set forth by Attachment 1 to this Chapter, are to be executed in duplicate, with a receipt acknowledgement signed and dated by the client, and maintained by the licensee for a period of five years. Licensees are subject to a random audit by the [NSBPA] or its designee for compliance with the written disclosure provisions of this rule.

007.02E Disclosure Form for commission, contingent fee, or referral fee.

(Emphasis supplied.) The rules do not anywhere define the term “commission.”

The rules then set forth a disclosure form which “is required by the [NSBPA] for use by duly licensed Certified Public Accountants (CPA’s) who intend to accept from any client compensation in the form of a commission, a contingent fee or a referral fee.” The rules explain that “CPA’s are prohibited from accepting a commission or contingent fee as compensation from a client for whom the CPA or the CPA’s firm also performs” the specified financial services. Nothing prohibits offering a “commission.” The evidence was uncontroverted that Bland did not accept a commission; it offered one to Dick.

Also, any wrong committed under the NSBPA rules was against the client and concerned an accountant’s potential conflict of interest vis-a-vis a client’s interests. And the commission structure at Bland that KPG takes issue with was not directed toward KPG; it was the bonus offered to all accountants for bringing in clients. The object sought was to reward accountants for networking efforts that resulted in expanding Bland’s client base. It was not dependent upon whether the clients were previously being served by another accounting firm. Again, improper means depends upon the relation

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between the actor and the person induced and upon the object sought to be accomplished by the actor.¹⁵⁸

[60] As a matter of law, the excluded evidence would not have been sufficient for KPG to satisfy its burden of proving that the conduct did not fall within the competitor's privilege. In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.¹⁵⁹ We find that KPG was not unfairly prejudiced by the exclusions of expert opinion that Bland had violated the NSBPA rules.

6. DICK'S AND BLAND'S CROSS-APPEALS

Dick assigns on cross-appeal that the district court erred by denying his motion for a directed verdict against KPG on KPG's counterclaims, because KPG failed to present sufficient evidence for the trier of fact either to find damages with reasonable certainty or to find that any damages were proximately caused by Dick's wrongful conduct. Bland makes similar assignments of error in its cross-appeal regarding KPG's third-party claims against it. Because we find no merit to KPG's appeal and affirm the judgment for that reason, it is unnecessary to address the cross-claims presenting alternative grounds for affirming the judgment.

VI. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

MILLER-LERMAN, J., not participating.

¹⁵⁸ See, Restatement (Second) of Torts, *supra* note 153, comment on clause (a); Restatement of Torts, *supra* note 148, comment on clause (b).

¹⁵⁹ *O'Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 903 N.W.2d 432 (2017).

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

STATE OF NEBRASKA, APPELLEE, V.

BRANDI R. ANDERA, APPELLANT.

950 N.W.2d 102

Filed October 30, 2020. No. S-19-1205.

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, the 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 the appellate court reviews independently of the trial court's determination.
2. **Search and Seizure: Standing.** A passenger who has a property interest in a container within the vehicle has standing to challenge the search of that container.
3. **Constitutional Law: Search and Seizure.** Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment to the U.S. Constitution, subject only to a few specifically established and well-delineated exceptions.
4. **Warrantless Searches.** The warrantless search exceptions recognized by the Nebraska Supreme Court include: (1) searches undertaken with consent, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest.
5. **Warrantless Searches: Police Officers and Sheriffs.** A warrantless search is valid when based upon consent of a third party whom the police, at the time of the search, reasonably believed possessed authority to consent to a search of the property, even if it is later demonstrated that the individual did not possess such authority.
6. **Search and Seizure: Police Officers and Sheriffs.** The search of property based on consent by a third party must be judged against

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an objective standard: Would the facts available to the officer at the moment warrant a person of reasonable caution in the belief that the consenting party had authority over the property?

7. **Warrantless Searches: Police Officers and Sheriffs.** A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which an object subject to seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and April M. Lucas for appellant.

Douglas J. Peterson, Attorney General, and Jordan Osborne for appellee.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

CASSEL, J.

I. INTRODUCTION

Brandi R. Andera appeals her drug possession conviction following a stipulated bench trial. During a traffic stop, a police officer obtained the female driver's consent to search the vehicle and found methamphetamine in a purse located on the front passenger floorboard. Andera, the front seat passenger, challenges the search, because she owned the purse and did not consent to its search. Because the officer reasonably believed that the driver could have owned the purse and the officer found the contraband in plain view upon opening the wallet that contained Andera's identification, we affirm.

II. BACKGROUND

Andera was convicted of one count of possession of a controlled substance after a female police officer found methamphetamine during a warrantless search of Andera's purse

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during a traffic stop. The officer initiated the stop because the vehicle did not have license plates.

During the traffic stop, the officer requested identification from Andera, the female driver, and the rear seat passenger. Andera and the driver complied, but the rear passenger failed to provide accurate identifying information. The officer testified that the driver provided a driver's license and the rear passenger gave verbal identification (name and date of birth). However, the officer could not recall whether Andera provided a driver's license or gave verbal identification.

Suspecting illicit activity, the officer obtained consent from the driver to search the vehicle. When the driver gave consent, she was located outside the vehicle near the trunk. At that time, Andera and the rear passenger remained in the vehicle out of earshot, but neither Andera nor the rear passenger objected once they were informed of the impending search.

After removing the three vehicle occupants, the officer searched the vehicle's passenger compartment. The officer discovered a single purse on the front passenger floorboard. It was the only handbag in the vehicle. The officer did not ask the occupants who owned the purse. The officer testified that at the time, she was not certain to whom the purse belonged. But she answered affirmatively when asked: "So in your mind, it could have been the driver's purse?"

The officer searched the purse and immediately discovered a needle. Continuing her search to a wallet located inside the purse, the officer discovered a small bag of methamphetamine and Andera's Social Security and debit cards. The record does not establish that the identification cards were discovered prior to the methamphetamine. When asked at the scene, Andera claimed the contraband was not hers. Nonetheless, she was charged with possession of a controlled substance.

Andera filed a motion to suppress the fruits of the warrantless search, claiming it violated her Fourth Amendment protections against unlawful searches and seizures because

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she did not consent to the search of her purse. At the conclusion of the evidentiary hearing, the district court overruled her motion.

In overruling the motion, the court made three findings on the record. First, the search was based on “the consent of the driver to search the vehicle.” Second, “it [was] reasonable for [the officer] to believe, [as] she testified, that the purse could have been the driver’s.” Third, “[the officer] located a syringe initially upon searching the purse, prior to discovering any venue information that may give indicia of ownership of the purse to someone [else].”

In due course, the matter proceeded to the stipulated bench trial, and shortly thereafter, the court found Andera guilty. After the court imposed a sentence of probation, Andera filed a timely appeal. We moved the appeal to our docket.¹

III. ASSIGNMENT OF ERROR

Andera assigns that the district court erred in overruling her motion to suppress.

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, we apply a two-part standard of review. Regarding historical facts, we review the trial court’s findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court’s determination.²

V. ANALYSIS

1. STANDING

[2] Andera does not challenge the validity of the officer’s stopping the vehicle or the search of the vehicle’s passenger

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

² *State v. Shiffermiller*, 302 Neb. 245, 922 N.W.2d 763 (2019).

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compartment; instead, she challenges the search of her purse. It is well established that a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.³ Additionally, a passenger does not have standing to challenge a vehicle search where she has neither a property nor a possessory interest in the automobile.⁴ However, a passenger who has a property interest in a container within the vehicle has standing to challenge the search of that container.⁵ Because Andera has a property interest in the purse that the officer searched, she has standing to challenge its search.

2. SEARCH OF PURSE

[3,4] Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment to the U.S. Constitution, subject only to a few specifically established and well-delineated exceptions.⁶ The warrantless search exceptions recognized by the Nebraska Supreme Court include: (1) searches undertaken with consent, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest.⁷

The officer who searched Andera's purse relied on the consent of the driver to conduct the warrantless search. However, the driver did not own the purse and Andera never consented to the search. Therefore, we must determine if the consent exception nonetheless applies to the search of the purse. We then address the legality of the discovery of the contraband within the purse.

³ *State v. Lee*, 265 Neb. 663, 658 N.W.2d 669 (2003).

⁴ See *Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978).

⁵ See *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996).

⁶ *State v. Wells*, 290 Neb. 186, 859 N.W.2d 316 (2015).

⁷ *Id.*

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(a) Consent to Search Purse

The right to be free from unreasonable searches and seizures may be waived by the consent of the citizen.⁸ When the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.⁹

[5,6] Furthermore, a warrantless search is valid when based upon consent of a third party whom the police, at the time of the search, reasonably believed possessed authority to consent to a search of the property, even if it is later demonstrated that the individual did not possess such authority.¹⁰ The search of property based on consent by a third party must “‘be judged against an objective standard: would the facts available to the officer at the moment . . . “warrant a man of reasonable caution in the belief”’ that the consenting party had authority over the [property]?”¹¹

Although the officer who searched Andera’s purse testified that she was not certain who the purse belonged to when she initiated the search, she reasonably believed that the purse could have belonged to the female driver. Other courts have found that officers can reasonably believe that a bag located on the floorboard of the front passenger seat is the property of the driver because the bag is within easy reach of the driver and drivers do not ordinarily place their bags on the driver’s-side floorboard.¹²

⁸ *Konfrst*, *supra* note 5.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See *Illinois v. Rodriguez*, 497 U.S. 177, 188, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990) (quoting *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

¹² See, e.g., *U.S. v. Barber*, 777 F.3d 1303 (11th Cir. 2015).

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Andera argues that we should apply *State v. Caniglia*¹³ to determine if the officer reasonably believed that the driver could have owned the purse. There, the Nebraska Court of Appeals ruled that a warrantless search of a makeup purse hidden under the passenger seat violated the Fourth Amendment, because a male driver could not give consent to the search.¹⁴ The male driver did not have common authority or joint control over a female passenger's makeup purse.¹⁵ The Court of Appeals reasoned that the officer could not reasonably have believed the female passenger's makeup purse was the property of the male driver.¹⁶

Andera's case is distinguishable from *Caniglia*. Here, the driver and passenger were both female. Moreover, the purse was located on the floorboard of the passenger seat, within the driver's reach, and not hidden under the passenger seat. We are not persuaded that the reasoning in *Caniglia* applies here. Thus, Andera's argument lacks merit.¹⁷

Because the officer reasonably believed the purse could have belonged to the driver, the officer was justified in relying on the driver's consent to search Andera's purse. However, the driver's consent was only a valid justification up until the moment the officer determined that the purse belonged to Andera. Thereafter, the driver's consent would have been insufficient to extend the search of the purse.

The district court seemed to rely upon the officer's discovery of the needle to justify the seizure of the methamphetamine. But another doctrine supported the officer's action.

(b) Plain View Doctrine

[7] It is well established that under certain circumstances, the police may seize evidence in plain view without a

¹³ *State v. Caniglia*, 1 Neb. App. 730, 510 N.W.2d 372 (1993).

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See *id.*

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warrant.¹⁸ Here, we are not concerned with the situation in which there has been no Fourth Amendment search at all, which encompasses those circumstances in which an observation is made by a police officer without a prior physical intrusion into a constitutionally protected area.¹⁹ The plain view doctrine, which applies here, serves to supplement a prior justification for a search—such as consent—and permits the warrantless seizure.²⁰ Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the plain view doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.²¹ Therefore, a warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which an object subject to seizure could be plainly viewed, (2) the seized object’s incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself.²²

Here, the officer lawfully seized the evidence of methamphetamine from Andera’s purse under the plain view doctrine. The officer’s search was already justified by the consent of the driver, and the officer had a legal right to be looking in the wallet. She did not discover the true ownership of the purse until the wallet was already opened. Once the officer saw the bag of methamphetamine, its contents became immediately apparent in correlation with the previously discovered needle and the officer could lawfully access and seize the

¹⁸ *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971).

¹⁹ See 1 Wayne R. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* § 2.2(a) at 621 (6th ed. 2020) (discussing “‘open field’ or similar unprotected area”).

²⁰ See 1 LaFave, *supra* note 19.

²¹ *Id.*

²² *State v. Shurter*, 238 Neb. 54, 468 N.W.2d 628 (1991).

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methamphetamine. Thus, the officer's seizure was lawful under the plain view doctrine.

VI. CONCLUSION

The driver's consent validated the officer's warrantless search of Andera's purse because the officer reasonably believed the purse could have belonged to the driver. The plain view doctrine justified the subsequent seizure of methamphetamine from Andera's wallet. Andera's Fourth Amendment protections against unreasonable searches and seizures were not violated. Because the district court did not err in overruling Andera's motion to suppress, we affirm the judgment of the district court.

AFFIRMED.

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Nebraska Supreme Court

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-- Nebraska Reporter of Decisions

STATE OF NEBRASKA, APPELLEE, V.

AARON TEPPER, APPELLANT.

950 N.W.2d 594

Filed November 6, 2020. No. S-19-688.

1. **Sentences: Prior Convictions: Appeal and Error.** A sentencing court's determination concerning the constitutional validity of a prior plea-based conviction, used for enhancement of a penalty for a subsequent conviction, will be upheld on appeal unless the sentencing court's determination is clearly erroneous.
2. **Convictions: Presumptions: Right to Counsel: Waiver: Proof.** Convictions obtained after *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), are entitled to a presumption of regularity such that records of conviction are admissible unless the defendant can show that he or she did not have or waive counsel at the time of conviction.
3. **Sentences: Prior Convictions: Proof.** In a proceeding to enhance a punishment because of prior convictions, the State has the burden to prove the fact of prior convictions by a preponderance of the evidence and the trial court determines the fact of prior convictions based upon the preponderance of the evidence standard.

Appeal from the District Court for Scotts Bluff County:
ANDREA D. MILLER, Judge. Affirmed.

Paul Payne and Darin J. Knepper, Deputy Scotts Bluff
Public Defenders, for appellant.

Douglas J. Peterson, Attorney General, and Matthew Lewis
for appellee.

HEAVICAN, C.J., MILLER-LEMAN, CASSEL, STACY, FUNKE,
PAPIK, and FREUDENBERG, JJ.

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PAPIK, J.

Aaron Teppert appeals his conviction for driving under the influence (DUI), fourth offense. He argues that the district court erred by receiving evidence of a prior conviction offered by the State in support of sentence enhancement. We find that the district court did not err and therefore affirm.

BACKGROUND

Teppert was charged with and pleaded guilty to DUI and driving under suspension. At the subsequent sentence enhancement proceeding, the State sought to introduce evidence of three prior DUI convictions. Teppert did not object to the district court's receipt of two of the prior DUI convictions, and those convictions are not at issue in this appeal.

Teppert did object to the admission of court records showing that he was convicted of DUI in 2010 in Red Willow County Court. He argued that those records were inadmissible because they did not affirmatively show that he had counsel or had knowingly, intelligently, and voluntarily waived the right to counsel before entering his guilty plea in that case. We will discuss the content of the court records at issue in more detail in the analysis section below.

The district court overruled Teppert's objection, found that the current conviction was his fourth offense, and sentenced Teppert accordingly. Teppert appeals.

ASSIGNMENT OF ERROR

Teppert assigns one error on appeal. He contends the district court erred by receiving the records of his 2010 DUI conviction for purposes of sentence enhancement.

STANDARD OF REVIEW

[1] A sentencing court's determination concerning the constitutional validity of a prior plea-based conviction, used for enhancement of a penalty for a subsequent conviction, will be upheld on appeal unless the sentencing court's determination is clearly erroneous. *State v. Orduna*, 250 Neb. 602, 550

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N.W.2d 356 (1996), *overruled on other grounds*, *State v. Vann*, 306 Neb. 91, 944 N.W.2d 503 (2020).

ANALYSIS

Law Governing Admissibility of Records of Prior Convictions in Enhancement Proceedings.

As both parties recognized at oral argument, the legal landscape on the issue raised in this appeal changed after the district court proceedings and the filing of briefs in this case. For many years, this court held that evidence of a prior conviction was inadmissible unless the State proved that, at the time of the prior conviction, the defendant either had counsel or knowingly, intelligently, and voluntarily waived the right to counsel. See, e.g., *State v. Nowicki*, 239 Neb. 130, 474 N.W.2d 478 (1991), *overruled*, *Vann*, *supra*. See, also, *Orduna*, *supra*. Under this rule, if a record was silent as to whether the defendant had or validly waived counsel in the prior proceeding, evidence of that conviction was not admissible; affirmative evidence that the defendant's Sixth Amendment right to counsel was honored in the prior proceeding was required. See, e.g., *State v. Garcia*, 281 Neb. 1, 792 N.W.2d 882 (2011), *overruled*, *Vann*, *supra*. At the enhancement proceeding in this case, Teppert relied on this line of cases to argue that the district court should not receive evidence of the 2010 DUI conviction.

[2] Earlier this year in *Vann*, *supra*, we overruled this line of cases. In *Vann*, we concluded that the rule prohibiting courts from presuming that prior convictions were obtained in compliance with the Sixth Amendment was based on a reading of a U.S. Supreme Court case, *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), that the U.S. Supreme Court later rejected in *Parke v. Raley*, 506 U.S. 20, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992). In light of *Parke*, we concluded that convictions obtained after the recognition of a federal constitutional right to counsel in state court in *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), are "entitled to a presumption of regularity such that records of conviction are admissible unless the defendant can show that

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he or she did not have or waive counsel at the time of conviction.” *Vann*, 306 Neb. at 102, 944 N.W.2d at 512. Additionally, we noted that many other state and federal courts apply the same rule, including some courts that once applied the rule we followed prior to *Vann*. While the fact of a prior conviction was an element of the underlying offense in *Vann*, we made clear that the same rule would apply to the use of prior convictions in sentence enhancement proceedings.

At oral argument, counsel for Teppert acknowledged that if *Vann* applied, the records of the 2010 DUI conviction would be entitled to a presumption of regularity and Teppert would have the burden to show he did not have or validly waive counsel at the time of that conviction. He argued, however, that because the enhancement proceeding occurred prior to the release of our opinion in *Vann*, we should reverse, and remand to the district court so that Teppert would have the opportunity to present evidence to carry his burden. Counsel for the State argued that no remand was necessary because the records were admissible whether the case is governed by *Vann* or the line of cases *Vann* overruled.

We do not believe remand is required. As we will explain, even under the pre-*Vann* law, the district court did not err by receiving evidence of the convictions.

Records Admissible Under Pre-Vann Law.

[3] In a proceeding to enhance a punishment because of prior convictions, the State has the burden to prove the fact of prior convictions by a preponderance of the evidence and the trial court determines the fact of prior convictions based upon the preponderance of the evidence standard. See, *State v. Hall*, 270 Neb. 669, 708 N.W.2d 209 (2005); *State v. Hurbenca*, 266 Neb. 853, 669 N.W.2d 668 (2003). Prior to our decision in *Vann*, in order for evidence of a prior conviction to be admitted for enhancement purposes, the State also had the burden to show by a preponderance of the evidence that the defendant had or waived counsel at the time of the prior conviction. See, e.g., *Hall*, *supra*.

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At the enhancement proceeding, the State offered various authenticated court records from a 2010 criminal case. Those records show that Teppert was charged with DUI, pleaded guilty, and was sentenced accordingly. The State argues that a September 30, 2010, journal entry and order from that case also shows that Teppert validly waived counsel before entering his guilty plea.

The journal entry and order states that Teppert pleaded guilty and was found guilty, followed by sections summarizing the advisements given and the arraignment:

APPEARANCES AND ADVISEMENT

. . . .

Defendant advised of the nature of the above charges, all possible penalties, effect of conviction on non-citizens, and each of the following rights: Counsel; Appointed Counsel; Trial; Jury Trial; Confront Accusers; Subpoena Witnesses; Remain Silent; Request Transfer to Juvenile Court; Defendant's Presumption of Innocence; State's Burden of Proof . . . ; Right to Appeal.

Indigency inquiry held[:]

Defendant adjudged indigent, public defender appointed.

ARRAIGNMENT

Defendant advised of and waived rights.

Defendant waives jury trial.

Defendant enters above pleas.

Pleas entered knowingly, intelligently, voluntarily, and a factual basis for plea(s) found.

Teppert argues that the district court could not have found that he validly waived his right to counsel at the plea hearing for his 2010 DUI conviction based on the journal entry and order. Teppert maintains that the journal entry and order is silent as to whether he validly waived his right to counsel before entering his guilty plea. We disagree.

Teppert points out that the journal entry and order does not directly state that Teppert knowingly, intelligently, and voluntarily waived the right to counsel. Nonetheless, we find that

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one could reasonably conclude from the information included in the journal entry and order that Teppert validly waived the right to counsel. After stating that Teppert was advised of a number of rights, including the right to counsel, the journal entry and order states that Teppert was “advised of and waived rights.” Read together, we believe it fair to infer that Teppert waived the specific rights referred to earlier, including the right to counsel.

The journal entry and order also contain several indications that Teppert waived his right to counsel knowingly, intelligently, and voluntarily. First, the fact that Teppert was advised about his rights before waiving them suggests a knowing, intelligent, and voluntary waiver. Second, the journal entry and order shows that after entering his guilty plea, Teppert invoked his right to counsel and was appointed counsel for sentencing. Teppert’s exercise of his right to counsel for the sentencing phase of the case also suggests he understood the right.

Finally, the notation that Teppert entered his plea knowingly, intelligently, and voluntarily shows that his waiver of counsel was also done knowingly, intelligently, and voluntarily. We explored the relationship between a valid plea and a valid waiver of the right to counsel in *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996), *overruled on other grounds*, *State v. Vann*, 306 Neb. 91, 944 N.W.2d 503 (2020). In *Orduna*, like this case, a record of the defendant’s prior conviction expressly stated that he had made a knowing, intelligent, and voluntary guilty plea, but did not expressly state that he had knowingly, intelligently, and voluntarily waived the right to counsel. We nonetheless found that the records affirmatively demonstrated a valid waiver of the right to counsel. We reasoned that if a trial court finds that a plea was entered knowingly, intelligently, and voluntarily, and the record reflects that the defendant also waived the right to counsel, the right to counsel must also have been waived knowingly, intelligently, and voluntarily. As we explained, “a plea cannot be legally sufficient unless those elements

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underlying the plea are also legally sufficient.” *Id.* at 611, 550 N.W.2d at 362-63.

As noted above, a sentencing court’s determination concerning the constitutional validity of a prior plea-based conviction, used for enhancement of a penalty for a subsequent conviction, will be upheld on appeal unless the sentencing court’s determination is clearly erroneous. *Orduna, supra*. Given all that the district court could fairly conclude from the journal entry and order, we cannot say the district court clearly erred by finding that Teppert knowingly, intelligently, and voluntarily waived his right to counsel prior to entering his guilty plea for his 2010 DUI conviction.

Because Teppert failed to demonstrate that the district court erred even if this case is reviewed under the more restrictive rule governing the admissibility of prior convictions that applied prior to *Vann*, we see no basis to reverse the decision of the district court.

CONCLUSION

The district court did not err by receiving records of Teppert’s 2010 DUI conviction and finding that his conviction in this case was his fourth offense. We affirm.

AFFIRMED.

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STATE v. SENTENEY

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Nebraska Supreme Court

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-- Nebraska Reporter of Decisions

STATE OF NEBRASKA, APPELLEE, V.

LARRY B. SENTENEY, APPELLANT.

950 N.W.2d 585

Filed November 6, 2020. No. S-19-690.

1. **Appeal and Error.** An appellate court may find plain error on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. Generally, an appellate court will find plain error only when a miscarriage of justice would otherwise occur.
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: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
5. **Sentences.** In determining a sentence to be imposed, relevant factors customarily considered and applied are the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.
6. _____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

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7. **Sentences: Probation and Parole: Appeal and Error.** Whether probation or incarceration is ordered is a choice within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion.

Appeal from the District Court for Scotts Bluff County:
ANDREA D. MILLER, Judge. Affirmed.

Harry A. Moore, Scotts Bluff County Public Defender, for appellant.

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

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Larry B. Senteney appeals his convictions and sentences in the district court for Scotts Bluff County for two counts of third degree sexual assault of a child, one count of attempted incest, and one count of attempted first degree sexual assault. Senteney claims on appeal that the court committed plain error when it allowed an investigator to testify regarding indicators of deception exhibited by Senteney in an interview. He also claims that the court imposed excessive sentences when it sentenced him to imprisonment rather than probation. We affirm Senteney's convictions and sentences.

STATEMENT OF FACTS

In late 2017, a social services agency reported to law enforcement agencies in Scottsbluff, Nebraska, that a 19-year-old woman, A.B., had disclosed that when she was 14 years old, she had been sexually abused multiple times by her grandfather, Senteney. A.B. reported that the incidents occurred in and around Scottsbluff, as well as Gering, Nebraska, and Guernsey, Wyoming, where Senteney lived at the time of the report. Investigators interviewed A.B. regarding the incidents,

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and it was determined that the Scotts Bluff County sheriff's office would take the lead in further investigation. An investigator contacted Senteney by telephone, and Senteney said that he would be in Nebraska in July 2018 and would contact the sheriff's office at that time.

On July 25, 2018, because Senteney had not yet contacted the sheriff's office, Investigator Robert Hackett and another investigator drove to Wyoming to contact Senteney at his residence. Hackett and his partner contacted Senteney shortly before noon and interviewed him at his front door regarding A.B.'s allegations. Hackett noted that Senteney "appeared to be very nervous and acted strangely," that he would only talk to the investigators through the storm door, and that several times he walked away. Senteney denied having had any "'improper or perverted'" contact with A.B., but toward the end of the interview, he stated that A.B. would not lie and that if she said something had happened, she likely believed it had happened. Senteney asked the investigators to tell A.B. that he was sorry and that he asked her to forgive him.

Hackett interviewed A.B. on July 27, 2018, and she detailed three incidents of sexual contact by Senteney that occurred in Scotts Bluff County and three other incidents that occurred in Wyoming. Hackett thereafter obtained a warrant for Senteney's arrest on charges of third degree sexual assault of a child. Law enforcement officers arrested Senteney in Wyoming, and he was transported to Nebraska. In the operative information, Senteney was charged with two counts of third degree sexual assault of a child, one count of attempted incest with a person under 18 years of age, and one count of attempted first degree sexual assault.

A.B. testified at trial, and she generally testified regarding the incidents that formed the basis for the charges against Senteney. She testified that when she was around 13 or 14 years old, Senteney began to frequently talk to her about sexual matters and her body, would hug her in a manner that was "gropey," and tried to kiss her on the mouth. A.B.

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testified regarding two specific incidents that occurred when Senteney was living in Gering. The first incident occurred in Senteney's residence in Gering when A.B. was "between 14 and 15" years old and they were watching a movie. A.B. was lying on the couch when Senteney pulled up her shirt, pulled down her bra, and put his mouth on her breasts. He also touched her breasts with his hands. The second incident occurred when the two were at a movie theater in Scottsbluff. Senteney "kept rubbing his hand up and down" her inner thighs throughout "[a]bout half of the movie off and on."

A.B. also testified regarding incidents that had occurred after Senteney moved to Wyoming. A.B. would visit Senteney's residence in Wyoming, and he would often pick her up from and return her to her home in Gering. After one of these visits, when A.B. was "about 15, almost 16," Senteney was driving her back to Gering. On a road near the Scotts Bluff National Monument, Senteney "pulled over on the side of the road" and asked A.B. "if [she] wanted to do anything there." Based on "the way he was acting and the way he was moving towards" her, A.B. interpreted Senteney's question as a "sexual innuendo." She told him "[N]o," and he drove her home.

A.B. testified regarding two incidents that occurred in Senteney's residence in Wyoming. The first incident occurred when A.B. was 16 years old and Senteney groped her breasts. The second incident occurred a few months later when A.B. was still 16 years old. Senteney told A.B. he wanted to draw some tattoos on her legs; she allowed him to do so, and as he was drawing on her thigh, he moved the marker and his hand up her shorts and "ended up penetrating [her] slightly with the marker." Senteney then unbuttoned his overalls and took A.B.'s hand and placed it on his penis. A.B. pulled her hand away and told him to stop. While driving A.B. back home, Senteney told A.B. "he couldn't wait until [she] turned 18."

Prior to trial, the State had filed notice of its intent to offer evidence from witnesses regarding other instances of uncharged sexual assaults under Neb. Rev. Stat. § 27-414

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(Reissue 2016). This evidence included A.B.'s testimony regarding the incidents that had occurred in Wyoming, as well as testimony by other women who asserted that they had been sexually assaulted by Senteney. A preliminary hearing was held prior to trial for the purpose of informing Senteney of the evidence the State intended to offer, but the court delayed ruling on admissibility until the trial, when it would hear the offered testimony outside the presence of the jury. A.B.'s testimony regarding the incidents that occurred in Wyoming was ruled admissible under this process. The court also allowed testimony by two women regarding incidents the court found to be sufficiently similar to the incidents involving A.B. The first witness was M.F., who testified that she was Senteney's stepdaughter and that when she was 10 or 11 years old, he put his hand inside her shorts and fondled her vagina while she was sitting on his lap. The second witness was T.C., who testified that she was a friend of M.F.'s and that when she was 11 years old and stayed overnight with M.F. in Senteney's house, Senteney had, inter alia, pinned her on the couch and groped her breasts and vaginal area. The court heard testimony outside the presence of the jury from one other woman, but the court ruled her testimony inadmissible because the situation she described was too dissimilar.

The State also called Hackett as a witness. Hackett generally testified regarding his employment by the Scotts Bluff County sheriff's office and his investigation of A.B.'s allegations against Senteney. Hackett testified, inter alia, regarding his and his partner's July 25, 2018, interview of Senteney at Senteney's residence in Wyoming. As part of Hackett's testimony, the court received into evidence a recording made from Hackett's body camera showing the interview of Senteney. After providing foundation through Hackett and having the recording received into evidence, the State questioned Hackett regarding his training with regard to conducting interviews. Hackett testified that he was trained that when conducting interviews, one should pay attention not only to what the

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person was saying but also to factors such as body language and tone of voice, because those factors could be indicators of deception. He testified that one would look for whether the person was being cooperative and for actions that would indicate deception, including avoiding eye contact, “go[ing] into retreat positions,” and actions he described as “tension relievers,” such as “big body movements, stretching, covering the mouth, [and] crossing the arms.”

The State then published the recording of Hackett’s interview of Senteney to the jury. Afterward, the State questioned Hackett regarding various aspects of what the recording showed, including questions regarding specific examples of indicators of deception that Senteney displayed during the interview. Hackett referenced his prior testimony regarding “retreat positions” and noted that Senteney “walked away several times retreating, generally when there was a tough question that was asked.” He clarified that by “tough” questions he meant “[q]uestions pertaining to the sexual assault of [A.B.]” Hackett referred to a portion of the interview in which Senteney stated that he drew tattoos on A.B.’s feet, rather than on her thighs as she had reported. Hackett testified that this was a form of “retreating” and “want[ing] to get as far away from whatever it is . . . as they can.” Hackett also noted that “when you’re talking about specifically [A.B.], that’s where there’s big body movements, big pain, walking away, [and] crouching down,” and that “if you go into something that he’s comfortable talking about, . . . his voice changed [and] was more relaxed, there’s no moaning, no large body movements.” Hackett also testified that when an interviewee is “comfortable talking about [an event], they’ll remember a lot of details.” Hackett noted that Senteney gave “minimal detail” regarding specific incidents with A.B. but that he provided “a lot of detail [regarding] something that [Hackett] thought [Senteney] was comfortable talking about.” Hackett also testified on redirect examination that he “felt that [Senteney] was being deceptive in some admissions that were given.” Senteney did not

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object to any of Hackett's testimony set forth above regarding indicators of deception.

After Hackett's testimony, the State rested its case. Senteney testified in his defense and, inter alia, denied the allegations of sexual assault raised by A.B. and the other women. Senteney presented testimony by a character witness and then rested his defense.

Among the instructions the court gave to the jury was a general instruction that the jurors were the sole judges of the credibility of witnesses and the weight to be given to their testimony. The court gave no limiting instruction, and Senteney requested no limiting instruction regarding Hackett's testimony about indicators of deception displayed by Senteney in the July 25, 2018, interview. The jury found Senteney guilty on the four counts charged. The court thereafter sentenced Senteney to imprisonment for 3 to 5 years for each of the four convictions and ordered the sentences to be served consecutively.

Senteney appeals his convictions and sentences.

ASSIGNMENTS OF ERROR

Senteney claims that the district court committed plain error when it allowed Hackett to testify regarding indicators of deception shown by Senteney in the July 25, 2018, interview. He also claims that the court imposed excessive sentences when it sentenced him to imprisonment rather than probation.

STANDARDS OF REVIEW

[1] An appellate court may find plain error on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Price*, 306 Neb. 38, 944 N.W.2d 279 (2020). Generally, we will find plain error only when a miscarriage of justice would otherwise occur. *Id.*

[2,3] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by

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the trial court. *Id.* 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

*Testimony Regarding Indicators of
Deception Was Not Plain Error.*

Senteney first claims that the district court committed plain error when it allowed Hackett to testify regarding indicators of deception shown by Senteney in the July 25, 2018, interview. Senteney acknowledges that he did not object to the testimony that he now contends should not have been allowed. Regardless of whether an objection to the testimony if timely made should have been sustained, we do not find plain error as urged by Senteney.

Senteney contends that Hackett's testimony at trial concerning indicators of deception that Senteney showed during the interview was improper. Senteney cites cases in which we have said that the credibility of witnesses is a determination within the province of the trier of fact and that therefore, under our rules of evidence, "it is totally improper for one witness to testify as to the credibility of another witness." *State v. Rocha*, 295 Neb. 716, 733, 890 N.W.2d 178, 195 (2017) (quoting *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989)). Despite this general rule, we concluded in *Rocha* that it was not an abuse of discretion for the trial court to admit, for the purpose of providing context to the defendant's statements, a recorded interview between an interrogating officer and the defendant in which the defendant denied possessing illegal drugs and the officer said the defendant was not being truthful. Senteney argues that the present case is different from *Rocha* because "Hackett's statements on video are not at issue" and instead "[i]t is [Hackett's] testimony in court" that is at issue. Brief for appellant at 30. Senteney acknowledges that his trial counsel failed to object to Hackett's testimony,

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but he asks that plain error be noticed because he claims the testimony prejudicially affected his right to a fair trial.

The State in its brief “acknowledges that portions of Hackett’s testimony” violated the rule set forth in *Rocha* to the effect that it is improper for a witness to testify whether another person may or may not have been telling the truth in a specific instance. Brief for appellee at 13. Nevertheless, the State asserts that the presentation of such testimony did not constitute plain error. The State initially notes that portions of the challenged testimony were admissible because Hackett “could have testified to his observations of Senteney during the interview without running afoul of” the rule in *Rocha*. Brief for appellee at 13. The State acknowledges, however, that Hackett’s testimony went a “step too far” when he “tied those observations to being possible ‘indicators of deception’ and then opined that he felt that Senteney was being deceptive in certain of his statements.” *Id.* Next, the State notes that “the jury had the opportunity to weigh Senteney’s credibility for itself because he testified at trial.” *Id.* And finally, referring to the testimony of A.B. and the other alleged victims, the State asserts that other, properly admitted evidence “effectively attacked Senteney’s credibility and demonstrated his guilt.” *Id.* at 14.

We agree with the State that any error in the presentation of Hackett’s testimony with respect to signs of deception did not rise to the level of plain error. As Senteney concedes, he did not object to any of the testimony he now asserts was improper. Without an objection by Senteney, the court was not asked to rule on the admissibility of Hackett’s testimony or the portion thereof, and therefore, it cannot be said that the court made an erroneous ruling. Our review on appeal is not to speculate whether such an objection, if made, should have been sustained. Instead, we review for plain error. Compare, *Yount v. State*, 872 S.W.2d 706 (Tex. Crim. App. 1993) (considering expert opinion on signs of deception of complainant and citing John E.B. Meyers et al., *Expert Testimony in Child*

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Sexual Abuse Litigation, 68 Neb. L. Rev. 1 (1989)); *Cortes-Puga v. State*, No. 03-17-00713-CR, 2019 WL 3680135 (Tex. App. Aug. 7, 2019) (unpublished opinion) (concluding admission of detective’s testimony regarding defendant’s signs of deception was harmless error).

We have said that generally, we will find plain error only when a miscarriage of justice would otherwise occur. *State v. Price*, 306 Neb. 38, 944 N.W.2d 279 (2020). Error must be plainly evident from the record, and it must be such that it prejudicially affects a litigant’s substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. See *id.*

In this case, Senteney claims that the court erred when it “allowed” testimony that violated the rules of evidence. As a general matter, during a trial a court is not obligated to rule *sua sponte* on the admissibility of testimony, and therefore without an objection it is difficult to say a court committed plain error when it allowed specific testimony. See *State v. Pointer*, 224 Neb. 892, 894, 402 N.W.2d 268, 270 (1987) (“[w]ithout an objection by defendant at trial, the trial court has no obligation to interject itself into the proceedings to make rulings not requested. Such actions might well trample on defendant’s trial tactics not known to the court”). See, also, *State v. Herrera*, 289 Neb. 575, 856 N.W.2d 310 (2014). Even when a question or answer is arguably improper, for strategic reasons the nonproponent may choose not to raise an objection because to do so would unduly emphasize the question or answer and cause the jury to speculate as to the answer to a challenged question or to consider an answer despite being instructed to ignore it. *State v. Pointer, supra*. We are not inclined to readily find plain error in testimony to which the opposing party did not object.

With the foregoing principles in mind, we do not find that Hackett’s testimony constitutes a miscarriage of justice or that leaving it uncorrected would result in damage to the integrity, reputation, and fairness of the judicial process. We note that

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Hackett's testimony regarding indicators of deception and his observations during the July 25, 2018, interview was a relatively small part of Hackett's testimony and that the prosecutor did not emphasize that testimony during closing arguments. Instead, the prosecutor emphasized to the jury during closing arguments that it was the sole judge of witness credibility, and the court similarly instructed the jury that it was the sole judge of witness credibility.

Considering the challenged testimony in the context of the entire trial, we do not find that the testimony constituted a miscarriage of justice or that leaving it uncorrected would result in damage to the integrity, reputation, and fairness of the judicial process. We conclude that regardless of whether the court would have or should have sustained an objection to the testimony if such objection had been made, it was not plain error for the court to allow the testimony in this case.

In connection with his claim of plain error, although he did not assign it as error, Senteney also argues that his trial counsel provided ineffective assistance when counsel failed to object to Hackett's testimony. We note that although the attorney who represented Senteney in this direct appeal was not the same attorney who represented him at trial, both attorneys worked for the Scotts Bluff County public defender's office. We have said that when a defendant was "represented by the public defender's office at trial and on direct appeal, he is not procedurally barred from asserting a claim of ineffective assistance of counsel in his motion for postconviction relief." *State v. Davlin*, 265 Neb. 386, 391, 658 N.W.2d 1, 6 (2003). We do not consider Senteney's argument that his trial counsel provided ineffective assistance.

*Sentences of Imprisonment Were
Not an Abuse of Discretion.*

Senteney claims that the court imposed excessive sentences when it sentenced him to imprisonment rather than probation. We find that the sentences were within statutory limits and that the court did not abuse its discretion.

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[4-7] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Price*, 306 Neb. 38, 944 N.W.2d 279 (2020). In determining a sentence to be imposed, relevant factors customarily considered and applied are the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.* Whether probation or incarceration is ordered is a choice within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion. *State v. Cerritos-Valdez*, 295 Neb. 563, 889 N.W.2d 605 (2017).

Senteney was convicted of two counts of third degree sexual assault of a child, one count of attempted incest, and one count of attempted first degree sexual assault. The convictions were based on incidents that occurred between 2011 and 2014. At that time, third degree sexual assault of a child was a Class IIIA felony under Neb. Rev. Stat. § 28-320.01 (Reissue 2008), attempted incest was a Class IIIA felony under Neb. Rev. Stat. § 28-201(4)(c) (Cum. Supp. 2014) and Neb. Rev. Stat. § 28-703 (Reissue 2008), and attempted first degree sexual assault was a Class III felony under § 28-201(4)(b) and Neb. Rev. Stat. § 28-319 (Reissue 2008). At that time, under Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014), the sentencing range for a Class III felony was imprisonment for a minimum of 1 year and a maximum of 25 years and the sentencing range for a Class IIIA felony was imprisonment for a maximum of

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5 years with no minimum. The court sentenced Senteney to imprisonment for 3 to 5 years for each of the four convictions and ordered the sentences to be served consecutively to one another. Therefore, the sentences were within statutory limits, and we review the sentences for an abuse of discretion.

Senteney argues that his sentences were excessive and asserts that “he should have been given probation by the court, instead of a lengthy prison term, because he is innocent of the charges for which he was convicted, he has only two speeding tickets in the past, and he is 68 years old.” Brief for appellant at 31. He also asserts the sentences are longer than necessary to address his rehabilitative needs.

At the sentencing, the court stated that it had considered each of the relevant factors set forth above and the court specifically acknowledged Senteney’s age and his “relatively nonexistent prior [criminal] record.” However, the court also noted that the record indicated that Senteney had not taken responsibility or shown remorse, and the court cited specific examples from the presentence report. This assessment by the court is consistent with the fact that on appeal, despite a jury’s having found him guilty, Senteney argues his sentences were excessive because he is innocent of the charges.

With respect to the appropriate sentences, the court also specifically addressed the possibility of probation and noted that Senteney had “rebuke[d]” the option of probation because he said he would accept probation but on the condition that the probation officer “treated him respectfully” and was not “a power-hungry probation officer.” The court determined that such comments indicated that probation was not an option in this case. The court also discussed relevant factors such as the nature of the offenses and the risk Senteney posed to society generally and to family members specifically.

Having reviewed the court’s comments at sentencing, we determine that the court did not consider improper factors and instead considered and based its sentencing on sufficient relevant factors. We therefore find no abuse of discretion in

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the sentences imposed by the court and specifically in the decision to impose sentences of imprisonment rather than probation. We reject Senteney's claim of excessive sentences.

CONCLUSION

We conclude that the district court did not commit plain error when it allowed Hackett's testimony. We also conclude that the sentences were not an abuse of discretion. We therefore affirm Senteney's convictions and sentences.

AFFIRMED.

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

DOUGLAS COUNTY SCHOOL DISTRICT NO. 10, ALSO KNOWN
AS THE ELKHORN SCHOOL DISTRICT, APPELLANT,
v. TRIBEDO, LLC, A NEBRASKA LIMITED
LIABILITY COMPANY, APPELLEE.

950 N.W.2d 599

Filed November 6, 2020. No. S-19-986.

1. **Trial: Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
2. **Evidence: Appeal and Error.** In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.
3. **Eminent Domain: Verdicts: Appeal and Error.** A condemnation action is reviewed as an action at law, in connection with which a verdict will not be disturbed unless it is clearly wrong.
4. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.
5. **Motions for New Trial: Appeal and Error.** An appellate court reviews a denial of a motion for new trial for an abuse of discretion.
6. **Constitutional Law: Eminent Domain: Damages: Words and Phrases.** The Nebraska Constitution provides that property shall not be taken or damaged for public use without just compensation, and the phrase "or damaged" provides that consequential damages may be an element of recovery in some situations.
7. **Eminent Domain: Damages.** The measure of damages for land taken for public use is the fair and reasonable market value of the land

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actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking.

8. ____: _____. Severance damages for land taken for public use are measured by all factors and inconveniences that would influence a purchaser.
9. **Jury Instructions: Appeal and Error.** If the jury instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.
10. **Trial: Expert Witnesses.** Expert witness testimony is not binding on the triers of fact.
11. **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.
12. **Attorney Fees.** 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.

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

Adam W. Barney, Trenten P. Bausch, and Sydney M. Huss,
of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for
appellee.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE,
and FREUDENBERG, JJ.

MILLER-LERMAN, J.

I. NATURE OF CASE

To acquire property for a new high school site, Douglas County School District No. 10, also known as the Elkhorn School District (Elkhorn), condemned 43.36 acres of a 73.99-acre tract owned by Tribedo, LLC. The board of appraisers issued an award of \$2,601,600 for the taking. Tribedo appealed the award to the district court for Douglas County

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and alleged that the award did not reflect the fair market value of the property taken and did not adequately compensate for damages to the remainder of Tribedo's property.

At trial, the parties offered evidence of the value of the taken property and the severance damages to the remainder property. Elkhorn unsuccessfully objected to Tribedo's presentation of evidence regarding the factors which went to the damages related to the change in fair market value of the remainder property. The jury returned a verdict finding compensation totaling \$4,625,967. Elkhorn moved for a new trial, which was denied. The court granted Tribedo's posttrial motions for an award of interest and attorney fees. Elkhorn appeals, and it assigns several errors related to the compensation awarded Tribedo and the award of attorney fees to Tribedo. We affirm.

II. STATEMENT OF FACTS

In April 2015, Tribedo executed a purchase agreement to acquire a 73.99-acre tract located on the northeast corner of West Maple Road and 180th Street in Douglas County, Nebraska (Property). The Property was zoned for agricultural use and was used as farmland. The managing agent of the partnership that owns Tribedo testified that Tribedo purchased the Property for \$60,000 per acre with the intent to develop it into a mixed-use development. The sale closed on October 20, 2016.

The intersection of West Maple Road and 180th Street, where the Property is located, is designated as a "[C]ommunity 165" intersection on the city of Omaha's future land use map. A Community 165 designation refers to a large mixed-use development area of at least 165 acres, which includes big-box stores, grocery stores, office buildings, and other commercial development. There is evidence that it is the most intensive land use development that is allowed within the city of Omaha. Another such example is Village Pointe, located at 168th Street and West Dodge Road.

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Tribedo planned to develop the Property with the use of a sanitary and improvement district. Pursuant to the purchase agreement for the Property, Tribedo began implementing land use planning and zoning processes to enable development of the land.

Subsequent to the execution of the purchase agreement, the 180th Street viaduct bridge, which connects Blondo Street to north of the Property, received federal funding and an environmental impact review. At the time of trial, Tribedo was acquiring right-of-way for the bridge project for construction to start in 2020, which it claims adds significant value to the Property. Tribedo had attempted to rezone the Property, which approval Tribedo believes it could have obtained, but once Elkhorn's condemnation occurred, the process was halted.

On February 22, 2017, 4 months after Tribedo closed on the land, Elkhorn condemned 43.36 acres of the Property for a new high school site. The board of appraisers appraised the 43.36-acre tract at \$60,000 per acre, awarding Tribedo a total amount of \$2,601,600 for the taking. Tribedo appealed to the district court, where it alleged that the award was inadequate and that the highest and best use of the Property was as a mixed-use commercial development.

1. TOTAL COMPENSATION: CONDEMNED PROPERTY
PLUS DIMINISHED FAIR MARKET
VALUE OF REMAINDER

As we explain in greater detail below, at trial, the experts addressed their opinions to both the 43.36 acres taken and the diminished fair market value of the 30.63-acre remainder, as well as a dollar value of total compensation incorporating both aspects of the award. Tribedo's first real estate appraiser, Kevin Kroeger, valued the total compensation at \$5,890,000; Tribedo's second appraiser, Nicholas Dizona, valued the total compensation at \$7,022,000; and Elkhorn's appraiser, Martin Giff, valued the total compensation at \$2,601,600.

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2. COMPENSATION FOR THE 43.36 ACRES
OF CONDEMNED PROPERTY

Both parties presented evidence of the value of the condemned parcel. Kroeger valued the 73.99-acre Property at \$98,010 per acre and the taken property at \$4,249,720. Dizona valued the Property at \$124,769 per acre and the taken property at \$5,410,000. Giff valued the Property at \$60,000 per acre, the same price it had sold for previously, and calculated the value of the taken property at \$2,601,600.

3. COMPENSATION FOR SEVERANCE DAMAGES
TO THE REMAINING 30.63 ACRES

At trial, Tribedo sought compensation for both the 43.36 acres taken and the reduction in fair market value to the remaining 30.63 acres. According to the evidence, after the condemnation, Tribedo's 30.63 acres remained in a Community 165 intersection and Tribedo's revised preliminary plat to develop that parcel into a mixed-use development had been approved at the time of trial.

Prior to trial, Elkhorn filed a motion in limine seeking to exclude testimony and evidence relating to Tribedo's "itemized" damages, based on the contention that they were not related to the reduction in fair market value to the remaining 30.63 acres. During trial, the district court overruled Elkhorn's evidentiary objections and motions to strike concerning the loss of market value of the remaining 30.63 acres.

Tribedo's first appraiser, Kroeger, testified that the highest and best use of the Property was "for a future mixed-use development, which would incorporate a combination of commercial, retail, office, and multi-family uses." He calculated severance damages to the 30.63 acres of \$1,640,280, based on the impact of the project on the remainder and included grading costs. Kroeger explained that the topography of the site varied by 80 feet from very low-lying along the south side to significantly higher elevations on the north side. Potential wetlands had been identified on the low-lying south side.

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Kroeger noted that there would be additional expenses to implement a new development plan, due to the condemnation and losses to the condemnee incurred because of lag time caused by starting over with a new development model. Kroeger explained that Tribedo would now have overall fixed costs for any future mixed-use development spread over fewer acres. For example, a mixed-use development on the remainder property would likely lose 1.5 acres of developable land required to address wetlands mitigation required by the city of Omaha, which would previously have been spread out across the larger parcel.

The second appraiser, Dizona, opined that the 30.63 acres suffered diminution in the fair market value of approximately \$1,500,000. On direct examination, Dizona testified that the highest and best use for the remaining 30.63 acres had changed from mixed-use “anchored development” to a development without an anchor tenant. According to Dizona, “the boulevard made it so that any potential anchored development would be impossible” because any improvements would have to face the boulevard, which could limit the useable space for Tribedo’s new proposed development. He opined that a parcel the size of the Property would have attracted a higher dollar purchaser, because it could support a larger market participant like a grocery store, with mixed-use surrounding, and high-density residential to the north. He stated that comparable sales of sites 20 to 30 acres were more appropriate to determine the present value after the condemnation, because of the differences in functionality and usability as compared to a development of a larger area. Dizona incorporated an estimate of \$937,000 associated with site elevation issues such as grading and dirt work in reaching his opinion.

Elkhorn’s expert, Giff, valued the 30.63 acres at \$69,000 per acre after the taking, and he concluded that the remainder property suffered no diminution in fair market value. He opined that the highest and best use of the condemned portion of the Property would have been as low-density residential

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development and that the highest and best use of the remainder of the Property would be for commercial development. Giff testified that in reaching his valuation, he performed a comparable sales analysis on the remaining 30.63 acres by comparing the remainder with sales of three other properties situated nearby, all of which had at least a quarter mile of frontage on West Maple Road, including a sale on the southwest corner of the West Maple Road and 180th Street intersection. Giff attributed the higher price per acre he assigned to the remainder property to its proximity to the West Maple Road frontage road.

Other evidence at trial showed that Tribedo's preliminary plat to develop the remaining 30.63 acres included no imported dirt. However, the managing agent of Tribedo testified that importing dirt is a "cost benefit" for a developer that he needed to think through to evaluate the rewards compared to the risks of developing the site.

4. JURY INSTRUCTIONS

At the jury instruction conference, Elkhorn proffered the following jury instruction regarding Tribedo's severance damages:

To determine the fair market value of the property taken in this case and to determine if there is a reduction in the fair market value of the property that was not acquired, you may consider everything which affects the market value of the subject property.

You have heard some testimony about [sic] from the witnesses regarding the "costs to cure," and like matters. You may only consider such "costs to cure" if they have an impact on the diminution of the fair market value of the remaining [30.63] acres as a result of the condemnation.

The district court refused this jury instruction, and instead instructed the jury, inter alia, that "Tribedo is entitled to recover the fair market value of the 43.36 acres taken by Elkhorn, and the diminished value, if any, of the remaining 30.63 acres

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owned by Tribedo, figuring the value as of February 22, 2017.” Instruction No. 4 defined “fair market value” as follows:

The “fair market value” of a piece of property is the price that someone ready to sell, but not required to do so, would be willing to accept in payment for the property, and that someone ready to buy, but not required to do so, would be willing to pay for the property.

In determining fair market value, you may consider the uses to which the property has been put and the uses to which it might reasonably be put in the immediate future.

5. JURY VERDICT AND POSTTRIAL
PROCEEDINGS

The jury found that Elkhorn owed compensation to Tribedo totaling \$4,625,967, broken down as follows: \$3,295,967 “[f]or the 43.36 acres owned by Tribedo taken by Elkhorn” and \$1,330,000 “[f]or the decrease in value, if any, of Tribedo’s remaining 30.63 acres.”

After the conclusion of the jury trial and after the jury returned its verdict, the district court issued an order setting forth its rationale for denying Elkhorn’s motions and objections concerning the testimony and evidence of the severance damages. The May 24, 2019, order stated, inter alia, that the \$937,000 to import dirt was not an impermissible “consequential cost” to the taking, but was “part of the diminished value of the remaining property,” because imported dirt was needed to level the remaining property, and that without imported fill, the property would be worth less than if it had been level.

Elkhorn moved for judgment notwithstanding the verdict and for a new trial, and Tribedo moved for attorney fees, expert witness fees, and costs. Hearing was held on June 14, 2019. Elkhorn argued that the verdict was not supported by the evidence with respect to severance damages, because there was no evidence to support an amount of \$1,330,000 for the diminished fair market value of the remainder property. The district court ultimately denied Elkhorn’s motions.

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With respect to Tribedo's request for attorney fees, expert witness fees, and interest, Tribedo submitted affidavits of three attorneys who had reviewed Tribedo's billing records and opined that the amount of fees requested was reasonable. Elkhorn objected to the affidavits, because they did not include actual billings and Elkhorn could not verify that the work was applicable and that the fees were not duplicative. The district court overruled Elkhorn's objections to the attorney fees affidavits. The district court rejected Elkhorn's opposition to the attorney fees request and stated that under the circumstances, it could determine the reasonableness of an attorney fees request even in the absence of a detailed billing record.

On September 16, 2019, the district court entered judgment for Tribedo for \$4,625,967 on the jury's verdict; \$143,681.89 in prejudgment interest; postjudgment interest at \$295.58 per day or as permitted by law; and \$590,924.89 in attorney fees. In a written order, the district court found that the requested attorney fees were reasonable, given the complexity and duration of the litigation; the number of issues litigated; the result of a judgment exceeding the award by the board of appraisers by over 75 percent; and the size of the judgment, which it believed to be one of the largest jury awards in a condemnation matter on record.

Elkhorn appeals.

III. ASSIGNMENTS OF ERROR

Elkhorn first assigns various errors related to the loss in value of Tribedo's remainder property. Summarized and restated, these claims are that the district court erred (1) when it denied Elkhorn's motions to strike appraisal evidence offered by Tribedo; (2) when it instructed the jury regarding severance damages; (3) when it accepted the jury's award of damages, which Elkhorn claims was excessive; and (4) when it denied Elkhorn's motion for a new trial.

Elkhorn further claims that the district court erred when it awarded attorney fees, expert fees, and interest to Tribedo.

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IV. STANDARDS OF REVIEW

[1] A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion. *Walker v. BNSF Railway Co.*, 306 Neb. 559, 946 N.W.2d 656 (2020).

[2] In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party. *Id.*

[3] A condemnation action is reviewed as an action at law, in connection with which a verdict will not be disturbed unless it is clearly wrong. *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004).

[4] To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Hike v. State*, 288 Neb. 60, 846 N.W.2d 205 (2014).

[5] An appellate court reviews a denial of a motion for new trial for an abuse of discretion. *Anderson v. Babbe*, 304 Neb. 186, 933 N.W.2d 813 (2019).

V. ANALYSIS

1. DAMAGE TO REMAINDER PROPERTY
AND LAW ON SEVERANCE DAMAGES

Elkhorn claims generally that the district court improperly allowed Tribedo's expert appraisers to itemize damages to the remainder property. Specifically, it claims that reversible error occurred when the district court admitted evidence of Tribedo's increased costs, when it instructed the jury regarding severance damages, when it accepted the jury's award of damages, and when it denied Elkhorn's motion for a new trial. We consider each claim in turn below.

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[6] Several principles of law govern damages to the remainder property in this case. The Nebraska Constitution provides that property shall not be taken or damaged for public use without just compensation, and the phrase “or damaged” provides that consequential damages may be an element of recovery in some situations. See *Patrick v. City of Bellevue*, 164 Neb. 196, 82 N.W.2d 274 (1957). See, also, NJI2d Civ. 13.01, comment & authorities, § X(G) (discussing just compensation as it relates to consequential damages).

[7,8] The measure of damages for land taken for public use is the fair and reasonable market value of the land actually appropriated and the difference in the fair and reasonable market value of the remainder of the land before and after the taking. *Armbruster v. Stanton-Pilger Drainage Dist.*, 169 Neb. 594, 100 N.W.2d 781 (1960). Severance damages for land taken for public use are measured by all factors and inconveniences that would influence a purchaser. See, *Sorenson v. Lower Niobrara Nat. Resources Dist.*, 221 Neb. 180, 376 N.W.2d 539 (1985) (superseded by statute on other grounds); *State v. Dillon*, 175 Neb. 444, 122 N.W.2d 223 (1963). A jury may take into account “‘every (nonspeculative) element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser’s estimate of the market value of such property.’” *Armbruster v. Stanton-Pilger Drainage Dist.*, 169 Neb. at 610, 100 N.W.2d at 792. For example, “[t]he burden of additional fencing, and like matters, are to be included, not by being added together item by item, but to the extent that, taken as a whole, they detract from the market value of the property.” *Id.* at 609, 100 N.W.2d at 791. Other such elements which could influence market value include

expenses for additional fencing, repairs, removal, and rebuilding thereof; the expenses of removal and repair of plaintiffs’ private roads and bridge, together with inconvenience and disadvantage caused thereby; the expenses of repair and the threatened peril and damages to one

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of plaintiffs' two valuable irrigation wells, irrigation and sewer systems, and to their buildings; and the expenses incurred attempting, in good faith, to stop the erosion and damages when defendant refused to do so, and like matters

Id. at 610, 100 N.W.2d at 792. Ultimately, evidence of itemized damages may be considered only if such damages diminish the market value of the property. See *Armbruster v. Stanton-Pilger Drainage Dist.*, *supra*.

2. ELKHORN'S CLAIMS

(a) Motion to Strike and Objections to
Tribedo's Appraisers' Testimony

Elkhorn argues that the district court abused its discretion when it allowed Tribedo's expert appraisers to testify about damages to the remainder over Elkhorn's objections. As stated previously, a trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *Walker v. BNSF Railway Co.*, 306 Neb. 559, 946 N.W.2d 656 (2020). In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party. *Id.*

Elkhorn specifically objects to evidence by Kroeger, who testified to a number of factors that diminished the value of the remainder for the property owner. Kroeger first testified that he believed the value of the property taken was \$4,249,720. Kroeger later opined that the total amount of compensation due for the taking, composed of property taken and diminution of fair market value of the remainder, was \$5,890,000.

Regarding the remainder, Kroeger presented evidence of the costs of several restoration items, such as grading and additional wetland rehabilitation that he stated were necessary as a result of dividing the Property. Kroeger testified that compensation was payable to the property owner based on a change in the fair market value of the remainder.

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Elkhorn also argues that Dizona's testimony should not have been admitted, because Dizona utilized a summation approach by tacking on itemized damages to determine the reduction in fair market value. To illustrate, Elkhorn notes that Dizona referred to elements influencing value, including dirt fill and leveling costs, a decrease in usable space, and changes in highest and best use. The question is whether Dizona's "itemized" costs were improperly considered as add-ons to the market value or whether they were properly considered as factors influencing his opinion of the fair market value of the remainder property. We find the factors to which Tribedo's experts referred were properly considered in reaching their opinions regarding the fair market value of the remainder.

Consistent with the district court ruling, Kroeger and Dizona detailed numerous elements that influenced their valuations, and both appraisers testified that their references to damages related to a reduction in fair market value. Items such as grading and importing dirt may properly be considered to the extent they affected the fair market value of the remaining property. To the extent that Elkhorn notes conflicting testimony by Tribedo's experts, or doubts the propriety of elements considered in the valuation, such conflicting testimony is a question of fact. See *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990). The district court did not abuse its discretion when it admitted expert testimony regarding the diminution of market value to Tribedo's remaining property.

(b) Jury Instruction

Elkhorn next contends that the district court erred when it refused to give its proposed jury instruction relating to the remainder which stated that the "costs to cure" could be considered only if they have an impact on the fair market value of the remaining property.

[9] As set forth above, a court's failure to give a requested jury instruction is not reversible error unless an appellant shows that (1) the tendered instruction is a correct statement

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of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Hike v. State*, 288 Neb. 60, 846 N.W.2d 205 (2014). However, if the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal. See *id.*

Although the requested instructions are a correct statement of the law, Elkhorn was not prejudiced by the district court's refusal to give them. The instruction actually given on this question stated that "Tribedo is entitled to recover the fair market value of the 43.36 acres taken by Elkhorn, and the diminished value, if any, of the remaining 30.63 acres owned by Tribedo, figuring the value as of February 22, 2017." Instruction No. 4 defined "fair market value" as follows:

The "fair market value" of a piece of property is the price that someone ready to sell, but not required to do so, would be willing to accept in payment for the property, and that someone ready to buy, but not required to do so, would be willing to pay for the property.

In determining fair market value, you may consider the uses to which the property has been put and the uses to which it might reasonably be put in the immediate future.

Instruction No. 5 stated, "The Nebraska and United States Constitutions provide that the property of no person shall be taken for public use without just compensation therefore." "Just Compensation," as defined in instruction No. 5, is "the fair market value of the property at the time it was taken and the diminished value, if any, of the remainder as a result of the taking which occurred on February 22, 2017."

The substance of the proposed instruction was consistent with the instructions given by the district court. Because the jury was adequately instructed on the measure of damages to the remaining property, this assignment of error is without merit.

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(c) Amount of Damages

Elkhorn next argues that the district court erred when it accepted the jury verdict with respect to damages to the remaining property. The crux of Elkhorn's argument is that the jury awarded severance damages which, Elkhorn argues, were not specifically supported by the opinion of any expert.

The amount of damages sustained in a condemnation action is peculiarly a question of a local nature and ordinarily is to be determined by a jury. *Patterson v. City of Lincoln*, 250 Neb. 382, 550 N.W.2d 650 (1996). Where the evidence is conflicting, an appellate court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong. *Id.*

[10] Here, the jury's total award of \$4,625,967, as compensation for both the taken property and diminution to the fair market value of the remainder, was supported by sufficient evidence. Kroeger valued the total compensation at \$5,890,000; Dizona valued the total damages at \$7,022,000; and Giff valued the total damages at \$2,601,600. Expert witness testimony is not binding on the triers of fact. *Id.* In condemnation cases, we generally do not set aside a jury award which has fallen within the range of conflicting sets of testimony. See *In re Petition of Omaha Pub. Power Dist.*, 268 Neb. 43, 680 N.W.2d 128 (2004). The jury award of \$4,625,967 in total compensation was supported by sufficient competent evidence. We will not speculate as to how the jury reached the amount of its award. This assignment of error is without merit.

(d) Motion for New Trial

Elkhorn's claim arising out of the denial of its motion for new trial is generally grounded in the question of whether Kroeger and Dizona testified to an improper measure of damages, particularly with respect to the remainder property. Because we have found the district court did not err when it admitted such testimony, it likewise did not abuse its discretion when it denied the motion for a new trial.

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3. ATTORNEY FEES

There is no dispute in this case that Tribedo had a right to an award of attorney fees. See Neb. Rev. Stat. § 76-720 (Reissue 2018). Elkhorn claims that the amount of the fees was unreasonable. We recognize that the attorney fees are substantial, but we find no abuse of discretion.

[11,12] 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. *ACI Worldwide Corp. v. Baldwin Hackett & Meeks*, 296 Neb. 818, 896 N.W.2d 156 (2017). 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. *Id.*

In support of its fee application, Tribedo offered affidavits of three members of the Nebraska bar, who testified that they had reviewed the fees charged by Tribedo's attorneys, received a detailed summary of the work provided by counsel, and stated that they found the requested fees reasonable. Following submission of evidence and briefing, the district court found:

The amount sought by Tribedo is extremely reasonable, particularly given the fact that the judgment exceeded the award by more than 75%, the judgment is believed to be one of the largest jury awards in a condemnation matter to be found in a reported court decision in this State, the litigation was fairly complex and, thus far, has persisted over a nearly 2 ½ year period, complex appraisals had to be prepared by highly trained and experienced appraisers, the experience and professional training of Tribedo's attorneys, the customary charges of the bar and the general equities of the case.

After reviewing the district court's detailed explanation for its award of attorney fees, we agree that the above factors

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support the attorney fees awarded. The district court did not abuse its discretion when it awarded Tribedo \$590,924.89 in attorney fees.

VI. CONCLUSION

For the reasons set forth above, we conclude that the district court did not err in its trial rulings nor in accepting the jury verdict for total compensation due Tribedo of \$4,625,967. Further, the district court did not abuse its discretion when it awarded Tribedo \$590,924.89 in attorney fees. All assignments of error have been considered and are without merit. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

PAPIK, J., not participating.

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

BENJAMIN M., APPELLANT, V.

JERI S., APPELLEE.

950 N.W.2d 381

Filed November 6, 2020. No. S-19-1144.

1. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. of Pldg. § 6-1112(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
4. **Courts: Jurisdiction: Paternity.** District courts have subject matter jurisdiction of actions to determine paternity of a child.
5. **Limitations of Actions: Pleadings.** A challenge that a pleading is barred by the statute of limitations is a challenge that the pleading fails to allege sufficient facts to constitute a claim upon which relief can be granted.
6. **Limitations of Actions: Pleadings: Waiver.** A statute of limitations does not operate by its own force as a bar, but, rather, operates as a defense to be pleaded by the party relying upon it and is waived if not pleaded.
7. **Limitations of Actions: Jurisdiction.** The failure to comply with a statute of limitations is not an issue of subject matter jurisdiction.
8. **Paternity: Acknowledgments.** The proper legal effect of a signed, notarized acknowledgment of paternity is a finding that the individual who signed as the father is in fact the legal father.

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9. ____: _____. The establishment of paternity by acknowledgment is the equivalent to establishment of paternity by judicial proceeding.
10. **Constitutional Law: Parental Rights: Minors.** Parents have a constitutional right to retain custody and control of their child.
11. **Constitutional Law: Jurisdiction: Equity: Child Custody.** Article V, § 9, of the Nebraska Constitution confers equity jurisdiction upon the district courts, and issues of child custody fall within that general equity jurisdiction.
12. **Paternity: Acknowledgments: Child Custody: Child Support.** Neb. Rev. Stat. § 43-1402 (Reissue 2016) authorizes the filing of an action for child custody and child support when an acknowledgment of paternity has been executed by the parties.
13. **Limitations of Actions: Paternity: Acknowledgments: Child Custody: Child Support.** The 4-year statute of limitations on paternity actions does not bar an action for child custody and child support for a father who executed an acknowledgment of paternity.
14. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Lancaster County:
SUSAN I. STRONG, Judge. Reversed and remanded for further proceedings.

Megan E. McDowell and Jerrad R. Ahrens, of Cordell & Cordell, P.C., for appellant.

Robert Wm. Chapin, Jr., for appellee.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

FUNKE, J.

NATURE OF CASE

Benjamin M. filed an action to establish paternity, custody, support, and parenting time. Benjamin later filed two notarized acknowledgments of paternity contemporaneously with an amended complaint to establish custody, support, and parenting time. The district court dismissed the amended complaint

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based on statute of limitations grounds. Benjamin appeals and argues that the district court erred in failing to give proper legal effect to the notarized acknowledgments of paternity. We agree and reverse the district court's order and remand the cause for further proceedings.

BACKGROUND

Benjamin and Jeri S. are the unmarried parents of two minor children: F.M., born in 2010, and L.M., born in 2012. Two days after the birth of F.M., Benjamin and Jeri executed a notarized acknowledgment of paternity for F.M. One day after the birth of L.M., Benjamin and Jeri executed a notarized acknowledgment of paternity for L.M.

In April 2019, Benjamin filed a complaint in the district court for Lancaster County, Nebraska, to establish paternity, child custody, child support, and parenting time. Jeri filed a motion to dismiss pursuant to Neb. Rev. Stat. § 43-1411 (Reissue 2016), arguing that the court lacked subject matter jurisdiction to adjudicate the case because the complaint was filed beyond the 4-year statute of limitations for a paternity action. In response, Benjamin filed an amended complaint to establish child custody, child support, and parenting time in which he pled that he and Jeri had executed notarized acknowledgments of paternity for both children. The amended complaint further alleged that as a result of the acknowledgments of paternity, Benjamin was the legal father of both children.

The court held hearings on the motion to dismiss on August 23 and September 10, 2019. The hearings were held “in chambers [and] not on the record.” However, at the September 10 hearing, the court went on the record to “see if [counsel for Benjamin] would like to offer the acknowledgments of paternity as exhibits that the Court could consider on the motion to dismiss,” as well as to “address [counsel for Benjamin's] comment that an Amended Complaint has been filed after the motion to dismiss.” Certified copies of the notarized acknowledgments of paternity for both F.M. and

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L.M. were offered and received into evidence, without objection from Jeri. In response, the court proposed converting the motion to dismiss into a motion for summary judgment. Neither party objected.

On September 11, 2019, the district court entered an order of dismissal. In its order, the district court determined that Benjamin set forth no allegations that would toll the statute of limitations and pointed out that Benjamin knew he was the biological father at the time of the births, as evidenced by the notarized acknowledgments of paternity, but he waited more than 4 years to bring this action. The district court discussed Neb. Rev. Stat. § 43-1409 (Reissue 2016), which recognizes that a signed, notarized acknowledgment of paternity can be rescinded within the earlier of 60 days or the date of a judicial proceeding relating to the child, including a proceeding to establish a support order, in which the signatory is a party. The district court also discussed *Cesar C. v. Alicia L.*,¹ in which this court found that a lower court committed plain error when it failed to give proper legal effect to a notarized acknowledgment of paternity signed at birth. However, the district court noted that *Cesar C.* did not involve the statute of limitations. The district court concluded that Benjamin failed to timely exercise his parental rights with due diligence and that thus, his action was barred by the 4-year statute of limitations set forth in § 43-1411. Because the court considered evidence (in the form of the acknowledgments of paternity), it applied a motion for summary judgment standard to Jeri's motion to dismiss. The court stated that when viewing the evidence and all reasonable inferences in the light most favorable to Benjamin, it could not find any genuine issues of material fact which would preclude summary judgment. The court determined that Benjamin was asserting his parental rights more than 4 years after the birth of his children and

¹ *Cesar C. v. Alicia L.*, 281 Neb. 979, 800 N.W.2d 249 (2011).

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ultimately found that an untimely action to establish paternity under § 43-1411 was a defect in subject matter jurisdiction and dismissed the case.

On September 20, 2019, Benjamin filed motions to reconsider, to vacate the order of dismissal, for new trial, and to reopen evidence. After a hearing, the district court entered an order denying all four motions. Benjamin timely appeals.

ASSIGNMENTS OF ERROR

Benjamin assigns, restated and consolidated, that the district court erred (1) by not giving proper legal effect to the acknowledgments of paternity, (2) in finding the notarized acknowledgments of paternity recognized in Neb. Rev. Stat. § 43-1402 (Reissue 2016) are subject to the 4-year statute of limitations for paternity actions set forth in § 43-1411, and (3) by improperly converting Jeri's motion to dismiss into a motion for summary judgment without proper notice or an opportunity to respond.

STANDARD OF REVIEW

[1] A district court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. Pldg. § 6-1112(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.²

[2] Statutory interpretation presents a question of law.³ On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.⁴

² *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 694 N.W.2d 625 (2005).

³ See, *State ex rel. Wagner v. Gilbane Bldg. Co.*, 280 Neb. 223, 786 N.W.2d 330 (2010); *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

⁴ *Ruzicka v. Ruzicka*, 262 Neb. 824, 635 N.W.2d 528 (2001).

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ANALYSIS

JURISDICTION

[3,4] Before reaching the legal issues presented for review, an appellate court must determine whether it has jurisdiction.⁵ In its order of dismissal, the district dismissed the case for lack of subject matter jurisdiction for Benjamin's failure to file his paternity action within 4 years of the birth of the children. Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.⁶ We have consistently held that the district court has subject matter jurisdiction of an action to determine paternity of a child.⁷

[5-7] A challenge that a pleading is barred by the statute of limitations is a challenge that the pleading fails to allege sufficient facts to constitute a claim upon which relief can be granted.⁸ We have previously stated that a statute of limitations specifies only that an action must be commenced within a specified time period.⁹ Further, a statute of limitations does not operate by its own force as a bar, but, rather, operates as a defense to be pleaded by the party relying upon it and is waived if not pleaded.¹⁰ Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created

⁵ *McEwen v. Nebraska State College Sys.*, 303 Neb. 552, 931 N.W.2d 120 (2019).

⁶ *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 899 N.W.2d 893 (2017).

⁷ *Sherman T. v. Karyn N.*, 286 Neb. 468, 837 N.W.2d 746 (2013). See Neb. Rev. Stat. § 43-1411.01 (Cum. Supp. 2018).

⁸ *Anthony K. v. Nebraska Dept. of Health & Human Servs.*, 289 Neb. 540, 855 N.W.2d 788 (2014).

⁹ *In re Estate of Hockemeier*, 280 Neb. 420, 786 N.W.2d 680 (2010).

¹⁰ *Id.*

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by waiver, estoppel, consent, or conduct of the parties.¹¹ As such, the failure to comply with a statute of limitations is not an issue of subject matter jurisdiction. Instead, we find that a more appropriate ground for dismissal in this case would have been dismissal for failure to state a claim upon which relief can be granted.¹² However, neither party has raised this issue on appeal, and as such, we proceed with our analysis as if the district court had dismissed this case on the ground of failure to state a claim upon which relief could be granted.

ACKNOWLEDGMENTS OF PATERNITY

Benjamin argues that the district court erred by not giving the acknowledgments of paternity proper legal effect. He further contends that a notarized acknowledgment of paternity which has not been rescinded is not merely a presumption of paternity, but a legal finding of paternity. Jeri counters that any paternity action brought more than 4 years after the birth of the child is barred by § 43-1411. She contends that an acknowledgment of paternity has no effect on the 4-year statute of limitations.

[8] The procedure for obtaining a judicial determination of paternity is set forth in Neb. Rev. Stat. §§ 43-1401 to 43-1418 (Reissue 2016 & Cum. Supp. 2018). Section 43-1409 provides as follows:

The signing of a notarized acknowledgment, whether under section 43-1408.01 or otherwise, by the alleged father shall create a rebuttable presumption of paternity as against the alleged father. The signed, notarized acknowledgment is subject to the right of any signatory to rescind the acknowledgment within the earlier of (1) sixty days or (2) the date of an administrative or judicial proceeding relating to the child, including a proceeding to establish a support order in which the signatory is a party.

¹¹ *J.S.*, *supra* note 6.

¹² See *Anthony K.*, *supra* note 8.

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After the rescission period a signed, notarized acknowledgment is considered a legal finding which may be challenged only on the basis of fraud, duress, or material mistake of fact with the burden of proof upon the challenger, and the legal responsibilities, including the child support obligation, of any signatory arising from the acknowledgment shall not be suspended during the challenge, except for good cause shown. Such a signed and notarized acknowledgment or a certified copy or certified reproduction thereof shall be admissible in evidence in any proceeding to establish support.

We have held that an unrescinded and unchallenged acknowledgment of paternity operates as a legal finding of paternity and that the proper legal effect of a signed, notarized acknowledgment is a finding that the individual who signed as the father is in fact the legal father.¹³

[9] In *Cesar C.*, we considered the legal effect of an acknowledgment of paternity in a custody matter.¹⁴ In that case, Cesar C. and Alicia L. were unmarried, but shared a child, Jaime C., together. A notarized acknowledgment of paternity was executed at Jaime's birth, and Cesar was listed as Jaime's father on the birth certificate. Three years later, at a subsequent court proceeding to establish custody and child support, a genetic test ruled out Cesar as a possible biological father of Jaime. Although the district court received the notarized acknowledgment of paternity into evidence without objection, it awarded custody of Jaime to Alicia and determined Alicia had superior rights to custody as the biological parent of Jaime. On appeal, this court reversed the decision of the district court and concluded that the district court committed plain error when it failed to give proper legal effect to

¹³ See, *Tyler F. v. Sara P.*, 306 Neb. 397, 945 N.W.2d 502 (2020); *In re Adoption of Jaelyn B.*, 293 Neb. 917, 883 N.W.2d 22 (2016); *Cesar C.*, *supra* note 1.

¹⁴ *Cesar C.*, *supra* note 1.

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the acknowledgment of paternity, which established Cesar as Jaime's legal father. We determined that had the court given proper legal effect to the acknowledgment, the court would have viewed both Cesar and Alicia as legal parents to Jaime. We found that the establishment of paternity by acknowledgment is the equivalent to the establishment of paternity by judicial proceeding. As a result, we held that based upon the acknowledgment of paternity, the court should have treated the complaint to establish paternity as a complaint to determine custody and support.

In *In re Adoption of Jaelyn B.*,¹⁵ we addressed the legal effect of an acknowledgment of paternity in a proceeding for adoption. We held that a father whose paternity is established by a final, voluntary acknowledgment has the same right to seek custody as the child's biological mother, even if subsequent genetic testing shows he is not the biological father.

Recently, in *Tyler F. v. Sara P.*,¹⁶ we again had the occasion to consider the effect of an acknowledgment of paternity in a custody matter. In *Tyler F.*, the district court ruled that an acknowledgment of paternity established Tyler as the legal father and a subsequent genetic test established another man as the biological father. In doing so, the court granted both men paternal rights. On appeal, we held that the original acknowledgment of paternity determined that Tyler was the only father of the minor child and that the subsequent genetic test did not establish paternal rights for the other man without setting aside the acknowledgment of paternity.

Additionally, § 43-1402 states that the father of a child whose paternity is established either by judicial proceedings or by acknowledgment shall be liable for the child's support to the same extent and in the same manner as the father of a child born in lawful wedlock is liable for the child's support.

¹⁵ *In re Adoption of Jaelyn B.*, *supra* note 13.

¹⁶ *Tyler F.*, *supra* note 13.

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We have explained that this language contained in § 43-1402 contemplates that an establishment of paternity by acknowledgment is the equivalent to an establishment of paternity by judicial proceeding.¹⁷

Furthermore, § 43-1412.01 authorizes the setting aside of a final judgment, a court order, an administrative order, an obligation to pay child support, or any other legal determination of paternity if a scientifically reliable genetic test performed establishes the exclusion of the individual named as a father in the legal determination. However, the statute precludes the granting of such relief when, among other things, the individual named as the father completed a notarized acknowledgment of paternity.¹⁸ This provision in § 43-1412.01 provides further support for the conclusion that an acknowledgment legally establishes paternity and grants the individual named as father the legal status of a parent to the child regardless of genetic factors.¹⁹

In the instant matter, it is undisputed that the acknowledgments of paternity have not been timely rescinded. It is also undisputed that there have been no challenges made to the signed and notarized acknowledgments of paternity based on fraud, duress, or material mistake of fact.²⁰ Further, neither party disputes that the acknowledgments of paternity operate as a finding that Benjamin is the legal father of F.M. and L.M. In fact, at the hearing on the motion to dismiss, counsel for Jeri stated, “I think what’s interesting about this particular case is that the acknowledgment of paternity establishes that [Benjamin] is, in fact, the father. We’re not actually even contesting that.”

Based upon the clear language of §§ 43-1402 and 43-1409, our cases interpreting these statutes, and the record before

¹⁷ *Id.*; *Cesar C.*, *supra* note 1.

¹⁸ § 43-1412.01.

¹⁹ *Cesar C.*, *supra* note 1.

²⁰ See § 43-1409.

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us, we find that Benjamin's acknowledgments of paternity established him as the legal father of the minor children.

STATUTE OF LIMITATIONS

In the present case, the district court did not have the benefit of our decision in *Tyler F.*²¹ However, the court did consider our decision in *Cesar C.* and determined that its holding was inapplicable to this matter because Jeri's defense was based on the statute of limitations, rather than on paternity.²² The 4-year statute of limitations for paternity actions is found in § 43-1411, which states, in relevant part:

A civil proceeding to establish the paternity of a child may be instituted, in the court of the district where the child is domiciled or found or, for cases under the Uniform Interstate Family Support Act, where the alleged father is domiciled, by (1) the mother or the alleged father of such child, either during pregnancy or within four years after the child's birth

In its order, the district court determined that if Benjamin had filed his action within 4 years from the date the children were born, "[it] would be required to treat the case as one for custody and support as between two legal parents (unless [Jeri] could successfully challenge the acknowledgments of paternity)."

It is undisputed that Benjamin filed his complaint to establish paternity, custody, and support more than 4 years after the birth of the minor children. However, by the time Benjamin initiated the current proceedings, Benjamin's paternity of F.M. and L.M. had already been established by the execution of unrescinded and unchallenged acknowledgments of paternity. As such paternity was no longer an issue, the only remaining issues to decide were issues of custody and support. As we have previously stated, when an action to establish paternity,

²¹ See *Tyler F.*, *supra* note 13.

²² See *Cesar C.*, *supra* note 1.

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custody, and support has been filed after the execution of an acknowledgment of paternity, the court should treat the action as an action solely to determine custody and support.²³

[10] Jeri contends that despite Benjamin's status as the legal father, there is no statutory authority for Benjamin to bring an action in district court to establish custody and support. We disagree. First, it is beyond dispute that under the U.S. Supreme Court's longstanding precedent, parents have a constitutional right to retain custody and control of their child.²⁴ Second, the Nebraska Legislature has recognized the critical importance of the parent-child relationship in the welfare and development of the child and that the relationship between the child and each parent should be equally considered unless it is contrary to the best interests of the child.²⁵

The district courts of Nebraska are courts of general jurisdiction and thus have inherent power to do all things necessary for the administration of justice within the scope of their jurisdiction.²⁶ Any power conferred by the constitution cannot be legislatively limited or controlled.²⁷ The Legislature may, however, grant to the district courts such additional jurisdiction as it may deem proper.²⁸

[11] We have said that article V, § 9, of the Nebraska Constitution confers equity jurisdiction upon the district courts, and issues of child custody fall within that general

²³ See, *Tyler F.*, *supra* note 13; *Cesar C.*, *supra* note 1.

²⁴ *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008). See, *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (plurality opinion) (citing *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944); *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)).

²⁵ Neb. Rev. Stat. § 43-2921 (Reissue 2016).

²⁶ *Charleen J. v. Blake O.*, 289 Neb. 454, 855 N.W.2d 587 (2014).

²⁷ *Id.*

²⁸ *Id.*

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equity jurisdiction.²⁹ Indeed, since a century ago, Nebraska common law has recognized an action in equity for custody apart from an action for dissolution of marriage or paternity.³⁰ Even when custody is determined within a dissolution or paternity action, it is considered ““incidental”” to those causes of action.³¹ Questions of custody within such actions still derive from the court’s general equity jurisdiction.³² The paternity statutes therefore cannot circumscribe the district courts’ inherent powers in equity to determine child custody.³³

Statutorily, § 43-1402 states that the liability of each parent may be determined, enforced, and discharged in accordance with the methods hereinafter provided. In *Cesar C.*, we held that when reading §§ 43-1402 and 43-1409 together, the provision in § 43-1409 that an acknowledgment is a “legal finding” means that a properly executed acknowledgment legally establishes paternity in the person named in the acknowledgment as the father.³⁴ A father whose paternity is established by a final, voluntary acknowledgment has the same right to seek custody as the child’s biological mother.³⁵ As such, Benjamin’s parental rights and responsibilities for the children could be determined and enforced through the filing of an action to establish custody and support. Any inability of Benjamin to enforce his parental rights and obligations would run contrary to his constitutional rights as a parent of the children.³⁶

If the 4-year statute of limitations were to bar an action for custody and support for a father who executed an

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 460, 855 N.W.2d at 593.

³² *Id.*

³³ *Id.*

³⁴ See *Cesar C.*, *supra* note 1.

³⁵ *Tyler F.*, *supra* note 13.

³⁶ See *Amanda C.*, *supra* note 24.

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acknowledgment of paternity, a man could be a legal father with the obligation to support his children, but have no parental rights of custody and parenting time. This would be an untenable result. Therefore, we conclude that Benjamin's action cannot be barred by the 4-year statute of limitations.

[12,13] We find that when an acknowledgment of paternity has been executed by the parties, the district court has the inherent authority to consider the issue of child custody, and that § 43-1402 authorizes the filing of an action for child custody and child support. We further find that the 4-year statute of limitations on paternity actions does not bar an action for child custody and child support for a father who executed an acknowledgment of paternity. As such, the district court erred in its application of § 43-1411.

REMAINING ASSIGNMENT OF ERROR

[14] Benjamin's remaining assignment of error is that the district court erred in improperly converting Jeri's motion to dismiss into a motion for summary judgment without proper notice or an opportunity to respond. However, because we have already determined the district court erred when it failed to give proper legal effect to the notarized acknowledgments of paternity, we need not address this 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.³⁷

CONCLUSION

The district court erred in failing to give proper legal effect to the signed, notarized acknowledgments of paternity executed by Benjamin and Jeri days after the births of F.M. and L.M. Additionally, where there is a properly executed and unrescinded and unchallenged acknowledgment of paternity, an

³⁷ *Fales v. County of Stanton*, 297 Neb. 41, 898 N.W.2d 352 (2017).

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action for establishment of paternity should be treated solely as an action to determine the issues of custody and support. As such, the statute of limitations governing the time to bring a paternity proceeding is inapplicable in cases where there is a properly executed and unrescinded and unchallenged acknowledgment of paternity. Accordingly, we reverse the district court's order of dismissal and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

BILLY MEREDITH HIGGINS, APPELLEE, v.
RASHELL RENE CURRIER, APPELLANT.

950 N.W.2d 631

Filed November 13, 2020. No. S-19-343.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In a marital dissolution action, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees.
2. **Evidence: Appeal and Error.** In a review de novo on the record, an appellate court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
4. **Divorce: Property Division.** All property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule.
5. ____: _____. Any given property can constitute a mixture of marital and nonmarital interests; a portion of an asset can be marital property while another portion can be separate property.
6. ____: _____. The original capital or value of an asset may be nonmarital, while all or some portion of the earnings or appreciation of that asset may be marital.
7. ____: _____. The active appreciation rule sets forth the relevant test to determine to what extent marital efforts caused any part of an asset's appreciation or income.
8. **Divorce: Property Division: Presumptions.** Accrued investment earnings or appreciation of nonmarital assets during the marriage are

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presumed marital unless the party seeking the classification of the growth as nonmarital proves: (1) The growth is readily identifiable and traceable to the nonmarital portion of the account and (2) the growth is not due to the active efforts of either spouse.

9. **Divorce: Property Division: Words and Phrases.** Appreciation caused by marital contributions is known as active appreciation, and it constitutes marital property.
10. ____: ____: _____. Passive appreciation is appreciation caused by separate contributions and nonmarital forces.
11. **Divorce: Property Division: Proof.** The burden is on the owning spouse to prove the extent to which marital contributions did not cause the appreciation or income.

Petition for further review from the Court of Appeals, MOORE, Chief Judge, and ARTERBURN and WELCH, Judges, on appeal thereto from the District Court for Douglas County, JAMES M. MASTELLER, Judge. Judgment of Court of Appeals affirmed in part, and in part reversed and remanded with directions.

Corey J. Wasserburger, of Johnson, Flodman, Guenzel & Widger, for appellant.

Megan E. Shupe and Richard W. Whitworth, of Reagan, Melton & Delaney, L.L.P., for appellee.

HEAVICAN, C.J., MILLER-LEMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

PAPIK, J.

In its decree dissolving the marriage of Billy Meredith Higgins and Rashell Rene Currier, the district court for Douglas County found that Currier should be awarded \$10,500 from a 401K account owned by Higgins, but otherwise awarded Higgins all funds in his retirement and investment accounts. Currier appealed, challenging various aspects of the district court's dissolution decree, and the Nebraska Court of Appeals affirmed. See *Higgins v. Currier*, No. A-19-343, 2020 WL 634183 (Neb. App. Feb. 11, 2020) (selected for posting to court website). We granted Currier's petition for further

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review. We find that the Court of Appeals erred in concluding that the district court did not abuse its discretion in its disposition of Higgins' 401K accounts.

BACKGROUND

Parties' Marriage.

Higgins and Currier were married in Washington on May 20, 2016. At the time of the marriage, Currier and her son from a prior relationship lived in Washington and Higgins lived in Council Bluffs, Iowa. Following the marriage, Currier and her son moved to Council Bluffs to live with Higgins. Higgins and Currier have no children together.

Higgins has been employed by TD Ameritrade since 1997. During a portion of the 14 months Currier lived with Higgins, she worked part time.

In July 2017, Currier and her son moved back to Washington. Shortly thereafter, Higgins moved to Omaha, Nebraska. After July 2017, the parties remained in contact and took occasional trips to visit one another. The parties were unable to reconcile and ended their relationship in March 2018.

Higgins initially filed a complaint for legal separation in April 2018, but later filed an amended complaint for dissolution of marriage. Trial was held in December 2018. Higgins was represented by counsel at trial. Currier represented herself. Both parties testified and offered exhibits, which were received into evidence by the district court.

Summary of Trial Evidence.

Much of the evidence at trial concerned investment and retirement accounts owned by Higgins. Higgins testified that he had a TD Ameritrade account with an account number ending in "3733" (the 3733 account). He testified that the 3733 account was in existence prior to the marriage and that he did not make any deposits into the 3733 account during the marriage. Higgins' counsel referred to the account as a "brokerage account" during direct examination. Higgins asked that the

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court award all funds in that account to him as a premarital asset.

In addition, Higgins testified that he had a 401K account, which was established prior to the marriage. He also asked that the district court award that account to him, but he did not provide any other testimony or documentation with respect to that account.

Currier also presented evidence regarding Higgins' accounts. She testified that Higgins had two different 401K accounts and that he was depositing \$1,500 per month into the accounts. Currier also introduced and the court received two account statements for a TD Ameritrade 401K account with an account number ending in "0510" (the 0510 account). The account statements are in Higgins' name and are from May 2016 and March 2018. These statements show that the 0510 account had a value of \$218,182.02 as of May 2016 and a value of \$359,128.29 as of March 2018. The statements show that Higgins held stocks and mutual funds within the account and that securities were sold and purchased and interest income was received during the period summarized by each statement. When referencing the account statements for the 0510 account, Currier noted that the account statements corresponded to the month the parties were married and the month the parties separated and asked the district court to divide the account equitably.

The district court also received evidence regarding the purchase and sale of the Council Bluffs house in which the parties resided together. Higgins testified that he purchased that house in 2014 for approximately \$675,000 and that, at the time, the house was appraised at \$625,000. Higgins testified that he made a downpayment on the purchase of about \$350,000, and a closing statement shows that he and his previous wife borrowed \$315,000 to purchase the house.

Higgins testified that, at Currier's request, he sold the Council Bluffs house in July 2017. Higgins testified that the house sold for \$615,000, about \$58,000 less than its purchase price, and that he paid about \$31,000 in fees and closing

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costs. He testified that he realized about \$300,000 from its sale. Following the sale of the house, Higgins used \$25,000 of the proceeds to pay off a marital credit card debt. He applied the rest of the proceeds to the purchase of a new house in Omaha. Higgins asked the district court to award him the Omaha house as nonmarital property traceable to his premarital Council Bluffs house.

District Court Decree.

In March 2019, the district court entered a decree of dissolution, dissolving the marriage and identifying and dividing the marital estate. Perhaps unsurprisingly, given the duration of the marriage, relatively little property was identified as marital and subject to equitable division. The district court awarded Currier \$303, representing half of the balance in a bank account in both parties' names. The court also awarded her \$3,570, a sum representing half of an income tax refund that accumulated during the portion of 2016 the parties were married.

The district court found that the TD Ameritrade account ending in "0733" (presumably the 3733 account) was Higgins' premarital asset and that "all accumulations to [that] account were from that premarital asset." It awarded Higgins that account and any other "TD Ameritrade accounts which belonged to [Higgins] prior to the marriage."

In a separate subsection of the decree, the district court discussed retirement plans. It found that Higgins had a 401K account through TD Ameritrade which was established prior to the marriage. It found that during the marriage, he made monthly contributions of \$1,500 from marital funds to that account. The court found that for purposes of dividing the marital portion of the 401K account, the operative dates for the marriage were from May 2016 to July 2017 and that Higgins thus made \$21,000 in contributions to the 401K account that were subject to division. Accordingly, it awarded Currier \$10,500 from Higgins' 401K and ordered it transferred through a qualified domestic relations order. The

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district court awarded the parties any other retirement plans held in their own names.

In a subsection of the decree addressing real property, the district court concluded that the Council Bluffs house was not a marital asset. It also concluded that the equity in the Council Bluffs house could be traced to the house Higgins purchased in Omaha. It found that the Omaha house was not a marital asset and thus awarded Higgins all right, title, interest, and equity in that property.

Court of Appeals.

Currier appealed. Among other things, she assigned that the district court had erred in classifying the increase in value of the 0510 account and the Council Bluffs house as non-marital property. The Court of Appeals affirmed the district court's decree.

The Court of Appeals found that the district court did not abuse its discretion by declining to include in the marital estate the amount by which the 0510 account increased during the marriage. The Court of Appeals recognized that the question of whether the increase in value was appropriately treated as nonmarital called for the application of the active appreciation rule, whereby the burden is on the owning spouse to prove the extent to which marital contributions did not cause the appreciation or income. It also acknowledged the district court's receipt of account statements showing that the value of that account increased from \$218,182.02 in May 2016 to \$359,128.29 in March 2018 and that stocks and mutual funds were sold and purchased within the account during that time. It concluded, however, that those statements did not indicate that active appreciation was the cause of the increase in value, but, rather, they suggested that "the account fluctuates, presumably depending on market forces." *Higgins v. Currier*, No. A-19-343, 2020 WL 634183 at *6 (Neb. App. Feb. 11, 2020) (selected for posting to court website).

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The Court of Appeals also concluded the district court did not err by finding that the Council Bluffs residence was a non-marital asset.

ASSIGNMENTS OF ERROR

Currier argues on further review that the Court of Appeals erred by improperly shifting the burden to her to prove that the increase in value in the 0510 account during the parties' marriage was due to active appreciation. She argues that, in this regard, the Court of Appeals' opinion is at odds with our recent opinion in *White v. White*, 304 Neb. 945, 937 N.W.2d 838 (2020). She contends that the increase in value of the 0510 account during the marriage should have been treated as marital property subject to equitable division.

Currier also claims that the Court of Appeals erred by failing to find that mortgage payments made during the marriage were inextricably comingled with the equity in the marital residence. We find no error in the district court's disposition of this issue, and we see no need for further comment on it. Therefore, our analysis below is limited to the assignment of error concerning the disposition of the 0510 account.

STANDARD OF REVIEW

[1] In a marital dissolution action, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. *White v. White, supra*.

[2] In a review de novo on the record, an appellate court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue. *Id.*

[3] A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id.*

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ANALYSIS

Currier introduced evidence showing that the value of the 0510 account increased during the course of the marriage. The account statements Currier introduced showed that the value of the account was \$218,182.02 in May 2016 and \$359,128.29 in March 2018. Currier argues that the district court should have classified this increase in value as marital property and divided it equitably.

[4-6] We have said that all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to this general rule. *Stephens v. Stephens*, 297 Neb. 188, 899 N.W.2d 582 (2017). Thus, for example, income from either party that accumulates during the marriage is a marital asset. *Id.* Any given property can constitute a mixture of marital and nonmarital interests; a portion of an asset can be marital property while another portion can be separate property. *Id.* Therefore, the original capital or value of an asset may be nonmarital, while all or some portion of the earnings or appreciation of that asset may be marital. *Id.*

Currier argues that is the case here. Although she concedes that the value of the 0510 account at the time of the parties' marriage was Higgins' nonmarital property, she contends that the growth in that account during the marriage was marital. She argues that this result is compelled by the active appreciation rule.

[7-11] The active appreciation rule sets forth the relevant test to determine to what extent marital efforts caused any part of an asset's appreciation or income. *White v. White*, 304 Neb. 945, 937 N.W.2d 838 (2020). Under the rule, accrued investment earnings or appreciation of nonmarital assets during the marriage are presumed marital unless the party seeking the classification of the growth as nonmarital proves: (1) The growth is readily identifiable and traceable to the nonmarital portion of the account and (2) the growth is not due to the active efforts of either spouse. *Id.* Appreciation caused by

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marital contributions is known as active appreciation, and it constitutes marital property. *Id.* Passive appreciation is appreciation caused by separate contributions and nonmarital forces. *Id.* The burden is on the owning spouse to prove the extent to which marital contributions did not cause the appreciation or income. *Id.*

In *Stephens v. Stephens*, 297 Neb. at 205, 899 N.W.2d at 595, we made clear that these principles “apply equally to appreciation or income during the marriage of any nonmarital asset.” We also explained that placing the burden on the owning spouse to prove that the growth is not due to active efforts “is the better policy, because it places the burden on the party who has the best access to the relevant evidence.” *Id.* at 206, 899 N.W.2d at 595.

We recently had occasion to apply the active appreciation rule in *White v. White*, *supra*. In that case, the husband created an investment account with funds he inherited. He argued that the district court abused its discretion by treating the appreciation in that account during the course of the marriage as marital property. We rejected the argument. We explained that under the active appreciation rule articulated in *Stephens v. Stephens*, *supra*, it was the husband’s burden to establish that the growth in the account was attributable solely to passive market forces or separate contributions. We also noted ways in which the husband might have been able to carry this burden: by showing that the growth was consistent with “some recognized benchmark of general market growth,” that the annual rate of return was guaranteed or statutorily prescribed, or that he relied on the recommendations or management of his account by a third party. *White v. White*, 304 Neb. at 961, 937 N.W.2d at 851. But because the husband failed to present evidence on any of these points or any evidence showing that his efforts did not cause the appreciation, we found that the district court did not err in classifying the appreciation in the account as marital.

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Currier argues that under the active appreciation rule, as applied in *White*, the increase in the value of the 0510 account is also marital property subject to equitable division. She does not dispute that Higgins satisfied the first element of the active appreciation rule by showing that the growth in the 0510 account was readily identifiable and traceable to the nonmarital portion of the account. But she contends that like the husband in *White*, Higgins introduced no evidence showing that the growth was not due to the active efforts of either spouse.

In response to this argument, Higgins has not directed us to any evidence in the record that might tend to show that the increase in the value of the 0510 account came about as a result of something other than the active efforts of either spouse. Indeed, during closing argument, Higgins' counsel seemed to acknowledge the lack of such evidence, stating "there's been absolutely no testimony that would guide the Court in determining how to divvy up any income and interest that would have come into that account during the time . . . that these folks have been married."

Unable to point to evidence that the increase in value in the 0510 account was the result of passive appreciation, Higgins attempts to undermine Currier's argument in other ways. First, he contends that Currier did not adequately raise this issue in the district court. We disagree. In referencing the exhibit she offered into evidence showing the increase in value of the 0510 account between May 2016 and March 2018, Currier mentioned that the account statements corresponded with the month the parties were married and the month they separated, and she asked the district court to "divide that equitably." Higgins' counsel appeared to understand that Currier was asking that at least some portion of Higgins' accounts be treated as marital property subject to equitable division. On cross-examination, he had Currier confirm that she was asking the district court to award her a portion of Higgins' 401K, and, in closing argument, he contended that, with the possible exception of funds that were contributed to accounts

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during the marriage, Higgins should be awarded the entirety of any investment or retirement accounts. We believe Currier adequately informed the district court and Higgins that she sought the equitable division of the 0510 account.

Higgins also argues that despite the lack of evidence that the increase in the value of the 0510 account was the result of passive appreciation, the Court of Appeals correctly applied the active appreciation rule. Again, we disagree. The Court of Appeals stated that the exhibits Currier offered regarding the 0510 account did not show any funds being deposited, but instead showed stocks and mutual funds being sold and purchased within the account along with the receipt of interest income. It noted that the March 2018 statement showed a \$20,000 loss for the month. It concluded that this evidence “does not indicate that active appreciation is the cause of the increase in value during the marriage; rather, it indicates that the account fluctuates, presumably depending on market forces.” *Higgins v. Currier*, No. A-19-343, 2020 WL 634183 at *6 (Neb. App. Feb. 11, 2020) (selected for posting to court website).

Although the Court of Appeals recognized earlier in its opinion that the burden is on the owning spouse to prove the extent to which marital contributions did not cause the appreciation or income, its analysis treated Currier as if she had the burden to show that the increase was caused by active appreciation. After concluding that the exhibits Currier offered did not demonstrate active appreciation, the Court of Appeals *presumed* that the account increased due solely to market forces. This was an incorrect application of the active appreciation rule. The burden was on Higgins to show that the increase in the 0510 account was the result of passive appreciation. Higgins was obligated to adduce evidence to carry that burden as opposed to relying on presumptions. He did not do so. Thus, under the active appreciation rule, the increase in value of the 0510 account during the marriage should have been treated as marital property.

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We are not swayed from this conclusion by Higgins' contention at oral argument that Currier's argument is flawed because the district court, for purposes of determining contributions to Higgins' 401K, treated the marriage as effectively concluded in July 2017 when Currier returned to Washington. Higgins pointed out that although Currier offered evidence of the value of the account in March 2018, she did not offer evidence of the value of the account in July 2017. He claimed that there is thus no evidence of how much the value of the 0510 account increased from the beginning of the marriage until its effective conclusion as determined by the district court.

Higgins is correct that Currier did not introduce evidence showing the value of the 0510 account in July 2017, but that does not affect our conclusion that under these circumstances, the increase between May 2016 and March 2018 should have been treated as marital property subject to equitable division. As we have discussed, because Higgins did not show that the increase in the 0510 account resulted from passive appreciation, the increase in the account during the marriage should have been treated as marital property under the active appreciation rule. To the extent the value of the account increased after the effective end of the marriage as determined by the district court and rendered any marginal increase after that time nonmarital property, Higgins had the burden to prove it. See *Burgardt v. Burgardt*, 304 Neb. 356, 363, 934 N.W.2d 488, 494 (2019) (“[i]n a marital dissolution proceeding, the burden of proof rests with the party claiming that property is nonmarital”). Higgins, however, introduced no evidence regarding the value of the 0510 account in July 2017 or any other time.

For all these reasons, we conclude that the increase in the value of the 0510 account should have been treated as marital property subject to equitable division. The district court abused its discretion by finding otherwise, and the Court of Appeals erred by failing to reverse on this issue.

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Disposition.

Currier argues that given the district court's error, we should modify the decree to award her half of the increase in the value of the 0510 account. While our de novo on the record standard of review permits us to modify a dissolution decree, we believe it best to instead reverse, and remand with directions in this case.

As we have noted, while the district court did not treat the entire increase of the 0510 account as marital property, it did find that Higgins deposited \$21,000 into a 401K account during the marriage. It determined those were marital contributions and, as a result, awarded Currier \$10,500 from the 401K account. It is not clear to us from the decree or the broader record, however, whether the district court determined that those contributions were made to the 0510 account or another account. If the contributions were found to be made to the 0510 account, it would be double counting to treat both those contributions and the full \$140,946.27 increase in the 0510 account as marital property. If the contributions were found to be made to some other account, however, then the entire increase in the 0510 account should be treated as marital property in addition to the \$21,000 in marital contributions the district court treated as marital in its initial decree.

Given this uncertainty in the record and because the district court is in a better position to make an equitable division, we will return this case to the district court. We do so by remanding the cause to the Court of Appeals and directing that it reverse the district court's decree in part and remand the cause to the district court with the following directions. The district court should clarify whether the \$21,000 in contributions found by the district court to be marital property were made to the 0510 account. If so, an additional \$119,946.27 should also be treated as marital. If not, an additional \$140,946.27 should be treated as marital. The district court should also determine the equitable division of marital property. See *Stephens v. Stephens*, 297 Neb. 188, 899 N.W.2d 582 (2017) (remanding

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to district court to determine equitable distribution of asset found to be marital). All such determinations should be made based on the existing record.

CONCLUSION

The Court of Appeals and the district court erred in their application of the active appreciation rule. We reverse the decision of the Court of Appeals to the extent it affirmed the district court's award of all but \$10,500 from Higgins' 401K account to Higgins. On that issue, we remand the cause to the Court of Appeals and direct that it reverse the district court's decree in part and remand the cause with directions to the district court as outlined above. In all other respects, we affirm.

AFFIRMED IN PART, AND IN PART REVERSED
AND REMANDED WITH DIRECTIONS.

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STATE v. COX

Cite as 307 Neb. 762



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

STATE OF NEBRASKA, APPELLEE, V.
FORREST R. COX III, APPELLANT.

985 N.W.2d 395

Filed November 13, 2020. No. S-19-780.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment or the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth or Fifth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Constitutional Law: Search and Seizure: Evidence: Police Officers and Sheriffs.** The exclusion of evidence obtained in violation of the Fourth Amendment is not itself a constitutional right; rather, it is a remedy designed to deter constitutional violations by law enforcement.
3. ____: ____: ____: _____. In situations where the exclusion of evidence as a remedy would not deter law enforcement, several exceptions to the exclusionary rule have been recognized. One of those exceptions applies to evidence obtained by police in objectively reasonable reliance on a statute later found to be unconstitutional.
4. **Trial: Evidence: Motions to Suppress: Waiver: Appeal and Error.** When a motion to suppress is overruled, the defendant must make a specific objection at trial to the offer of the evidence which was the subject of the motion to suppress in order to preserve the issue for review on appeal. Put another way, a failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal.
5. **Verdicts: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not

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whether in a trial that occurred without the error, a guilty verdict surely would have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.

Appeal from the District Court for Douglas County:
KIMBERLY MILLER PANKONIN, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and
Natalie M. Andrews for appellant.

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

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE,
PAPIK, and FREUDENBERG, JJ.

HEAVICAN, C.J.

INTRODUCTION

Forrest R. Cox III was convicted of first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. At issue on appeal is whether the district court erred in admitting cell phone records for Cox's phone and whether Cox invoked the right to counsel during questioning by law enforcement. We affirm.

FACTUAL BACKGROUND

Cox was charged in connection with a shooting at a convenience store in Omaha, Nebraska, on the evening of March 6, 2017. The victim of the shooting, Laron Rogers, died on March 22 as a result of injuries he sustained.

TRIAL TESTIMONY

According to testimony and evidence presented at trial, an employee of the convenience store called emergency services upon learning of a shooting in the parking lot of the store. Rogers was lying on the ground. Rogers was initially stabilized and taken to a hospital, but he did not respond to questions about who had shot him.

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Two different witnesses at the scene of the shooting testified that Rogers was leaning into a white vehicle without license plates, which vehicle was identified by both witnesses as a Chevy Impala. According to the witnesses, it appeared that Rogers was talking to the occupants of the vehicle. A gunshot was heard, and Rogers walked a few steps before collapsing. The witnesses both testified that the white Impala then drove off. Law enforcement later obtained surveillance video from the scene and confirmed that the suspect vehicle was a white Impala.

During the course of the investigation, law enforcement visited Rogers' place of employment, a cell phone store, and spoke with the store manager. The manager showed law enforcement video clips that were taken earlier on the day of Rogers' shooting. The video clips showed two men inside the store. According to the manager, coworkers had seen Rogers outside the store interacting with the men prior to the men entering the store. Law enforcement was able to identify Cox at the time the clips were viewed. Shortly thereafter, the other man was identified as Rufus Dennis.

The manager provided law enforcement with a piece of paper with "Bubba" and the phone number ". . . 6473" written on it. According to one of Rogers' coworkers, the phone number on the piece of paper was the phone number provided by Cox as he sought assistance with his cell phone at the store. Other evidence at trial revealed that Cox's nickname was "Bubba."

That same coworker also testified that Rogers left work at approximately 6 p.m. but stayed in the parking lot, sitting in his car with a friend. The friend was a manager at a different branch of the same cell phone company that employed Rogers. She had stopped by to pick up phones for her store and stayed to smoke marijuana and talk with Rogers in his car after he got off work. The friend testified that Rogers smoked and dealt marijuana.

According to the friend, while she was in Rogers' car, two men in a white Chevy Impala, with no license plates and

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displaying in-transit stickers, parked at the store. One of the men—whom she identified at trial as Cox—stopped at Rogers’ car to talk to Rogers. The friend said that Cox wanted to buy some marijuana, but that Rogers did not have enough on hand. Rogers and Cox exchanged telephone numbers and agreed to be in touch later that day. Cox and the other man, unknown to the friend but later identified as Dennis, went into the store; the friend and Rogers left the store’s parking lot in their separate vehicles.

During the course of the investigation, law enforcement determined that Rogers owed his drug supplier money. Both Rogers’ fellow employee and Rogers’ friend testified that Rogers had asked them for money, though both declined to give him any. After leaving work, Rogers went to the home he shared with his mother and father. He asked his father for money and received \$200. In addition, bank records show that Rogers withdrew nearly \$950 from his bank accounts on the day of the shooting. That money was not recovered.

After identifying Cox and obtaining the paper with the phone number on it, law enforcement sought subscriber information for that number. A warrant was issued, and the cell phone records from January 1 to March 24, 2017, including cell site location information (CSLI), were provided to law enforcement. In addition, law enforcement had access to Rogers’ cell phone.

According to the record, Rogers sent a text message to Cox at 6:37 p.m. the day of the shooting that said, “This Ronno.” Cell phone records show that there were several phone calls between Rogers and Cox on March 6, 2017, in the hour or so leading up to the shooting, but that there were no calls between the two within the approximately 2 months preceding the shooting. CSLI records further showed that Cox’s phone was in the area of the shooting at the time and that he was not in the area of his purported alibi.

Evidence offered at trial also linked Cox to a white Chevy Impala. When questioned by law enforcement, Dennis admitted that he had access to a white Impala that was registered

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in the name of his mother. Dennis led officers to the white Impala, which was parked near Cox's brother's residence. The car was impounded. The license plate screws on the car looked new, and there were what appeared to be glue marks from in-transit stickers in the window. Inside the car was a steering wheel cover and two remaining license plate screws in original packaging, along with a receipt from an auto parts store for the purchase of a steering wheel cover and license plate screws. Further investigation revealed video showing Cox purchasing those items.

Law enforcement was unable to locate Cox until February 26, 2018. During his interview, Cox acknowledged that his phone number was the same number ending in 6473; that he knew Rogers; that he had met with Rogers on March 6, 2017, the day of shooting; and that he wanted to obtain marijuana. Cox denied shooting Rogers and said he was with a female friend during the evening of the shooting. That friend, who testified that Rogers was her uncle, also testified that she did not recall seeing Cox on March 6 or 7 and that she did not see him until early April. In addition, as previously noted, Cox's CSLI data suggested that he was not at this friend's home on the day of the shooting.

PROCEDURAL HISTORY

Prior to trial, Cox filed motions to suppress his cell phone records and the statements he made to law enforcement in his February 26, 2018, interview. As to the statements, Cox argued that his rights under *Miranda v. Arizona*¹ were violated when he invoked his right to remain silent and officers continued to question him. As for the cell phone records, Cox argued that the warrant was obtained without probable cause as explained in *Carpenter v. U.S.*²

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

² *Carpenter v. U.S.*, 585 U.S. 296, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018).

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In its order, the district court denied the motion to suppress the statements. With respect to the cell phone records, the court noted that the State had conceded that “the search warrant, although obtained prior to *Carpenter* . . . , has not been remedied post-*Carpenter*. Accordingly, the State concedes this issue and Cox’s motion to suppress these records is granted.”

However, while the motion to suppress the cell phone records was pending, the State filed a second affidavit seeking a warrant for the cell phone records. The second affidavit included additional averments intended to cure the previous deficiency. A second warrant was then issued, and Cox filed another motion to suppress. The second motion was denied.

At trial, in response to questioning about Cox’s cell phone records, counsel for Cox objected on the basis of the motion to suppress. That objection was denied. Counsel for Cox objected at the next opportunity, stating: “Judge, I would just ask that my same objection be noted for the record and a standing objection for any new matters with respect to . . . 6473.” The court granted counsel’s “request for a standing objection.”

Counsel also objected to the admission of exhibit 162 on the basis of his motion to suppress. Exhibit 162 was a video of law enforcement’s first interview with Cox. In addition to showing that video, the detective who conducted the interview testified. Cox offered few objections to this testimony and made no objections on *Miranda* grounds.

Prior to the case being submitted to the jury, the State abandoned its theory that the murder was premeditated and proceeded solely on a felony murder theory. Cox was found guilty on all counts and sentenced to life imprisonment for felony murder, 25 to 30 years’ imprisonment for use of a deadly weapon, and 40 to 45 years’ imprisonment for possession of a firearm by a prohibited person.

ASSIGNMENTS OF ERROR

Cox assigns, restated and consolidated, that the district court erred in (1) admitting cell phone records for Cox’s cell

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phone in violation of Cox's Fourth Amendment rights and (2) admitting statements made by Cox that were in violation of Cox's Fifth Amendment rights as explained in *Miranda*.

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment or the safeguards established by the U.S. Supreme Court in *Miranda*, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth or Fifth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.³

ANALYSIS

On appeal, Cox assigns that the district court erred in admitting his cell phone records and in admitting statements made after he invoked his right to remain silent during his February 26, 2018, interrogation.

ADMISSIBILITY OF CELL PHONE RECORDS

Cox assigns that the district court erred in denying his second motion to suppress his cell phone records, including his CSLI. Cox's argument is rooted in the U.S. Supreme Court's decision in *Carpenter*.⁴

In *Carpenter*, the Court concluded that individuals had a reasonable expectation of privacy in their record of physical movements as captured by CSLI. Because of this expectation of privacy, the Court concluded that a warrant was, in most cases, required before such records could be acquired. The conclusion reached in *Carpenter* effectively overruled this court's earlier decision in *State v. Jenkins*,⁵ in which

³ *State v. Schriener*, 303 Neb. 476, 929 N.W.2d 514 (2019).

⁴ *Carpenter v. U.S.*, *supra* note 2.

⁵ *State v. Jenkins*, 294 Neb. 684, 884 N.W.2d 429 (2016).

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we held that the acquisition of CSLI did not implicate the Fourth Amendment.

Since *Carpenter*, this court has had the opportunity to address the applicability of the exclusionary rule and suppression of evidence as a remedy for a Fourth Amendment violation of the type at issue in this appeal.⁶ In both *State v. Brown*⁷ and *State v. Jennings*,⁸ we declined to apply the exclusionary rule to CSLI obtained without a warrant supported by probable cause, explaining in each case that the rationale for the exclusionary rule would not be met on the facts presented. In both of these cases, officers relied upon the Stored Communications Act to support court orders seeking cell phone records, and specifically CSLI. At the time the court orders were sought and executed, the U.S. Supreme Court had not yet decided *Carpenter*. We concluded that officers in each case were following the statute as written and that the statute in question was not clearly unconstitutional.

[2,3] The exclusion of evidence obtained in violation of the Fourth Amendment is not itself a constitutional right.⁹ Rather, it is a remedy designed to deter constitutional violations by law enforcement.¹⁰ Thus, in situations where the exclusion as a remedy would not deter law enforcement, several exceptions to the exclusionary rule have been recognized.¹¹ One of those exceptions applies to evidence obtained by police in objectively reasonable reliance on a statute later found to be unconstitutional.¹²

⁶ *State v. Jennings*, 305 Neb. 809, 942 N.W.2d 753 (2020); *State v. Brown*, 302 Neb. 53, 921 N.W.2d 804 (2019).

⁷ *State v. Brown*, *supra* note 6.

⁸ *State v. Jennings*, *supra* note 6.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

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In this case, law enforcement sought a court order based upon a statute that was, many months later, determined to be unconstitutional. Similar to *Brown* and *Jennings*, law enforcement's reliance on a court order issued under the Stored Communications Act, at a time when the act had not yet been found by the U.S. Supreme Court or by this court to implicate the Fourth Amendment, was not objectively unreasonable.

We observe that the district court originally granted Cox's motion to suppress below on the basis of the State's concession, but that the evidence was eventually admitted following the denial of a second motion to suppress. The district court reasoned that a subsequent warrant essentially cured any Fourth Amendment violation.

Of course, this reasoning varies from the reasoning we employ today, and in particular, this court's reasoning relies upon the good faith exception to the Fourth Amendment's warrant requirement. We have previously held that an appellate court may not, *sua sponte*, rely on the good faith exception to the warrant requirement.¹³ We explained that the concern with an appellate court's reaching the issue of good faith *sua sponte* is that a defendant must have sufficient opportunity to defend against the application of the exception.¹⁴ But a review of the record shows that this scenario is not presented here. The State raised the issue of good faith in its brief on appeal. Cox also argues the issue in his brief on appeal.

The district court did not err in admitting the CSLI evidence at trial. There is no merit to Cox's first assignment of error.

ADMISSIBILITY OF STATEMENTS

Cox also assigns that the district court erred in denying his motion to suppress statements made to law enforcement after he invoked his right to remain silent. He argues, in turn, that the district court erred in admitting those statements. Because

¹³ *State v. Tompkins*, 272 Neb. 547, 723 N.W.2d 344 (2006).

¹⁴ *Id.*

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Cox failed to object to the investigating detective's testimony about his statements, we find no error in the admission of these statements.

At issue are statements made during law enforcement's first interview of Cox on February 26, 2018. The State offered a video of that interview, exhibit 162, which was shown to the jury. The record shows, and the State acknowledges, that Cox objected to exhibit 162 on the basis of the earlier motion to suppress. But Cox did not seek a continuing objection, or object on the basis of *Miranda*, to any other testimony regarding the statements he made during the interview.

Rather, the detective testified, without objection, that Cox agreed that he knew Rogers, that the 6473 number was his, and that he provided the name of his alibi. In addition, Cox told the detective that he was dropped off at his brother's residence after seeing Rogers at the cell phone store and that he had been in a white Chevy Impala. Other evidence showed that the white Impala in this case, found near the brother's residence, was later seized.

[4] When a motion to suppress is overruled, the defendant must make a specific objection at trial to the offer of the evidence which was the subject of the motion to suppress in order to preserve the issue for review on appeal.¹⁵ Put another way, a failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal.¹⁶

Because there was no objection to the statements made by Cox and testified to by the interviewing detective, Cox has waived any right to assert error. The video that was shown and objected to was cumulative to that testimony as well as to other evidence presented at trial. Namely, several witnesses at the cell phone store testified that Rogers spoke to Cox at the

¹⁵ *State v. Piper*, 289 Neb. 364, 855 N.W.2d 1 (2014).

¹⁶ See *State v. Montoya*, 305 Neb. 581, 941 N.W.2d 474 (2020).

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store, both Cox's and Rogers' cell phone records supported contact between the two, and other evidence tied Cox to the white Chevy Impala.

[5] Even if the proper objections had been made, however, we would still find no reversible error in the admission of the statements, because any error would have been harmless. Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error, a guilty verdict surely would have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.¹⁷

During the challenged interview, Cox did not admit to the crime or even admit to being in the area at the time of the crime. When these statements are compared to the cell phone records of calls between Rogers and Cox, the CSLI, and the fact that Cox had control over a white Chevy Impala, which had been identified by multiple witnesses as being involved in the shooting, there was sufficient evidence unattributable to any error in offering the video and statements.

There is no merit to Cox's second assignment of error.

CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

¹⁷ *State v. Devers*, 306 Neb. 429, 945 N.W.2d 470 (2020).

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Cite as 307 Neb. 773



Nebraska Supreme Court

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STATE OF NEBRASKA, APPELLEE, v.

ALAN E. STACK, APPELLANT.

950 N.W.2d 611

Filed November 13, 2020. No. S-19-833.

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. **Verdicts: Insanity: Appeal and Error.** The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support such a finding.
3. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
4. **Motions to Dismiss: Directed Verdict: Waiver: Appeal and Error.** A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict but may still challenge the sufficiency of the evidence.
5. **Homicide: Intent.** Both second degree murder and voluntary manslaughter involve intentional killing; they are differentiated only by the presence or absence of the sudden quarrel provocation.
6. **Homicide: Words and Phrases.** A sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control.

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7. **Homicide: Intent.** It is not the provocation alone that reduces the grade of the crime, but, rather, the sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason so that the elements necessary to constitute murder are absent.
8. **Homicide: Words and Phrases.** A sudden quarrel does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim.
9. **Insanity: Proof.** The insanity defense requires proof that (1) the defendant had a mental disease or defect at the time of the crime and (2) the defendant did not know or understand the nature and consequences of his or her actions or that he or she did not know the difference between right and wrong.
10. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
11. **Sentences.** In determining a sentence to be imposed, relevant factors customarily considered and applied are the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.
12. _____. 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 Sarpy County: STEFANIE A. MARTINEZ, Judge. Affirmed.

Gregory A. Pivovar, and, on brief, John P. Hascall, Deputy Sarpy County Public Defender, for appellant.

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

HEAVICAN, C.J., MILLER-LEMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

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PAPIK, J.

Alan E. Stack appeals his convictions and sentences for second degree murder and use of a deadly weapon to commit a felony. Circumstantial evidence presented at Stack's bench trial linked him to the murder of a woman with whom he lived. In this appeal, Stack challenges the sufficiency of the evidence and the district court's finding that the evidence supported a conviction of second degree murder, rather than sudden quarrel manslaughter. He also claims that the district court erred in rejecting his insanity defense and imposed excessive sentences. Finding no merit to Stack's contentions, we affirm.

I. BACKGROUND

1. PROCEDURAL OVERVIEW

On November 16, 2017, family members found Beverley Diane Bauermeister dead in her home. Severe head trauma was evident. Bauermeister's elderly mother was in another room, alive but immobile. Stack, a heavy drinker, was living with Bauermeister and her mother at the time of Bauermeister's death.

Stack was ultimately charged with second degree murder; abuse of a vulnerable or senior adult; and use of a deadly weapon, other than a firearm, to commit a felony. Stack filed a notice of intent to rely on the insanity defense. He claimed that a mental defect impaired his mental capacity so that he did not understand the nature and consequences of his actions and that he did not have the ability to form the requisite intent.

At the subsequent bench trial, the State presented circumstantial evidence that tied Stack to the crimes charged. At the close of the State's case, Stack made a motion to dismiss all counts, which the district court overruled. Stack proceeded to present evidence in his defense, including testimony in support of his insanity defense. The State presented additional evidence opposing Stack's defense.

Once the parties rested, the district court ruled that there was insufficient evidence to find that Stack was either insane or could not form the specific intent to commit the crimes

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alleged. It convicted Stack of second degree murder and use of a deadly weapon to commit a felony, but it acquitted him of the abuse charge. Following a sentencing hearing, the district court sentenced Stack to consecutive terms of 80 years' to life imprisonment for second degree murder and 40 to 50 years' imprisonment for use of a deadly weapon to commit a felony. Stack now appeals.

2. CIRCUMSTANTIAL EVIDENCE AT TRIAL

(a) Crime Scene and Stack's Arrest

Stack and Bauermeister had been living together for more than 15 years but were not in a dating relationship at the time relevant to this case. By all accounts, Stack was an alcoholic.

Stack and Bauermeister shared a trailer home with Bauermeister's 90-year-old mother. Bauermeister's mother was wheelchair-bound, was unable to get out of bed on her own, and could not take care of her own basic needs.

Bauermeister's daughter testified that she and Bauermeister communicated daily, but Bauermeister did not respond to her daughter's attempts to reach her after they had a disagreement on November 8, 2017. On November 16, Bauermeister's daughter and brother discovered Bauermeister deceased on her living room floor. They found Bauermeister's mother in a bedroom, lying on her hospital bed in her own urine and feces. Bauermeister's mother was admitted to a hospital due to severe dehydration.

When law enforcement searched the residence, they observed that Bauermeister had severe head trauma, blood around her hair, yellow brain matter in her hair, and brown hair strands in her hand and on the carpet near her. The scene was processed for DNA and blood evidence. There was blood spatter in the living room area and additional possible blood evidence between the living room and Stack's bedroom. On the floor of Stack's bedroom, officers located a "Crosman 66 Powermaster BB rifle[/pellet gun]," .177 caliber, with a sight near the tip of the gun barrel. A gray or silver pellet was in the clip of the gun. A detective who investigated the scene

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testified that he observed what appeared to be dried bloodstains and brain matter on areas of the gun.

The same day Bauermeister's body was discovered, law enforcement took Stack into custody. They located him parked in Bauermeister's truck, which he sometimes drove. The officer who transported Stack to the station testified that he could smell the strong odor of an alcoholic beverage coming from Stack. At the station, Stack's clothing was collected. In photographs taken shortly after his arrest, Stack appears to have brown hair.

(b) Autopsy

Dr. Michelle Elieff, a general and forensic pathologist, conducted an autopsy of Bauermeister's body on November 17, 2017. Based on the decomposition of the body, Elieff estimated that Bauermeister had been deceased for days, perhaps up to a week. Elieff identified the cause of death as extensive blunt force head injuries and two penetrating wounds to the head. The extensive blunt force injuries included multiple skull fractures and multiple scalp lacerations. Regarding the penetrating wounds, Elieff explained they were "what we refer to as missile wounds; they are a type of gunshot wound that are resulting from small projectiles, pellet-type projectiles." Elieff recovered a missile projectile, consistent with a pellet, from behind Bauermeister's right eye.

Elieff opined that the right angle or rectangular component on the sight of the pellet gun found in Stack's bedroom could be consistent with Bauermeister's pattern injuries. She also opined that the circular tip of the barrel of the gun could have caused the injuries.

(c) Electronic Evidence

Upon Stack's arrest, Bauermeister's cell phone was found in her truck and later processed. There were 41 missed calls between November 14 and 16, 2017. The last four outgoing calls occurred between November 10 and 13. Twenty-seven text messages were received between November 9 and 16,

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but it could not be determined who had viewed the messages. The last outgoing text message occurred on November 8. The last message from Bauermeister's social media account was also sent on November 8.

During the search of the crime scene, officers seized a laptop computer from Stack's bedroom. A "Skype" account on the laptop bore the username "Al Stack." The laptop showed multiple internet searches on November 7, 2017, for the make and model of pellet gun found in Stack's bedroom, a "Crosman 66 Powermaster BB rifle[/pellet gun]." .177 caliber. On November 8, there were various searches for iterations of whether a .177 caliber pellet can penetrate a human skull. The next day, there were multiple searches inquiring about various methods of suicide, among them were searches for "[i]s it possible to kill yourself with a pellet gun" and "kill yourself with a pellet gun." Nearly 2 hours after the last of these searches, there were searches for "can a .177 cal. penetrate a human skull" and "can a .177 cal. 66 powermaster penetrate a human skull." On November 10, at 9:22 p.m., a search was made for "decomposition of a human body timeline." Searches for "what gets supplied for you in jail and prison" and "are socks and under[wear] provided in jail or prison" were made on the morning of November 12.

Based upon the history on the cell phone and the laptop, along with the crime scene, the detective who processed the electronic evidence opined that Bauermeister was killed on or about November 10, 2017.

(d) DNA Evidence

Forensic DNA analyst Mellissa Helligso tested numerous items for the presence of blood and for DNA. She used buccal swabs from Stack and Bauermeister for DNA comparison.

Helligso observed what appeared to be bloodstains on the front and back of Stack's pants, but she only tested a swab from one 2-inch long stain. That swab tested positive for blood. It generated a DNA mixture from two individuals. Bauermeister was not excluded as a major contributor. The

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probability of an unrelated individual matching the major DNA profile, given that Bauermeister expressed the profile, was 1 in 1.08 nonillion, which Helligso testified “is 30 zeros.” Stack was not excluded as a partial profile contributor. The probability of an unrelated individual matching the partial profile, given that Stack expressed such a profile, was 1 in 1.66 billion.

Also positive for blood were swabs from Stack’s left shoe, which had a few areas of visible blood; from various areas of the pellet gun; and from Bauermeister’s fingernails and her cell phone. DNA testing showed that Bauermeister was not excluded as the source. The probability of an unrelated individual matching the DNA profile, given that Bauermeister expressed such a profile, was 1 in 1.08 nonillion.

Helligso tested a swab from various textured areas of the gun for “touch DNA” contributed by skin cells. The swab generated a DNA profile from a mixture of two individuals. Stack and Bauermeister were not excluded as contributors. As to Stack, the probability of an unrelated individual matching the DNA profile, given that Stack expressed such a profile, was 1 in 36.3 sextillion. Regarding Bauermeister, the probability of an unrelated individual matching the DNA profile, given that Bauermeister expressed such a profile, was 1 in 17.9 quintillion. Helligso testified that she cannot know when DNA was deposited on an item and that she has found touch DNA on an item up to 2 years after it has been handled by a person.

Helligso attempted to test a brown hair strand found in Bauermeister’s hand, but she could not obtain a DNA profile from the root area. And she did not have the capability in her laboratory to test the remainder of the strand for a different form of DNA.

(e) Jailhouse Recordings

While incarcerated for the present offenses, Stack spoke to his brother. A recording of their conversation was received as evidence. In the conversation, Stack told his brother about

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his relationship with Bauermeister and his limited memory of the days surrounding her death:

Stack's brother: So you just don't even remember what happened . . . ?

Stack: No, I remember a couple of days before, I mean, how irritated I was getting and drunk because that was the only thing that would calm me down [T]here's not much I can say, I mean, I can say how evil and mean [Bauermeister] was to me for a long period of time because that's what I remember from before, but I don't remember damn near probably five days. I just don't.

Stack's brother: Well, I would assume you were hammered.

Stack: Yeah I was drinking over a case of beer and I went back to booze too. I was drinking booze.

. . . .

Stack: . . . [T]he night they found me in the parking lot. They arrested me.

. . . .

Stack's brother: So what did you do for those days?

Stack: I don't remember. I just drunk, drank. I don't remember. I drank and drove around. I didn't eat anything. I was, I was upset. I don't know. I remember, I don't know what I really remember. It seems like I remember at one point I knew I was gonna be dead or something because I went back home and seen, seen the house and I had to just stay drunk.

. . . .

Stack's brother: . . . I mean, um, I get, I get that you blacked out, um, but you said you went, you actually, after you had done it there was a point in time when you went back there?

Stack: I'm a, I slightly remember it, yeah, because I knew I had to leave, get outta there and I don't remember how long it was that I was driving around in the truck before they found me . . . I didn't have no clue where

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I was. All I know is I was drinking booze and beer constantly, not eating and that's all I can explain.

Minutes later in the conversation, Stack continued:

[T]o me, that's not me. I obviously fucking lost it or something. I don't know. I know I was drinking hard and I know I was fed up a long time before that. It got to that point. I know that, I remember that much. For me to believe everything or what actually happened, I just don't know, and I don't even really want to talk about it now.

....

Stack's brother: . . . [I]f you're hammered and you do what apparently it looks like you did, I don't think it makes you any less guilty.

Stack: No, I don't think it does either. . . .

. . . I mean I did want to be alone. That's what I was thinking weeks, weeks before. I started to get real drunk again I was and I did want to be alone, I did want to be alone. I didn't want to listen to her mouth anymore. I remember thinking things like that but that's not, that hasn't got anything to do with it. I don't. But that's, I mean that's why I was in no hurry to call anybody anyway because I didn't want to sit here and try to explain shit to everybody that I don't even understand myself.

The district court also received a recording of a telephone conversation Stack had with his sister while in jail awaiting trial for the present offenses:

Stack: They pulled some shit off of my computer or somethin' I think is what they're sayin'. They don't, they don't know what I was doin' with it. I don't even know what they But I know what I looked up on the computer. I was looking up suicides and I was looking up what I could shoot with my BB gun and stuff like that. I know that's what I looked up because that was before I went on a drinking rampage[.]

....

Stack's sister: But you remember searching stuff like that?

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Stack: Mm. . . hm . . . that was before I went off the reservation.

Stack's sister: Yeah, okay, alright, mm, ok so you do remember that so I don't know do you think maybe you did a search on something else that you don't remember?

Stack: It's possible. I mean I don't know about that. I mean I remember what I did do as far as, you know as far as suicide I know I did do that because I remember that because

Stack's sister: Okay.

Stack: I was the one who wanted out. I wasn't going to do anything about her.

3. TESTIMONY RELEVANT TO
INSANITY DEFENSE

(a) Testimony of Dr. Terry Davis

In support of his insanity defense, Stack presented the testimony of Dr. Terry Davis, a board-certified forensic and addiction psychiatrist. Davis interviewed Stack in March 2018 and performed a mental status examination. He also reviewed Stack's medical record from an emergency room visit on November 17, 2017; information from Bauermeister's family; police reports; and a transcript of a recorded conversation between Stack and his brother.

Davis diagnosed Stack with a mild neurocognitive disorder and a severe level of alcohol use disorder. Davis testified that in Stack's evaluation and the records he reviewed, Stack consistently said that he did not remember killing Bauermeister, but he had brief memories from being in "his" truck on November 16, 2017, and speaking to an officer.

Davis testified about other statements Stack made in the evaluation that were received for the limited purpose of diagnosis, not the truth of the matter asserted. Stack informed Davis that he drank "constantly" before he was arrested and that he drank beer daily. He also stated that he drank hard liquor but switched to beer primarily after he developed pancreatitis. He

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said that he did not have much of a memory of 1 or 2 months prior to Bauermeister's death because of his alcohol use.

Davis testified that severe alcohol use disorder can impair one's cognitive functioning on a permanent basis. Davis explained that an individual who drinks a large amount of alcohol may experience a blackout, or a period of "anterograde amnesia," and may not form lasting memories of what occurred during the blackout period. He testified that immediate and short-term memory are impaired during an alcoholic blackout. According to Davis, the blood alcohol concentration range for a blackout varies from person to person, but the range is typically between ".20 and .30 on the milligram percent scale." Davis observed that Stack's medical record from several hours after his arrest showed that his blood alcohol content was .119. And Stack reported that he previously experienced blackouts. Davis testified that Stack is more at risk for a blackout because of his mild neurocognitive disorder, but that the disorder itself would not cause a blackout.

It was Davis' opinion that, assuming Stack killed Bauermeister and did not have a memory of killing her, Stack was unable to form the specific intent to kill because he experienced an alcoholic blackout resulting from a combination of his alcohol ingestion and his alcohol-induced mild neurocognitive disorder. Again assuming that Stack killed Bauermeister, Davis opined that he suffered at that time from a mental disease or defect, specifically an alcohol-induced mild neurocognitive disorder. Further, as a result of that disorder, in combination with his consumption of alcohol, Stack experienced an alcoholic blackout, which caused him to be unable to know and understand the nature and consequences of his actions.

Davis opined that Stack's substance-induced mild neurocognitive disorder alone did not mean that Stack could not form the intent to kill Bauermeister, nor did it alone cause him not to know the nature and consequences of his actions. He explained that Stack's voluntary ingestion of alcohol was necessary to cause the blackout that, in combination with the

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mild neurocognitive disorder, was the basis of Davis' opinions on intent and insanity.

(b) Testimony of Klaus Hartmann
and Mindy Abel

Dr. Klaus Hartmann, a board-certified forensic psychiatrist, evaluated Stack in December 2018 and reviewed the same or similar information as Davis, along with Davis' report. Dr. Mindy Abel, a clinical psychologist, was present for Hartmann's interview with Stack and conducted diagnostic testing. Hartmann testified that he disagreed with the method Davis used to diagnose Stack with mild neurocognitive disorder. Using a different method, Hartmann and Abel concluded that Stack did not have a neurocognitive disorder because he was able to remember the events leading up to and after Bauermeister's death. Hartmann testified that even people with mild neurocognitive disorders should know the consequences of their actions and appreciate what they are doing. Hartmann and Abel recognized that Stack had a history of blackouts. But Hartmann testified that someone who suffers from an alcoholic blackout knows and understands the consequences of their actions. Hartmann opined that Stack was not insane when Bauermeister was killed.

4. SENTENCING

After rejecting Stack's insanity defense and finding him guilty of second degree murder and use of a deadly weapon to commit a felony, the district court ordered a presentence investigation report. It then conducted a sentencing hearing at which victim impact statements were received and the parties presented arguments. Considering the customary factors, the presentence investigation report, the victim impact statements, and the parties' arguments, the district court sentenced Stack within statutory limits. It imposed consecutive terms of 80 years' to life imprisonment for second degree murder and 40 to 50 years' imprisonment for use of a deadly weapon to commit a felony.

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II. ASSIGNMENTS OF ERROR

Stack assigns that the district court erred in (1) declining to direct a verdict and finding the evidence sufficient to support the verdicts; (2) determining that the evidence supported a finding of second degree murder rather than manslaughter; (3) overruling his insanity defense; and (4) imposing excessive sentences.

III. STANDARD OF REVIEW

[1] In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Martinez*, 306 Neb. 516, 946 N.W.2d 445 (2020).

[2] The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support such a finding. *State v. France*, 279 Neb. 49, 776 N.W.2d 510 (2009).

[3] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Leahy*, 301 Neb. 228, 917 N.W.2d 895 (2018).

IV. ANALYSIS

1. SUFFICIENCY OF EVIDENCE

We begin with Stack's challenge to the sufficiency of the evidence. He argues that he was entitled to a directed verdict; that the circumstantial evidence in this case warrants a different standard of review; that the evidence does not support a conviction for second degree murder; and that if the district

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court convicted him of any homicide offense, it should have been sudden quarrel manslaughter. As we will explain, these claims lack merit.

(a) Directed Verdict

[4] Stack asserts that the district court erred by declining to grant a directed verdict in response to the motion to dismiss he made at the close of the State's case. But Stack waived this argument. The record shows that after Stack's motion was denied, he put on evidence in his defense. A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict but may still challenge the sufficiency of the evidence. *State v. Vann*, 306 Neb. 91, 944 N.W.2d 503 (2020). We therefore consider only Stack's assertion that the evidence as a whole was insufficient to support his convictions.

(b) Standard of Review

Because the standard of review defines our view of the evidence, we consider it before turning to the facts of this case. In arguing that the evidence was insufficient, Stack asks us to return to a standard of review that we have long since abandoned.

It is well established that 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

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of the crime beyond a reasonable doubt. *State v. Martinez*, 306 Neb. 516, 946 N.W.2d 445 (2020).

Stack acknowledges the controlling standard of review, but he adds that “there are situations that just require this Court to take a different view of circumstantial evidence cases.” Brief for appellant at 21. Stack suggests that we apply the “accused’s rule,” which provides that when two equal presumptions from circumstantial evidence—one in favor of innocence and the other in favor of guilt—are presented, a presumption in favor of innocence is to be preferred and applied. See *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995). For support, he cites some federal circuit courts that have applied a similar rule. See, e.g., *U.S. v. Glenn*, 312 F.3d 58 (2d Cir. 2002) (if evidence viewed in light most favorable to verdict gives equal or nearly equal circumstantial support to theory of guilt and theory of innocence of crime charged, appellate court must reverse conviction); *U.S. v. Flores-Rivera*, 56 F.3d 319 (1st Cir. 1995) (same). But see, e.g., *U.S. v. Vargas-Ocampo*, 747 F.3d 299 (5th Cir. 2014) (abandoning rule).

Based on the evidence here, we have doubts that an application of the accused’s rule would lead to a finding of insufficient evidence. But we need not resolve that issue, because we decline Stack’s invitation to resurrect a rule that we have repeatedly rejected.

Prior to 1981, this court applied the accused’s rule when reviewing circumstantial evidence. See *State v. Pierce*, *supra*. But observing various reasons why circumstantial evidence should be treated the same as direct evidence, we abandoned the accused’s rule in *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981). In *Buchanan*, we held that one accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt, and we disclaimed any requirement that the State disprove every hypothesis but that of guilt. Over the years, we have briefly veered from this approach, only to steer definitively back to it and place circumstantial

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evidence on equal footing with direct evidence. See, *State v. Skalberg*, 247 Neb. 150, 526 N.W.2d 67 (1995), *overruled*, *State v. Pierce*, *supra*; *State v. Dawson*, 240 Neb. 89, 480 N.W.2d 700 (1992), *abrogated*, *State v. Pierce*, *supra*; *State v. Trimble*, 220 Neb. 639, 371 N.W.2d 302 (1985), *overruled*, *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991), *disapproved on other grounds*, *Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994). Most recently, in *State v. Olbricht*, 294 Neb. 974, 885 N.W.2d 699 (2016), this court thoroughly recounted the demise of the accused's rule in Nebraska and again rejected the suggestion that it should be applied. And in light of our jurisprudence on the matter, we see no reason to apply the accused's rule here.

(c) Circumstantial Evidence Supports
Stack's Convictions

With our well-established standard of review in mind, we now determine whether there was sufficient evidence to support Stack's convictions for second degree murder and use of a deadly weapon to commit a felony. Stack challenges the sufficiency of the evidence on two bases. First, he argues that the evidence did not prove that he was the person who killed Bauermeister or that his pellet gun, which he does not dispute is a deadly weapon other than a firearm, was used to kill her. Second, he argues in the alternative that the district court should have convicted him of voluntary sudden quarrel manslaughter, rather than second degree murder. But both of these arguments fail.

[5] To prove second degree murder, a felony offense, the State was required to show beyond a reasonable doubt that Stack caused Bauermeister's death "intentionally, but without premeditation." See Neb. Rev. Stat. § 28-304 (Reissue 2016). Voluntary manslaughter, also a felony, is a lesser degree offense, not a lesser-included offense, of second degree murder. See *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012). That is, it is possible to commit second degree murder without committing voluntary manslaughter. See *id.* Both second

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degree murder and voluntary manslaughter involve intentional killing; they are differentiated only by the presence or absence of the sudden quarrel provocation. *State v. Smith, supra* (where there is evidence that killing occurred intentionally without premeditation and that defendant acted under provocation of sudden quarrel, fact finder has option of conviction of second degree murder or voluntary manslaughter depending on resolution regarding sudden quarrel provocation.) See, also, Neb. Rev. Stat. § 28-305(1) (Reissue 2016).

In disputing the theory that he committed second degree murder by killing Bauermeister with his pellet gun, Stack takes a selective view of the evidence, focuses on other possible explanations for Bauermeister's death, and characterizes the investigation as incomplete. In essence, Stack contends that the State failed to disprove every hypothesis, other than Stack's guilt, that could be drawn from the circumstantial evidence. And according to Stack, even if the evidence did show that he killed Bauermeister with his pellet gun intentionally and without premeditation, evidence of multiple blows demonstrated that a sudden quarrel occurred and that voluntary manslaughter was the proper conviction. To support this position, Stack further cites a lack of evidence about recent fighting or animosity between Stack and Bauermeister and a lack of evidence conclusively showing when the internet searches occurred in relation to Bauermeister's death. That is, Stack suggests that the circumstantial evidence supports the presumption that a sudden quarrel occurred to the same extent that it supports the opposite conclusion and that we should resolve the matter in favor of the less onerous offense. However, as explained above, whether arguing that he did not kill Bauermeister or that he did so upon a sudden quarrel, Stack depends on an improper standard of review. Viewing the evidence in the light most favorable to the prosecution, as our standard of review requires, a rational trier of fact could have found beyond a reasonable doubt that Stack used his pellet gun, a deadly weapon other than a firearm, to kill

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Bauermeister intentionally, but without premeditation and not upon a sudden quarrel.

The State presented circumstantial evidence that Stack, without premeditation, intentionally killed Bauermeister with his pellet gun. The record shows that over time, Stack had become irritated with Bauermeister and wanted to be alone. Bauermeister was found on November 16, 2017, in the residence she and Stack shared, dead due to blunt force head trauma from multiple blows and multiple missile injuries, both consistent with a pellet gun Stack owned. Testing showed an extremely high probability that blood found on the pellet gun was Bauermeister's and that touch DNA on the weapon belonged to Stack. In Bauermeister's hand and on the floor nearby were strands of brown hair, like Stack's. Stack was apprehended with Bauermeister's cell phone, which had blood on it that was most likely Bauermeister's. Testing of two spots among multiple bloodstains revealed an extremely high probability that Bauermeister's blood was on the pants and one of the shoes Stack was wearing when he was arrested. Stack's computer reflected that from November 7 through 9, the days before Bauermeister's estimated date of death, there were internet searches regarding whether a pellet gun could kill someone, among searches for suicide methods. In postarrest statements to his sister, Stack admitted to conducting internet searches related to suicide and what he could shoot with his pellet gun. On November 10, there was a search for "decomposition of a human body timeline," followed by searches inquiring what items are provided in prison. In a conversation after his arrest, Stack did not contradict his brother's suggestion that Stack had killed Bauermeister and confirmed that he was at the crime scene after her death.

[6-8] Furthermore, upon our review of the record, we see no evidence of a sudden quarrel. A sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control. *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012). It is not the provocation alone that reduces the grade of the crime, but, rather, the

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sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason so that the elements necessary to constitute murder are absent. *Id.* Although there was evidence that Stack was irritated with Bauermeister, in the absence of some provocation, a defendant's anger with the victim is not sufficient to establish the requisite heat of passion. *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011). And the fact that Stack may have been intoxicated is not a proper consideration in determining whether the killing arose from a sudden quarrel. See *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012). Further, contrary to Stack's suggestion, a sudden quarrel does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim. *Id.*

In sum, under the proper standard of review, we conclude the evidence was sufficient to support Stack's convictions.

2. INSANITY DEFENSE

Any person prosecuted for an offense may plead that he or she is not responsible by reason of insanity at the time of the offense. Neb. Rev. Stat. § 29-2203(1) (Reissue 2016). A successful insanity defense would be dispositive in Stack's favor, regardless of the evidence that he killed Bauermeister with a deadly weapon. See *State v. Bigelow*, 303 Neb. 729, 931 N.W.2d 842 (2019) (successful insanity defense operates as complete defense). Therefore, even though the evidence was sufficient to prove the elements of second degree murder and use of a deadly weapon other than a firearm to commit a felony, we must address Stack's claim that the district court erred by finding that he had failed to prove he was legally insane at the time he committed those offenses.

[9] Generally, under Nebraska's common-law definition, the insanity defense requires proof that (1) the defendant had a mental disease or defect at the time of the crime and (2) the defendant did not know or understand the nature and

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consequences of his or her actions or that he or she did not know the difference between right and wrong. *Id.* The defendant carries the burden to prove the defense by a preponderance of the evidence. See § 29-2203(1). The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support such a finding. *State v. France*, 279 Neb. 49, 776 N.W.2d 510 (2009).

To support his insanity defense, Stack relies on the testimony of Davis, who opined that Stack had a mild neurocognitive disorder and that as a result of such mental disease or defect in combination with his alcohol consumption, Stack experienced an alcoholic blackout, which caused him to be unable to know and understand the nature and consequences of his actions. However, as the State points out, under § 29-2203(4), “insanity does not include any temporary condition that was proximately caused by the voluntary ingestion . . . of intoxicating liquor.” Pursuant to this statute, the State argues, Stack was not legally insane under Davis’ opinion because it was based on Stack’s experiencing a blackout, a temporary condition caused by voluntary alcohol consumption. Stack contends that because voluntary intoxication was not the sole basis for Davis’ opinion that he was insane, Stack is not precluded from the benefit of the insanity defense. Although we have discussed the relationship between intoxication and insanity, we have not, since the adoption of § 29-2203(4), considered whether voluntary intoxication in combination with a mental disease or defect can be the basis for a successful insanity defense. See, *State v. Bigelow*, *supra*; *State v. Hotz*, 281 Neb. 260, 795 N.W.2d 645 (2011). And based on the record in this case, we need not do so today.

Here, even if the State’s argument concerning voluntary intoxication is set to the side, there was sufficient evidence that Stack did not fulfill a crucial element of legal insanity: a mental disease or defect. As mentioned, Stack’s expert, Davis, opined that Stack had a mental disease or defect in the form of a mild neurocognitive disorder. However, the State’s experts, Hartmann and Abel, disagreed. Their diagnostic

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testing showed that Stack did not suffer from a mild neuro-cognitive disorder. Thus, Davis' opinion on the issue of legal insanity was in direct conflict with the evidence presented by the State, and it was the province of the district court to resolve that conflict. See *State v. Martinez*, 306 Neb. 516, 946 N.W.2d 445 (2020) (appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, or reweigh evidence; such matters are for finder of fact). Given the opinions of Hartmann and Abel, the record contained sufficient evidence for the district court to conclude that Stack was not legally insane at the time of Bauermeister's murder. Stack's assertion to the contrary lacks merit.

3. EXCESSIVE SENTENCES

Lastly, Stack contends that his sentences were excessive. He does not and cannot dispute that he was sentenced within statutory limits. Instead, Stack argues that the sentences do not fit the crime or him as an offender. He points out that given his age, he will effectively have no opportunity for parole for crimes that he characterizes as not especially depraved and heinous. He also cites his limited criminal record and his poor health as mitigating factors. We are not persuaded.

[10-12] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Price*, 306 Neb. 38, 944 N.W.2d 279 (2020). In determining a sentence to be imposed, relevant factors customarily considered and applied are the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor

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and attitude and all the facts and circumstances surrounding the defendant's life. *Id.*

According to the record, the district court considered the familiar factors above, along with other information in the presentence investigation report and evidence received at the sentencing hearing. Thus, it took into account the factors Stack says justified a lesser penalty along with other factors. Those other factors included the particularly violent nature of Bauermeister's murder and the circumstances surrounding it. Based on the record in this case and the relevant considerations, we conclude that the district court did not abuse its discretion in sentencing Stack.

V. CONCLUSION

Finding no merit to the errors assigned and argued by Stack, we affirm.

AFFIRMED.

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TDP PHASE ONE v. THE CLUB AT THE YARD
Cite as 307 Neb. 795



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

TDP PHASE ONE, LLC, APPELLEE, v. THE CLUB
AT THE YARD, LLC, DOING BUSINESS AS
RULE G NIGHT CLUB, AND ERIC
F. MARSH, APPELLANTS.

950 N.W.2d 640

Filed November 13, 2020. No. S-19-1198.

1. **Jurisdiction.** The question of jurisdiction is a question of law.
2. **Jurisdiction: Appeal and Error.** 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.
3. **Claims: Parties: Judgments: Appeal and Error.** Where the proceedings below involved multiple claims for relief or multiple parties, and the court has adjudicated fewer than all the claims or the rights and liabilities of fewer than all the parties, then, absent a specific statute governing the appeal providing otherwise, Neb. Rev. Stat. § 25-1315 (Reissue 2016) controls and mandates that the order is not immediately appealable unless the lower court issues an express determination for the entry of judgment upon an express determination that there is no just reason for delay.
4. **Statutes: Final Orders: Intent.** The intent behind Neb. Rev. Stat. § 25-1315(1) (Reissue 2016) was to prevent interlocutory appeals, not make them easier.
5. **Claims: Parties: Judgments: Appeal and Error.** Neb. Rev. Stat. § 25-1315(1) (Reissue 2016) attempts to strike a balance between the undesirability of piecemeal appeals and the potential need for making review available at a time that best serves the needs of the parties.
6. ____: ____: ____: _____. Certification of a final judgment must be reserved for the “unusual case” in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by the pressing needs of the litigants for an early and separate judgment as to some claims or parties.

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7. **Claims: Parties: Final Orders.** The power Neb. Rev. Stat. § 25-1315(1) (Reissue 2016) confers upon the trial judge should be used only in the “infrequent harsh case” as an instrument for the improved administration of justice, based on the likelihood of injustice or hardship to the parties of a delay in entering a final judgment as to part of the case.
8. **Parties: Judgments: Appeal and Error.** Every party seeking certification may eventually appeal the judgment in question.
9. **Claims: Final Orders.** A court should be particularly cautious in certifying as final a judgment on a claim which is not truly distinct from the claims on remaining issues, for even if the certified judgment is inherently final, the facts underlying the claim resulting in that judgment may be intertwined with the remaining issues.
10. **Statutes.** To the extent there is a conflict between two statutes on the same subject, the specific statute controls over the general.
11. **Statutes: Appeal and Error.** When a statute is not ambiguous, an appellate court ordinarily looks no further than the plain language of the statute. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
12. **Actions: Parties: Final Orders: Appeal and Error.** One may bring an appeal pursuant to Neb. Rev. Stat. § 25-1315(1) (Reissue 2016) only when (1) multiple causes of action or multiple parties are present, (2) the court enters a final order within the meaning of Neb. Rev. Stat. § 25-1902 (Supp. 2019) as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal.
13. **Claims: Parties: Final Orders: Appeal and Error.** In the absence of an express determination that there is no just reason for delay and upon an express direction for the entry of judgment, orders, however designated, adjudicating fewer than all claims or the rights of fewer than all the parties are not final. Absent an entry of judgment under Neb. Rev. Stat. § 25-1315 (Reissue 2016), no appeal will lie unless all claims have been disposed as to all parties in the case.

Appeal from the District Court for Lancaster County: LORI A. MARET, Judge. Appeal dismissed.

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

Gregory S. Frayser and Nathan D. Clark, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

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HEAVICAN, C.J., MILLER-LEMAN, CASSEL, STACY, and
FREUDENBERG, JJ.

FREUDENBERG, J.

NATURE OF CASE

After its tenant failed to pay rent and refused to vacate the premises, a commercial landlord brought suit for restitution of premises pursuant to the forcible entry and detainer (FED) statutes, Neb. Rev. Stat. §§ 25-21,219 through 25-21,235 (Reissue 2016 & Cum. Supp. 2018). The landlord also brought claims for breach of the lease agreement and breach of the guaranty agreement. The tenant counterclaimed for breach of contract, breach of implied covenant of good faith and fair dealing, money had and received, and fraud in the inducement of the lease and guaranty agreements. The tenant also brought suit against the property management company and its owners, as third-party defendants, for civil conspiracy to tortiously interfere with a business expectancy and fraud in the inducement of the lease and guaranty agreements.

The tenant appeals from an order of summary judgment in favor of the landlord on its FED claim. The district court's order did not resolve the remaining claims of either the landlord or the tenant, and no request was made of the district court to issue a certification under Neb. Rev. Stat. § 25-1315 (Reissue 2016). We hold that this court is without jurisdiction over the present appeal.

BACKGROUND

TDP Phase One, LLC (TDP), a commercial landlord, entered into a 10-year lease agreement with The Club at the Yard, LLC, doing business as Rule G Night Club (Rule G), signed by its managing member and guarantor, Eric F. Marsh, in 2013. The property at issue is located in the "Railyard," an entertainment district in Lincoln, Nebraska, with a common area in the middle and tenants surrounding it. TDP owns the Railyard. The tenants surrounding the Railyard share costs of the common area, which they pay pursuant to the terms

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of their lease agreements. When Rule G failed to pay rent in April through July 2019, TDP prepared a 3-day notice to quit, mailing the notice to Marsh and hand delivering a copy to the attorney of record at all relevant times for Rule G. TDP then brought suit against Rule G, alleging restitution of the premises pursuant to §§ 25-21,219 through 25-21,235, as well as claims of breach of contract relating to both the lease and the guaranty agreements. TDP asserted that Rule G failed to pay rent in breach of its lease, that Marsh refused to pay the rent owed as Rule G's guarantor, and that Rule G refused to vacate the premises after TDP prepared and sent a 3-day notice to quit pursuant to § 25-21,221. In its restitution action, TDP sought restitution, costs, and such other relief as was just and equitable.

Rule G challenged proper notice pursuant to § 25-21,221 and raised various defenses, including waiver, prior material breach, and that Rule G was entitled to a setoff due to its overpayment of rent. Rule G also counterclaimed against TDP for (1) breach of contract, (2) breach of implied covenant of good faith and fair dealing, (3) money had and received, and (4) fraud in the inducement of the lease and the guaranty agreements. Finally, Rule G filed a third-party complaint against the management company for the property and its sole members, alleging they conspired to tortiously interfere with its business expectancies.

TDP moved for partial summary judgment, seeking a determination of its FED claim, asserting that there was no genuine issue of material fact as to its right to restitution of the premises. The court determined that Rule G failed to make all payments of rent due under the lease agreement and failed to deliver possession of the property within 3 days of the notice. The court found this entitled TDP to immediate restitution of the property.

In its order, the court rejected Rule G's claim that TDP did not satisfy the notice requirement required by § 25-21,221. It declined to construe § 25-21,221 as requiring notice to be served in the same manner as a summons in a civil action.

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Further, the court was not persuaded by Rule G's arguments that TDP waived its FED claim by accepting rental payments after filing suit and that there was a genuine issue of material fact as to whether Rule G was entitled to a setoff for the overpayment of rent under the lease agreement. The court noted that the lease agreement clearly provided that the acceptance of rent is not a waiver of default and that setoff for overpayment of the rent was explicitly precluded by the lease agreement. The court further observed that Rule G's fraudulent inducement claims were barred by the statute of limitations. It did not address any other counterclaims or third-party claims.

Rule G and Marsh appeal the order granting summary judgment to TDP on its FED claim. However, neither sought a § 25-1315 certification from the district court.

ASSIGNMENTS OF ERROR

Rule G and Marsh assign that the district court erred in granting the partial summary judgment for TDP, because the district court erroneously (1) concluded overpayments could not be considered to prove that the rents were paid, (2) did not allow discovery concerning prepayments of rent and calculations of rent credits, (3) found proper presuit notice was given under § 25-21,221, and (4) granted summary judgment for restitution against a lease guarantor who is not a party in possession of the leased premises.

STANDARD OF REVIEW

[1] The question of jurisdiction is a question of law.¹

ANALYSIS

[2] Before reaching the assignments of error asserted by Rule G and Marsh, this court must first determine whether it has jurisdiction over this appeal. It is the power and duty of an appellate court to determine whether it has jurisdiction

¹ *State v. Harris*, ante p. 237, 948 N.W.2d 736 (2020). See, also, *Federal Nat. Mortgage Assn. v. Marcuzzo*, 289 Neb. 301, 854 N.W.2d 774 (2014).

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over the matter before it, irrespective of whether the issue is raised by the parties.² In doing so, we find that we lack jurisdiction over the present appeal, because it lacks certification under § 25-1315.

Section 25-1315(1) provides in full:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

[3] Where the proceedings below involved multiple claims for relief or multiple parties, and the court has adjudicated fewer than all the claims or the rights and liabilities of fewer than all the parties, then, absent a specific statute governing the appeal providing otherwise,³ § 25-1315 controls and mandates that the order is not immediately appealable unless the lower court issues an “express direction for the entry of judgment” upon “an express determination that there is no just reason for delay.”

² *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003).

³ See *R & D Properties v. Altech Constr. Co.*, 279 Neb. 74, 776 N.W.2d 493 (2009) (finding Neb. Rev. Stat. § 25-1315.03 (Reissue 2016) to be more specific and controlling statute over § 25-1315 and allowing appeal without § 25-1315 certification).

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This case involved both multiple claims for relief and multiple parties, and the order of restitution appealed from adjudicated both fewer than all the claims and the rights and liabilities of fewer than all the parties. TDP filed suit against Rule G for breach of contract, breach of guaranty, and restitution of premises. Rule G in turn brought several counterclaims, as well as a third-party complaint against the property's management company for fraud and tortious interference. TDP filed a motion for partial summary judgment, and the district court entered an order of restitution granting TDP restitution of the premises. This order disposed only of TDP's restitution-of-premises claim against Rule G. The district court has yet to adjudicate TDP's breach of contract and guaranty claims, Rule G's counterclaims against TDP, and Rule G's third-party claims against the property's management company.

[4,5] The intent behind § 25-1315(1) was to prevent interlocutory appeals, not make them easier.⁴ Prior to the enactment of § 25-1315, an order that effected a dismissal with respect to one of multiple parties was a final, appealable order, and the complete dismissal with prejudice of one of multiple causes of action was a final, appealable order, but an order dismissing one of multiple theories of recovery, all of which arose from the same set of operative facts, was not a final order for appellate purposes.⁵ Section 25-1315 was an evident attempt by the Legislature to simplify the issue and clarify many of the questions regarding final orders when there are multiple parties and claims.⁶ It attempts to strike a balance between the undesirability of piecemeal appeals and the potential need for making review available at a time that best serves the needs of the parties.⁷

⁴ *Rafert v. Meyer*, 298 Neb. 461, 905 N.W.2d 30 (2017).

⁵ *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

⁶ *Id.*

⁷ *Id.*

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[6-9] Certification of a final judgment must be reserved for the “unusual case” in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by the pressing needs of the litigants for an early and separate judgment as to some claims or parties.⁸ The power § 25-1315(1) confers upon the trial judge should be used only in the “infrequent harsh case” as an instrument for the improved administration of justice, based on the likelihood of injustice or hardship to the parties of a delay in entering a final judgment as to part of the case.⁹ Every party seeking certification may eventually appeal the judgment in question.¹⁰ A court should be particularly cautious in certifying as final a judgment on a claim which is not truly distinct from the claims on remaining issues, for even if the certified judgment is inherently final, the facts underlying the claim resulting in that judgment may be intertwined with the remaining issues.¹¹

[10] To the extent there is a conflict between two statutes on the same subject, the specific statute controls over the general,¹² but we find no statute applicable here that conflicts with § 25-1315. The statute applicable in the present case, § 25-21,233, provides: “Any party against whom judgment has been entered in an action of [FED], or forcible detention only, of real property, may appeal as provided for in a civil action.” There is nothing in the language of § 25-21,233 indicating that an order of restitution resolving a FED claim, when it adjudicates fewer than all claims for relief and the rights and liabilities of fewer than all the parties in the action in which such claim was brought, should be immediately appealable without having to obtain a certified judgment pursuant to § 25-1315.

⁸ *Rafert v. Meyer*, *supra* note 4.

⁹ *Id.*

¹⁰ *Cerny v. Todco Barricade Co.*, *supra* note 5.

¹¹ *Id.*

¹² *Becher v. Becher*, 299 Neb. 206, 908 N.W.2d 12 (2018).

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[11] When a statute is not ambiguous, an appellate court ordinarily looks no further than the plain language of the statute.¹³ Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.¹⁴ Section 25-21,233, by its plain language, directs that the party against whom judgment has been entered in a FED action may appeal only “as provided for in a civil action.” And § 25-1315 governs civil actions. Thus, by the plain language of § 25-21,233, when the FED claim is part of an action involving multiple claims or multiple parties, § 25-1315 governs the immediate appealability of an order determining the FED claim.

The language of § 25-21,233 is distinguishable from § 25-1315.03, which we held in *R & D Properties v. Altech Constr. Co.*¹⁵ to be a more specific statute that controls over § 25-1315 in determining whether the order described therein is immediately appealable. Section 25-1315.03 plainly states that an order granting or denying a new trial is “an appealable order,” with the time and manner for the appeal of such order to be as for an appeal from a judgment, decree, or final order. Thus, in *R & D Properties*, we found we had jurisdiction over an appeal from an order granting a new trial on the building owner’s claims against a contractor, even though a third-party claim against a subcontractor was still pending and the court did not issue a certification under § 25-1315.¹⁶ The order granting a new trial was final and appealable without a § 25-1315 certification, because the language designating the order granting a new trial as “an appealable order” plainly controlled over the mandate in § 25-1315 that “any order or other form of decision, however designated, which

¹³ See *State v. McGuire*, 301 Neb. 895, 921 N.W.2d 77 (2018).

¹⁴ *Moser v. State*, ante p. 18, 948 N.W.2d 194 (2020). See, also, *State v. McGuire*, supra note 13.

¹⁵ *R & D Properties v. Altech Constr. Co.*, supra note 3.

¹⁶ *Id.*

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adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties.”

The plain language of § 25-21,233 does not designate an order determining the rights and liabilities in a FED action to be “an appealable order.” Rather, it generally states that any party against whom “judgment” has been entered in an action of FED or forcible detention only “may appeal as provided for in a civil action.” As already stated, § 25-1315 is part of how one may appeal in a civil action, when multiple claims or parties are involved. We also note that where there are multiple parties or multiple claims, fewer than all of which have been adjudicated, there is no “judgment” as defined by Neb. Rev. Stat. § 25-1301(1) (Cum. Supp. 2018).¹⁷

While prior versions of § 25-21,233 had language directing, without caveat, that the judgment in the FED action could be appealed, this language had been adopted at a time when FED actions were not joined with other claims, and it has since been amended. At the time prior versions of § 25-21,233 were in effect, the language of the statute combined with the rule that FED claims cannot litigate questions outside of the immediate right to possession and statutorily designed incidents thereto, so that claims for damages related to rent costs and restitution were not joined in an action with claims nonrelated to rental damages or restitution of the property.¹⁸ But, after the passage of the liberal joinder amendments in 1998,¹⁹ the Legislature accounted for the possibility of joinder of FED and non-FED claims and, accordingly, the possible implication of § 25-1315, by qualifying in § 25-21,233 that the appeal must be “as provided for in a civil action.”

¹⁷ See *Boyd v. Cook*, 298 Neb. 819, 906 N.W.2d 31 (2018).

¹⁸ See *Federal Nat. Mortgage Assn. v. Marcuzzo*, *supra* note 1.

¹⁹ See, e.g., Neb. Rev. Stat. §§ 25-311, 25-320, 25-701, and 25-705 (Reissue 2016); Introducer’s Statement of Intent, L.B. 234, Judiciary Committee, 95th Leg., 1st Sess. (Feb. 21, 1997).

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Nothing in the history of § 25-21,233 indicates any intent on the part of the Legislature after the passage of the liberal joinder amendments to allow orders determining FED claims to be immediately appealable even when fewer than all claims or the rights of fewer than all the parties in the action have been adjudicated. Section 25-21,233 originally stated: “Any party against whom judgment has been entered by this court in an action of [FED], or forcible detention only, of real property, may appeal therefrom to the district court, except that the right of appeal herein granted shall not be granted from judgments entered by default.”²⁰ At that time, FED actions originated in municipal courts and “by this court” referred to municipal courts.²¹

In 1972, the Legislature amended § 25-21,233 by taking out “by this court,” because a reorganization of the courts in Nebraska was occurring and the municipal courts of Lincoln and Omaha, Nebraska, were limited to the cities’ corporate limits.²² In 1981, the Legislature amended the FED statutory scheme to account for the fact that municipal courts no longer existed. The amendment allocated jurisdiction to both county and district courts to handle FED claims.²³ Also in 1981, the language of § 25-21,233 was amended to allow an appeal of a FED claim “as provided in sections 24-541.01 to 24-541.10 and 24-551.” Neb. Rev. Stat. §§ 24-541.01 to 24-541.10 (Reissue 1985), currently found at Neb. Rev. Stat. §§ 25-2728 to 25-2738 (Reissue 2016 & Cum. Supp. 2018), laid out the location, deadlines, and procedures for appealing cases from county court to district court. This language in § 25-21,233

²⁰ 1929 Neb. Laws, ch. 82, § 131, p. 312.

²¹ 1929 Neb. Laws, ch. 82, § 117, p. 309.

²² Compare Neb. Rev. Stat. § 26-1,132 (Reissue 1964), with Neb. Rev. Stat. § 24-582 (Reissue 1975). See, also, Introducer’s Statement of Purpose, L.B. 1032, Judiciary Committee, 82d Leg., 2d Sess. (Jan 24, 1972).

²³ Neb. Rev. Stat. § 24-568 (Reissue 1985).

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was adopted in order to streamline the appeal process from county courts to district courts.²⁴

Lastly, in 2004, the Legislature corrected an error in § 25-21,233 indicating that FED claims brought in district court were appealed to district court. The 2004 amendment clarified that appeals of FED claims brought in district court were to be appealed as provided for in a civil action. The pre-2004 error was due to the jurisdictional language in § 25-21,219 giving jurisdiction of FED claims to county and district courts and then the language in § 25-21,233 allowing for appeals “as provided in sections 25-2728 to 25-2738,” which laid out the process to appeal cases from county to district court. The statutory scheme read with § 25-21,233 made it sound as if the appeals could go only to district court, based on the language “may appeal as provided in sections 25-2728 to 25-2738.” So the amendment in 2004 removed “in sections 25-2728 to 25-2738” and added “for in a civil action,” so that the appeals of FED actions would now be allowed as any other appeal would.²⁵

The current statutory scheme adopted in 2004, combined with the liberal joinder rules adopted in 1998, means that an action involving multiple claims, only one of which arises under the FED statutes, can be presented in a single action. With this possibility, the Legislature’s amendment of § 25-21,233 to state that an appeal from a “judgment” in a FED action may be appealed only as provided “for in a civil action”²⁶ indicates its intent that appeals involving FED claims

²⁴ Introducer’s Statement of Intent, L.B. 42, Judiciary Committee, 87th Leg., 1st Sess. (Jan. 21, 1981). See, also, §§ 24-582 (Reissue 1985) and 24-568.

²⁵ Compare § 25-21,219 (Reissue 1995) (giving jurisdiction of FED actions to county and district courts), § 25-21,233 (Reissue 1995) (providing specific appeal statutes), and §§ 25-2728 to 25-2738 (specific appeal statutes from § 25-21,223 that laid out appeal process from county to district court), with § 25-21,233 (Reissue 2008).

²⁶ See 2004 Neb. Laws, L.B. 1207.

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should now be governed by the normal appeal process for civil actions—which would require satisfying Neb. Rev. Stat. § 25-1902 (Supp. 2019) or § 25-1301(1) and, when implicated, § 25-1315.

[12,13] We need not conduct an analysis of whether the FED order of partial summary judgment that Rule G and Marsh attempt here to appeal was a final order under § 25-1902 or a judgment under § 25-1301, because we conclude that § 25-1315 was implicated and the court did not certify the appeal as required by that statute. With the enactment of § 25-1315(1), one may bring an appeal pursuant to such section only when (1) multiple causes of action or multiple parties are present, (2) the court enters a final order within the meaning of § 25-1902 as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal.²⁷ In the absence of an express determination that there is no just reason for delay upon an express direction for the entry of judgment, orders, however designated, adjudicating fewer than all claims or the rights of fewer than all the parties are not final.²⁸ Absent an entry of judgment under § 25-1315, no appeal will lie unless all claims have been disposed as to all parties in the case.²⁹

The order of partial summary judgment in this matter adjudicated both fewer than all claims presented in the underlying action and the rights of fewer than all the parties. The district court did not make an express direction for the entry of judgment upon an express determination that there is no just reason for delay. Therefore, we lack jurisdiction over TDP's appeal.

²⁷ *Rafert v. Meyer*, *supra* note 4.

²⁸ See *Boyd v. Cook*, *supra* note 17.

²⁹ *Id.*

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CONCLUSION

This court is without jurisdiction over the present appeal, because the order of restitution disposing of the FED action did not satisfy § 25-1315(1). Therefore, the appeal is dismissed.

APPEAL DISMISSED.

FUNKE and PAPIK, JJ., not participating.

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STATE v. JONES

Cite as 307 Neb. 809



Nebraska Supreme Court

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STATE OF NEBRASKA, APPELLEE, V.

AKEEM R. JONES, APPELLANT.

950 N.W.2d 625

Filed November 13, 2020. No. S-20-184.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
2. **Negligence: Public Officers and Employees: Pleadings: Appeal and Error.** The appropriate filing procedure when an appeal is lost due to official negligence is for the party seeking relief to file a motion in the lower court, seeking the ability to establish the basis for obtaining relief.
3. **Presumptions.** A letter properly addressed, stamped, and mailed raises a presumption that the letter reached the addressee in the usual course of the mails.
4. **Public Officers and Employees: Presumptions.** In the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties, and absent evidence showing misconduct or disregard of the law, the regularity of official acts is presumed.
5. **Public Officers and Employees: Presumptions: Evidence.** The presumption that a public officer will faithfully perform his or her official duties can be overcome by the showing of evidence to the contrary.

Appeal from the District Court for Douglas County: LEIGH ANN RETELSDORF, Judge. Reversed and remanded.

Akeem R. Jones, pro se.

Douglas J. Peterson, Attorney General, and Siobhan E. Duffy for appellee.

HEAVICAN, C.J., MILLER-LEMAN, CASSEL, STACY, FUNKE, and PAPIK, JJ.

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STATE v. JONES

Cite as 307 Neb. 809

MILLER-LERMAN, J.

NATURE OF CASE

Akeem R. Jones was convicted in the district court for Douglas County of first degree murder and was sentenced to life imprisonment. *State v. Jones*, 296 Neb. 494, 894 N.W.2d 303 (2017). After his direct appeal was unsuccessful, Jones' subsequent postconviction petition was denied without an evidentiary hearing on February 5, 2018, and Jones attempted to appeal the postconviction ruling. He filed a notice of appeal on February 26; however, Jones' request to proceed in forma pauperis and the supporting poverty affidavit were not filed until March 23, thereby missing the March 7 deadline. Therefore, on July 6, we dismissed the appeal in case No. S-18-295 for lack of jurisdiction. Thereafter, Jones filed a verified motion to vacate or modify in the district court in which he sought reinstatement of his appeal. Jones claimed that in order to meet the March 7 appellate deadline, he gave his paperwork to the proper authorities to mail prior to March 7, but that the negligent acts of prison officials in the mailroom at the Nebraska State Penitentiary delayed the filing of his poverty affidavit. The district court denied the motion without a hearing. Jones appeals. We reverse, and remand for a hearing on Jones' motion.

STATEMENT OF FACTS

This case arises from a motion filed by Jones in the district court seeking postconviction relief, which was denied on February 5, 2018, without an evidentiary hearing. Jones filed a notice of appeal on February 26, but his request to proceed in forma pauperis and his supporting poverty affidavit were not filed until March 23. On July 6, we dismissed the appeal in case No. S-18-295 for lack of jurisdiction because of failure to pay the required docketing fee within 30 days or failure to file a poverty affidavit to substitute for the required docketing fee. See Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2018).

On November 15, 2019, Jones filed a verified motion in which he sought an order vacating or modifying judgment, the

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purpose of which was to reinstate his appeal from the denial of his motion for postconviction relief. The denial of Jones' motion to vacate or modify without a hearing is the subject of this appeal.

In his motion, Jones alleged, inter alia:

[Jones'] Poverty Affidavit was submitted via prison mail (according to rules and regulations established by the prison, handing mail to prison staff in one's housing unit to transport to deliver to the prison mailroom staff for mailing) on or about March 2, 2018, to be received by the Clerk of District Court (Douglas County, Nebraska) before the 30-day timeline (March 7, 2018). However, [Jones'] said legal mail was erroneously returned to his housing unit, and placed on a desk of one of the unit staff member[s], and abandoned, without informing or notifying [Jones] in a timely fashion

Additional allegations are quoted below in our analysis section. In conclusion, Jones alleged that the poverty affidavit was untimely filed in the appellate court "due to the lateness and negligence of prison officials." With respect to relief, relying on our language in *State v. Parnell*, 301 Neb. 774, 919 N.W.2d 900 (2018), Jones asserted that in such a case, he was entitled to "the ability to establish the basis for relief" through an order granting his motion or a hearing that "would permit and allow [Jones] to present said merits before the court."

Jones alleged that certain exhibits were attached. He stated that the exhibits "are imperatives and submitted herewith as bona fide proof, commensurating [Jones'] requested relief in the instant, and as a matter of law." The memorandum from Melody Michaud, a case manager at the Nebraska State Penitentiary, was attached. The memorandum is unsworn. The memorandum states, in relevant part:

On 3-16-2018/, I found an envelope on a desk that inmate Jones 84240 had previously turned in to mail on 3-7-2018. (A note from our mailroom was attached giving me this information.) The letter was returned for

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postage, but should have been given to Mr. Jones upon it's [sic] arrival back to the housing unit. I notified Jones, who told me that this was a letter for the courts and had a due date, but now it was late.

Jones had resubmitted the envelope for mail, but was returned to the unit on 3-20-2018 as no staff had signed off on approval for postage. On this occasion, the fault lies with me, I had neglected to sign off approval and the envelope came back to the housing unit again.

Please take into consideration that the lateness of this mail was not the fault of Akeem Jones, but that of housing unit staff. I apologize for any inconvenience that this may have caused.

The district court denied Jones' motion for reinstatement of his appeal. It appears the court ignored Jones' sworn allegations of an earlier date. Instead, working on the incorrect assumption that appellate filings were due on March 2, 2018, and relying on the unsworn Michaud memorandum, the district court made certain findings. It found that Jones originally gave his request to proceed in forma pauperis and his poverty affidavit to the mailroom on March 7 and that because these documents were due on March 2, they were untimely delivered to the mailroom even before any subsequent acts of negligence by public officials. Jones appeals.

ASSIGNMENT OF ERROR

Jones assigns, restated, that the district court erred when it denied his motion to vacate or modify the judgment without a hearing.

STANDARD OF REVIEW

[1] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions. *State v. Parnell*, *supra*.

ANALYSIS

In this appeal, Jones generally claims that the appeal from the denial of his motion for postconviction relief was lost

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due to official negligence and that his attempt to remedy the situation in the district court was wrongly denied. As explained below, we find merit in Jones' assignment of error and reverse, and remand for a hearing.

Jones filed a verified motion to vacate or modify the judgment. In his motion, Jones alleged that he submitted mail, including his request to proceed in forma pauperis and his poverty affidavit, "on or about March 2, 2018, to be received . . . before the 30-day timeline (March 7, 2018)." Jones further alleged that mail containing the poverty affidavit was mislaid by prison staff, causing it to be filed after the deadline for his appeal. The unsworn memorandum prepared by the case manager, Michaud, was attached to Jones' motion. The district court denied Jones' motion without a hearing. The district court reasoned that the memorandum attached to Jones' motion conclusively disproved Jones' allegations. In particular, the district court found that Jones' request to proceed in forma pauperis and his poverty affidavit were untimely submitted to the mailroom regardless of mishandling of the mail and subsequent negligence of prison staff.

[2] We have recently concluded that the appropriate filing procedure when an appeal is lost due to official negligence is for the party seeking relief to file a motion in the lower court, seeking the ability to establish the basis for obtaining relief. *State v. Parnell*, 301 Neb. 774, 919 N.W.2d 900 (2018). This is the procedure Jones followed.

[3-5] We have long held that a letter properly addressed, stamped, and mailed raises a presumption that the letter reached the addressee in the usual course of the mails. *Id.* In the absence of evidence to the contrary, it may be presumed that public officers faithfully performed their official duties, and absent evidence showing misconduct or disregard of the law, the regularity of official acts is presumed. *Id.* The presumption that a public officer will faithfully perform his or her official duties can be overcome by the showing of evidence to the contrary. See *id.* In this case, Jones has made a showing under oath that mail consisting of his poverty affidavit to

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be delivered to the court in a timely manner for filing was handled in an irregular manner.

As an initial matter, we note that the district court incorrectly calculated the final day to perfect an appeal as March 2, 2018, when the actual deadline was March 7. See § 25-1912. This error coupled with its reliance on the unsworn memorandum based on hearsay cast doubt on the district court's reasoning.

Relying on the memorandum attached to Jones' motion, and contrary to Jones' allegations, the district court found that Jones gave his mail containing the poverty affidavit to the mailroom on March 7, 2018, and thus found it was untimely upon arrival. We believe that the district court's reliance on the memorandum as a basis to deny a hearing was misplaced, for several reasons.

The memorandum from Michaud upon which the district court relied was not verified, was not based on her own knowledge, and was based entirely on the hearsay contained in a note prepared by an unknown author. Further, Michaud was not competent to assert of her own knowledge that Jones turned his mail in on March 7, 2018. With respect to the March 7 date, Michaud admits that "[a] note from our mailroom was attached giving me this information." See Neb. Rev. Stat. § 27-801 (Supp. 2019) (providing that hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted").

In contrast, Jones swore in a verified motion that he submitted the poverty affidavit

via prison mail (according to rules and regulations established by the prison, handing mail to prison staff in one's housing unit to transport or deliver to the prison mailroom staff for mailing) on or about March 2, 2018, *to be received by the Clerk . . . before the 30-day timeline (March 7, 2018).*

(Emphasis supplied.) In paragraph 10 of the verified motion, Jones alleged that the acts of the officials "denied [Jones]

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appellate review for the denial of his postconviction motion, based upon a filing procedure and/or *delay that was not [Jones'] fault* and out of his hands to control.” (Emphasis supplied.) He further alleged in paragraph 9 that he was precluded from taking an appeal “by neglect, mistake, or an irregularity (official neglect or omission or state impediment) culpable on the part of Nebraska State Penitentiary’s prison staff official *failure to submit [his] legal documents for mailing in a timely fashion for filing.*” (Emphasis supplied.) And in paragraph 6, he alleged:

[Jones] was effectively hindered and precluded from submitting his said legal mail (with the Poverty Affidavit enclosed) through the prison mailroom, for reasons exuding culpability and negligence by prison staff, who failed to appropriately notify or inform [Jones] that the mailroom had returned said legal mail erroneously, to him, *thereby denying [him] the opportunity to take rapid corrective measure(s)* to re-send same said legal mail for filing . . . (SEE Exhibit 1 and 5 attached herewith).

(Emphasis supplied.) (Emphasis omitted.)

As we read the motion in its entirety, Jones attached Michaud’s memorandum as support for his allegations that the “delay . . . was not [Jones’] fault,” officials failed to submit his documents “in a timely fashion for filing,” and he was denied “the opportunity to take rapid corrective measure(s).” The memorandum supports Jones’ numerous temporal allegations of a delay caused by negligent acts of officials, and we do not read his motion as adopting the memorandum’s unsubstantiated date of March 7, 2018. The motion’s narrative to the effect that the exhibits are “imperatives” and “bona fide proof, commensurating [Jones’] requested relief” indicates, albeit colorfully, that Jones tendered the exhibits to support the thrust of his motion regarding official irregularity causing delay, rather than an endorsement of the March 7 date. The memorandum corroborates Jones’ claim that he submitted his mail containing the poverty affidavit to the prison mailroom

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on a date and in a proper manner and that it was delayed by subsequent official negligence. Given the layers of hearsay encompassed by the memorandum as attached, it is not appropriate to resolve the trustworthiness of statements therein about dates at this stage. See *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015) (stating that when out-of-court statement relates content of another out-of-court statement, there must be independent hearsay exception for each statement). The motion's reference to the memorandum does not eclipse Jones' numerous explicit allegations under oath that he submitted his paperwork prior to the court deadline so as to reach the court in a timely manner.

As in our recent case, *State v. Parnell*, 301 Neb. 774, 919 N.W.2d 900 (2018), Jones' claim of official negligence was sufficient to obtain a hearing at which to submit proof to the court of his allegation of official negligence. The district court erred when it denied the motion without holding a hearing at which Jones was able to offer proof of his allegations and attempt to carry his burden to rebut the presumption that public officers faithfully performed their official duties.

CONCLUSION

The district court erred when it denied Jones' motion to vacate or modify the judgment without a hearing. We reiterate that we do not adopt a prison delivery rule, see *State v. Smith*, 286 Neb. 77, 834 N.W.2d 799 (2013), and *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998), nor do we hold that a delay in mailing necessarily results in an untimely filing. We reverse the decision of the district court and remand the cause for a hearing at which Jones may offer evidence that the negligence of prison officials at the Nebraska State Penitentiary delayed the mailing of a poverty affidavit associated with his prior appeal.

REVERSED AND REMANDED.

FREUDENBERG, J., not participating.

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

IN RE INTEREST OF A.A. ET AL., CHILDREN
UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V.
JOSHUA C., APPELLANT.
951 N.W.2d 144

Filed November 20, 2020. Nos. S-20-009, S-20-244.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is a question of law that an appellate court resolves independently of the conclusions reached by the trial court.
2. **Constitutional Law: Due Process.** The determination of whether the procedures afforded to an individual comport with constitutional requirements for due process presents a question of law.
3. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings; however, when the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other.
4. **Jurisdiction: Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1911 (Reissue 2016), for an appellate court to acquire jurisdiction of an appeal, there must be a final judgment or final order entered by the tribunal from which the appeal is taken.
5. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction deals with the court's ability to hear a case.
6. ____: _____. Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
7. **Juvenile Courts: Jurisdiction.** To obtain jurisdiction over a juvenile and the juvenile's parents, the court's only concern is whether the condition in which the juvenile presently finds himself or herself fits within the asserted subsection of Neb. Rev. Stat. § 43-247 (Reissue 2016).

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8. **Constitutional Law: Due Process: Parent and Child.** The relationship between parent and child is constitutionally protected and cannot be affected without procedural due process.
9. **Due Process.** The concept of due process embodies the notion of fundamental fairness and defies precise definition.
10. _____. Due process is flexible and calls for such procedural protections as the particular situation demands.
11. **Constitutional Law: Parent and Child.** The mere existence of a biological link does not merit substantial constitutional protection; rather, the parental liberty interest in a child stems from the more enduring relationship developed upon a biological parent's commitment to the responsibilities of parenthood.
12. **Constitutional Law: Due Process: Parent and Child.** An unwed biological father who has grasped the opportunity to establish a familial relationship with his biological child has an interest in personal contact with his child, which interest is given substantial protection under the Due Process Clause of the 14th Amendment.
13. **Parental Rights.** When parental control fails, the State must play its part as *parens patriae*.
14. _____. The rights of parenthood, even of a fit parent, are not beyond limitation by the State's powers and duties as *parens patriae*.
15. _____. Where a child is cared for by a fit parent, the State's interest in caring for the child is *de minimis*.
16. **Parental Rights: Child Custody.** Only the paramount interest which the public has in the protection of the rights of the child can subjugate the rights of parents to maintain custody of their children.
17. _____. _____. The parental preference doctrine holds that in a child custody controversy between a biological parent and one who is neither a biological nor an adoptive parent, the biological parent has a superior right to the custody of the child.
18. **Parental Rights: Child Custody: Presumptions.** Under the parental preference doctrine, unless the State affirmatively shows a parent is unfit or has forfeited the right to custody, due regard for the parent's natural right to the custody of a child requires that a parent be presumptively regarded as the proper guardian.
19. **Parental Rights: Child Custody: Proof.** Only exceptional circumstances involving proof of serious physical or psychological harm to the child or a substantial likelihood of such harm will negate the superior right of a fit parent who has not forfeited parental rights to custody under the parental preference doctrine.
20. **Juvenile Courts: Jurisdiction: Child Custody: Proof.** When the allegations of a petition for adjudication invoking the jurisdiction of

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the juvenile court are against one parent only, the State cannot deny the other parent's request for temporary physical custody in lieu of a foster care placement unless it pleads and proves by a preponderance of the evidence that the other parent is unfit or has forfeited custody or that there are exceptional circumstances involving serious physical or psychological harm to the child or a substantial likelihood of such harm.

21. **Parental Rights: Child Custody.** Because parental preference derives not simply from biology but from the enduring relationship developed upon a biological parent's commitment to the responsibilities of parenthood, children removed from their homes due to the fault or habits of one parent need not immediately and without some minimal investigation be placed with the other biological parent whose status as having an actual relationship of parental responsibility is unknown.
22. **Juvenile Courts: Jurisdiction: Parental Rights: Child Custody.** The nonoffending parent's exercise of the parental preference of custody is not entirely unfettered during the juvenile court's continuing jurisdiction under the juvenile code.
23. **Juvenile Courts: Parental Rights.** The juvenile court, in the exercise of its *parens patriae* responsibilities, may develop a transition plan constituting a reasonable intrusion of limited duration into the nonoffending parent's rights to autonomy in the care and custody of the child.
24. **Juvenile Courts: Due Process: Parental Rights: Child Custody.** It does not violate due process for the juvenile court in its determination of the child's best interests and in its role as adjudicator of the custody rights between two parents to require the nonoffending parent's cooperation with goals of reunification back into the home from where the child was taken.
25. **Due Process: Notice.** Procedural due process generally requires that notice be given of such a nature as to reasonably convey the required information.
26. **Parental Rights: Child Custody: Notice.** In the context of denying parental preference in a placement decision during proceedings under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016), reasonable notice must include the factual bases for seeking to prove that the parent is unfit or has forfeited parental rights or that exceptional circumstances exist involving serious physical or psychological harm to the child or a substantial likelihood of such harm.
27. ____: ____: _____. Allegations as to the fault or habits of the custodial parent do not operate to give notice to the noncustodial parent that the State seeks to rebut that parent's right to parental preference in its placement decisions.

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28. **Handicapped Persons: Parent and Child: Parental Rights: Presumptions.** There is no presumption that a disabled parent is unfit, that a disabled parent has forfeited parental rights, or that exceptional circumstances exist involving serious physical or psychological harm to the child or a substantial likelihood of such harm because a parent is disabled.
29. **Handicapped Persons: Parent and Child: Presumptions.** The simple fact that a parent is disabled does not overcome the presumption that the parent is a better caretaker of the parent's own child than the State is.
30. **Juvenile Courts: Jurisdiction: Final Orders: Appeal and Error.** A juvenile court is not wholly divested of jurisdiction during the pendency of an appeal from a final order.
31. **Courts: Juvenile Courts: Jurisdiction: Appeal and Error.** The extent of the continuing jurisdiction of the separate juvenile courts and the county courts sitting as juvenile courts during the pendency of an appeal is not without limits and must be determined by the facts of each case.
32. **Juvenile Courts: Jurisdiction: Parental Rights.** The juvenile courts' continuing jurisdiction does not include the power to terminate a juvenile's relationship with the child's parents.
33. **Judges: Recusal: Time.** The issue of judicial disqualification is timely if submitted at the earliest practicable opportunity after the disqualifying facts are discovered.
34. **Judges: Recusal: Presumptions.** There exists a presumption of judicial impartiality, and a party alleging that a judge acted with bias or prejudice bears a heavy burden of overcoming that presumption.
35. **Judges: Recusal.** A judge's opinions based on facts presented during a hearing, even if those opinions are stated before the hearing's conclusion, are not indicative of bias by the judge unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

Appeals from the Separate Juvenile Court of Lancaster County: REGGIE L. RYDER, Judge. Judgment in No. S-20-009 reversed, and cause remanded with directions. Judgment in No. S-20-244 affirmed.

Matt Catlett, of Law Office of Matt Catlett, for appellant.

Douglas J. Peterson, Attorney General, C.J. Roberts, Special Assistant Attorney General, and Patrick Condon, Lancaster County Attorney, and Haley N. Messerschmidt for appellee.

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HEAVICAN, C.J., MILLER-LEMAN, CASSEL, STACY, FUNKE,
PAPIK, and FREUDENBERG, JJ.

FREUDENBERG, J.

I. NATURE OF CASE

Upon allegations that the mother had endangered her 6-year-old child who was living with her, the Nebraska Department of Health and Human Services (DHHS) was given temporary legal and physical custody of the child and his half siblings, who were placed together in temporary foster care. No allegations were made against the child's legal father, who did not at that time live with the child and did not have notice of the hearing on temporary custody. There was an acknowledgment of paternity, and the father had lived with and helped support the child and his mother for approximately 5 years up until the father developed Guillain-Barre syndrome approximately 7 months before the petition for adjudication was filed. After the father became aware that his child was in foster care, he moved for temporary physical placement, which the juvenile court denied. The court reasoned that the father was "unfit" for placement at that time due to his unwillingness to cooperate with DHHS in forming a placement plan that addressed concerns stemming from a physical disability.

In case No. S-20-009, the father appeals the denial of his motion for placement, arguing that the State did not sustain its burden to affirmatively prove him unfit by a preponderance of the evidence before depriving him of his fundamental liberty and privacy interests in caring for and guiding his child without undue interference. He also challenges the jurisdiction of the juvenile court based upon filing dates and scrivening details pertaining to the ex parte order removing the children from the mother's home. While his appeal in case No. S-20-009 was pending, the court proceeded with adjudication of the child over the father's objection. In the appeal in case No. S-20-244, the father argues that his appeal in case No. S-20-009 divested the juvenile court of jurisdiction to issue the adjudication order.

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II. BACKGROUND

Joshua C., the legal father of B.C., appeals in case No. S-20-009 from the juvenile court's order denying his motion for temporary physical placement of B.C. in his home pending the adjudication of B.C. under a petition making allegations of endangerment by the mother. In case No. S-20-244, Joshua appeals from the court's subsequent order adjudicating B.C. due to the fault or habits of B.C.'s mother. We have consolidated the two cases, Nos. S-20-009 and S-20-244, for purposes of oral argument and disposition.

1. OCTOBER 14, 2019, EX PARTE
EMERGENCY TEMPORARY ORDER

(a) Motion

On October 14, 2019, a Monday, a motion for an ex parte order for emergency temporary custody was file stamped in the separate juvenile court of Lancaster County. Three children, A.A., M.A., and B.C., were listed in the caption. In the motion, the county attorney asserted that "the above-named juveniles are endangered in such conditions or surroundings that the juveniles' welfare and best interest require immediate removal."

The affidavit in support of the motion, dated October 11, 2019, listed in its caption four children, D.W., A.A., M.A., and B.C.

In the affidavit, Officer Jarid Freyermuth stated that on October 11, 2019, he was dispatched on a report of "belated child neglect" in Lincoln, Nebraska. D.W., age 12, had reported that his mother had threatened him with a steak knife an hour prior, during the course of an argument about not properly storing an open bag of hotdogs. The mother had reportedly cornered D.W. while armed with the knife and, when he put his hands on her upper chest area to defend himself, placed the tip of the knife on his shoulder and said, "[I]f you touch me I'll stab your hands."

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Freyermuth reported that D.W.'s siblings, A.A., M.A., and B.C., corroborated D.W.'s description of the incident and that the mother ultimately admitted to arming herself with the knife and threatening D.W. Freyermuth reported that she denied, however, "touching D.W. with the knife even when faced with the fact that D.W. had an injury resembling being touched with the knife."

According to the affidavit, D.W. was turned over to his father, while an employee of DHHS took emergency custody of the other three children. The mother was taken to jail on October 11, 2019, upon charges of felony child abuse, terroristic threats, and use of a weapon to commit a felony.

Freyermuth averred that the children were in such condition or surroundings that their welfare required the court to assume temporary custody immediately by endorsement upon the summons or separate order directing that the children be taken into custody at once, with proper arrangements being made for their temporary custody and care pending a hearing on a petition.

(b) Order

The juvenile court signed an ex parte order for emergency temporary custody on Saturday, October 12, 2019. The order was not file stamped until Monday, October 14.

The caption for the order listed A.A., M.A., and B.C. D.W. was not named in the caption. The order described that pursuant to Neb. Rev. Stat. § 43-248(2) (Cum. Supp. 2018), the "above-named juveniles' needs require that they be taken into emergency custody and placed with [DHHS]."

Pursuant to the ex parte order, a temporary custody hearing was scheduled for October 16, 2019. Notice of the hearing was to be sent to the parents and guardians identified in the affidavit. Joshua was not identified.

The court found in the ex parte order that DHHS could, at its discretion, return the children home pending the placement hearing. The ex parte order was to expire if the county

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attorney failed to file a petition by October 15, 2019, at 4:30 p.m. A guardian ad litem was appointed.

2. OCTOBER 14, 2019, PETITION

A petition was filed in juvenile court on Monday, October 14, 2019, at approximately 4 p.m. All four children, A.A., M.A., B.C., and D.W., were named in the caption. The petition alleged that A.A., M.A., B.C., and D.W. were within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016), by reason of the fault or habits of their mother, or that they were in a situation injurious to life or limb or their health or morals, based on the incident on October 11 in which she threatened one of them with a knife. The adjudication was based on no other events. No allegations were made against Joshua.

While the alleged father of D.W. was listed in the petition as a person to be served with a summons, no other father was identified. Likewise, only the father of D.W., and the children's mother, were identified in the praecipe for summons, dated October 17, 2019, to be served with copies of the petition. The record does not reflect that the court published notice, because a parent's name was unknown, as provided for in Neb. Rev. Stat. § 43-268 (Reissue 2016).

3. OCTOBER 17, 2019, TEMPORARY
CUSTODY ORDER

A hearing on the motion for temporary custody was held on October 16, 2019. Neither Joshua nor his counsel was present. The appellate record does not contain a transcription of the October 16 hearing.

In an order on October 17, 2019, the court found that although DHHS was making reasonable efforts to eliminate the need for out-of-home placement, remaining in the home at that time would be contrary to the children's health, safety, and welfare, and that it was in their best interests to remain in out-of-home placement. The court ordered that temporary legal and physical custody remain with DHHS. The mother was

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given reasonable rights of supervised parenting time so long as she was not in custody.

Only A.A., M.A., and B.C. were listed in the caption for the order of temporary custody. Joshua was not served with a copy of the order.

4. JOSHUA'S INTERVENTION AND REQUEST FOR
PLACEMENT ON OCTOBER 30, 2019

On October 30, 2019, Joshua, through his attorney, filed a motion for leave to intervene and for immediate placement of B.C. with him. In the motion, Joshua alleged that he was B.C.'s biological father and that with the exception of a 1-year separation from B.C.'s mother, from B.C.'s birth in August 2013 until July 2019, B.C. and his mother had lived with Joshua, during which time Joshua had provided continuous care and support for B.C.

Joshua did not explain when he received actual notice of the juvenile proceedings relating to B.C. Joshua described only that on or about October 29, 2019, a DHHS employee had informed him that DHHS would not consider placing B.C. in his care and custody.

Joshua did not in the motion challenge the prior orders of the court on due process or any other grounds. He did not move for legal custody.

Hearings on the motion were held on November 21 and December 23, 2019.

(a) November 21, 2019, Hearing

At the November 21, 2019, hearing, Joshua testified that he has lived for approximately 8 years in Superior, Nebraska, where he owns a four-bedroom house in the center of town. Joshua testified that he was in a romantic relationship with B.C.'s mother from approximately July 2012 until July 2019. During that time, they conceived B.C., who was born in August 2013. Joshua testified that he had signed an acknowledgment of paternity but had forgotten to bring it to the

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November 21 hearing. There was no evidence of an adjudication of custody rights between the two parents.

B.C. and B.C.'s mother lived with Joshua during the entirety of their relationship with the exception of a year when she and B.C. had moved out, 2 or 3 years before the hearing, and then moved back in.

Joshua described that in late February 2019, he developed Guillain-Barre syndrome. He was hospitalized for a month and then spent approximately 6 months in rehabilitation centers until returning home in September. It was during his illness that his relationship with B.C.'s mother ended.

At the time of the hearing, Joshua had been home for approximately 2 months. B.C. visited Joshua 5 to 10 times while Joshua was residing at rehabilitation centers. Joshua testified that he had seen B.C. only twice since returning home, during two weekend visits arranged with B.C.'s current placement caretaker.

Joshua lives alone, but has a 15-year-old child who stays with him every Wednesday overnight and every other Thursday through Sunday.

As of the time of the hearing, Joshua was still unable to get around without a wheelchair. He had the aid of home health care in the mornings. He was unable to fully sit himself up in his wheelchair without assistance. Before developing Guillain-Barre syndrome, Joshua worked as a pipewelder. Since his illness, he has relied on Social Security disability payments. Joshua testified that he was financially able to provide for B.C. Joshua did not believe his physical limitations impaired his ability to properly parent or supervise B.C.

Joshua testified that his grandfather had agreed to take B.C. to and from school. The school bus stopped only "three blocks away." Joshua could also reach out to his mother, if she was not working, as well as to "[f]riends and just people in the community," for school transportation. Joshua named a couple of people who had volunteered to help. Joshua explained that

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the transportation company he uses would be able to transport B.C. to any appointments.

As far as feeding B.C., Joshua testified that “[t]here’s the local grocery store and then there’s the Dollar General.” Joshua testified that he was not yet cooking any of his own meals, but that his mother, his grandfather, and the aides had all said they would be willing to prepare meals for B.C. Alternatively, he could order takeout or delivery.

Joshua described a nightly routine for B.C. that would involve homework, television, showering, and brushing teeth. He did not foresee its being a problem that he generally did not have assistance overnight.

Joshua said that DHHS had been in contact with him about a placement plan. There had been some discussion about placing B.C.’s half siblings with Joshua as well. Joshua was willing to serve as such a placement.

The plan that was developed was originally going to involve having Joshua’s mother stay overnight. At that time, his mother was spending the night in Joshua’s home to help care for him. She had been staying the night at Joshua’s house from the time of his return from the rehabilitation centers up until approximately 2 weeks before the November 21, 2019, hearing. Joshua explained that as of early November 2019, his mother no longer wished to stay overnight. Joshua did not reach out to notify DHHS that his mother would no longer be staying the night, but confirmed that was true when DHHS called and asked.

Joshua testified that he was willing to have a conversation with DHHS about any logistical concerns of how to address emergencies or other childcare issues that might arise in the middle of the night. Joshua conceded that he had refused to sign a medical release to allow DHHS to review his medical records relating to his Guillain-Barre syndrome prognosis, explaining, “I’m just not prepared to do it right now, okay.”

At the close of the day on November 21, 2019, the court noted that the hearing would be continued in order to allow

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the parties to present additional evidence. The court told Joshua that he had “come a long way.” The court stated that it needed to see the acknowledgment form. The court continued to explain that, also, “we need to make sure there’s a plan,” elaborating:

[W]e’ve talked about evenings. We haven’t talked about weekends when he’s not in school. We haven’t talked about a snow day that we’re probably going to have. We haven’t talked about two or three weeks of not being in school during Christmas. We’ve got to make sure we’ve got a plan. It sounds like you’ve thought about it a little bit but I’d want to make sure before I’m going to say he’s in your care, that we’ve got a daily consistent plan and schedule. Who’s going to be coming over. Who can we call at 2:00 in the morning if he has a nose bleed, a fever. If he falls out of bed. If he’s scared and I understand you would like to be there and right now you’re limited on doing that. So we’ve got to make sure we’ve got a safe and smart plan I’ve got to make sure we’ve got, you know, a plan that’s — that’s really pretty much consistent. Who’s going to be on call at 2:00 in the morning. Who’s going to be there on the weekends. Who’s going to be preparing the meals because on the weekends we’ve got breakfast, lunch, we’ve got dinner. And we’ve got snacks. We’ve got a lot of things that six year olds need help with so we’ll certainly hear more about that at the next hearing[.]

(b) December 23, 2019, Hearing

At the continuation of the hearing on December 23, 2019, Joshua offered into evidence the acknowledgment of paternity containing the notarized signatures of both Joshua and B.C.’s mother in August 2013, which the court received. The exhibit reflects that the acknowledgment had been filed with DHHS as required by Neb. Rev. Stat. § 43-1408.01 (Reissue 2016). As soon as the acknowledgment was received, the

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court orally pronounced that Joshua's motion to intervene was granted, and the only motion still pending was placement.

(i) Joe Knott's Testimony

Joe Knott, an employee of DHHS, testified that an inspection of Joshua's home found it to be in appropriate condition and that DHHS had previously "ironed out a plan" with Joshua for placement of the children with him around November 4, 2019. That plan, however, had "deteriorated" by the time of the scheduled placement due to the sudden departure of Joshua's mother as an overnight caretaker. Accordingly, placement was delayed.

Knott checked in a few more times throughout that week to see if there had been any change in the situation. After a couple of conversations in which Joshua indicated nothing had changed, Knott was unable to reach Joshua. Knott testified that he "left voicemails trying to figure out a way that we could remedy the situation and kind of make sure that we had something that was in place so that it would allow us to move forward with placement, but I did not hear back from [Joshua]." At some point, B.C., A.A., and M.A. were placed together in another home.

Since the unsuccessful prior attempts at moving forward with placement with Joshua, communication between Joshua and DHHS had involved one conversation about the two visits with B.C. and B.C.'s half siblings facilitated by B.C.'s current placement and one conversation about "placement and things that we'd like to see." After that, Knott understood Joshua had "been advised by his attorney not to speak with us."

According to Knott, B.C.'s mother had indicated "she did not want any of her ex's to have placement of the children." This conversation apparently occurred after the November 21, 2019, hearing. She had originally told Knott that B.C. was "well bonded" with Joshua.

Knott described that if Joshua were willing to work with DHHS, DHHS would gather information about reasonable accommodations that Joshua would be making "in terms of

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finding individuals that are willing [and] able to assist him with the placement to make sure that it can be done effectively, and that there's no safety concerns for [B.C.,] who's six years old." Knott opined that "just being able to identify those individuals that would be willing and able to help in certain situations I think would be very helpful and go a long way into helping us develop and firm up a plan." Knott noted that DHHS would want to run background checks on any potential caretakers.

Since the November 21, 2019, hearing, Knott and a caseworker had reached out to Joshua's attorney via email several times, requesting that they have discussions to work out a placement plan or visitation. Neither Joshua nor his attorney had responded to such requests. Knott expressed having certain concerns until DHHS could work with Joshua in developing a plan regarding the logistics of placement, mainly about how Joshua would handle hypothetical emergent situations that could arise in the middle of the night. Knott testified that he believed that because B.C. was a state ward, DHHS had certain obligations to ensure the safety of any placement—apparently including with a noncustodial parent against whom no allegations had been made. According to Knott, "the biggest barrier" to placement with Joshua was "not being able to have an open and honest conversation" with him.

Part of Knott's testimony was adduced upon questioning by the juvenile court judge. The judge asked if, since the prior hearing, Knott had been given any more specifics about assistance with meal preparation or general preparedness to care for B.C. over the upcoming holiday break, which Knott testified he had not. Further, Knott agreed, upon the judge's questioning, that it was possible "that had [Joshua] cooperated with [DHHS] and [its] efforts from the last hearing to come up with a plan, [Knott] could've been in a position today to recommend [B.C.] be placed with [Joshua] in his home today." Knott also agreed with the judge that it was "fair to say" that Joshua's "unwillingness to do that has delayed in progress in

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that regard.” Finally, the court asked several questions of Knott regarding DHHS’ requirements, responsibilities, and expectations once a child becomes a state ward. Knott affirmed that DHHS felt a responsibility to be able to follow up on placements, going to the home at least once a month for private conversations with the child and caregivers to see how things were going. Knott testified he was concerned that Joshua would not allow that.

(ii) B.C.’s Mother’s Testimony

B.C.’s mother testified at the hearing that during the course of her relationship with Joshua, which she said ended in May 2019, they had arguments that sometimes became “physical.” She described one incident over winter break in 2015 when Joshua was intoxicated and threatened to shoot himself, shoot her, and then shoot the children. It was unclear if Joshua was brandishing a weapon at that time. The police intervened, arrested Joshua, and confiscated his weapons. She testified that Joshua was initially charged with terroristic threats but that the charges might have been dropped.

B.C.’s mother testified that her “only concern” with B.C.’s being placed in Joshua’s care was “if he’s mentally capable of handling certain situations.” When asked, she also affirmed she was concerned with excessive drinking. She testified that when she moved out, Joshua had approximately 13 guns locked in a gun safe he had acquired after the terroristic threats incident.

*(c) December 23, 2019, Order Granting
Intervention and Denying Placement*

At the close of the evidence, Joshua’s counsel argued that a parent who is not the subject of a petition to adjudicate the child retains constitutional parental preference such that a child removed from the home under a petition alleging fault or habits of the other parent must automatically be placed with the parent who is not the subject of the petition.

Joshua’s counsel referred to the motion for placement as being “actually a little bit awkward because the Court has

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not acquired jurisdiction over this child”—an allegation that was apparently elaborated upon in the trial brief that is not in the record. Also, Joshua’s counsel referred to the court’s “argumentative suggestions — suggestive and leading questions” of Knott. But Joshua’s counsel did not move to disqualify the juvenile court judge.

The court disagreed with Joshua’s arguments, including that it had to place B.C. with him because of the parental preference doctrine. The court stated that based on the evidence presented, Joshua was “currently a parent who’s unfit to have his child placed in his care.” It also found that it was not in B.C.’s best interests for the placement to occur.

In support of these conclusions, the court cited “[t]he lack of any ability to try to overcome the concerns.” The court explained that it had “made it very clear” a month before what its concerns were and that DHHS had “made a number of efforts to try to overcome those issues and concerns and unfitness.” The court stated, “[T]here hasn’t been any cooperation whatsoever.”

In an order filed on December 23, 2019, the court found that Joshua was B.C.’s father and allowed Joshua to intervene. The same order memorialized the court’s denial of Joshua’s motion for placement. The court found that Joshua was not “currently a fit and proper parent to have custody,” noting that Joshua “has not been willing to work with DHHS to develop a plan to overcome the barriers to approving that placement.” Due in part to such lack of cooperation, the court found that “it would not be safe” for B.C. “to be placed in the home of his father at this time.” Such placement would be “contrary to the health, safety, and welfare” of B.C. and would not be in B.C.’s best interests.

The court ordered DHHS to continue to make efforts to work with Joshua to overcome the barriers to placement, noting that once a plan is in place that ensures the safety and well-being of B.C., Joshua could petition the court for placement and a further hearing would be timely scheduled. Joshua appealed the December 23, 2019, order.

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5. FEBRUARY 27, 2020, ORDER
OF ADJUDICATION

Subsequently, the juvenile court held a hearing on adjudication. Joshua objected to the hearing on the ground that his pending appeal of the denial of his motion for placement divested the court of jurisdiction to adjudicate B.C. The court found the case law relied upon by Joshua inapposite and found that the mother had an interest in case progression so that a rehabilitative plan could be developed to place B.C. back in her care as soon as possible. The juvenile court accepted the mother's plea of no contest to the petition for adjudication.

In an order dated February 27, 2020, the court overruled Joshua's objection. The court articulated as part of its findings that "[t]he current goal in this case is to return the juveniles to the custody of [their mother]."

That same date, the court issued an order adjudicating B.C. and his half siblings as lacking proper parental care by reason of the fault or habits of their mother and determining that they were in a situation dangerous to their life or limb or injurious to their health or morals. At some point, the court had placed B.C. and his half siblings in a different foster care home from where they were first placed. The court ordered all prior temporary orders to remain in effect.

III. ASSIGNMENTS OF ERROR

In his appeal in case No. S-20-009 from the denial of his motion for placement, Joshua assigns, restated, that the juvenile court (1) erred by denying his motion for temporary placement; (2) was biased when considering his motion for placement; (3) erred by imposing, contrary to his superior parental right to custody and due process, the burden of proof on Joshua in relation to the placement decision; (4) treated him differently from the father of D.W., in violation of equal protection principles; and (5) issued void orders in the ex parte order of emergency temporary custody and the October 16, 2019, continuation of such temporary custody.

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In his appeal from the adjudication order in case No. S-20-244, Joshua assigns that (1) the juvenile court erred in overruling his objection to proceeding with the hearing on the petition as to B.C. on the ground that the juvenile court had no jurisdiction to adjudicate B.C. due to the pending appeal in case No. S-20-009; (2) the juvenile court's order on February 27, 2020, adjudicating B.C. is void for lack of jurisdiction; and (3) the juvenile court judge's remark that "[t]he current goal in this case is to return the juveniles to the custody of [their mother]" was prejudicial and required disqualification.

IV. STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is a question of law that an appellate court resolves independently of the conclusions reached by the trial court.¹

[2] The determination of whether the procedures afforded to an individual comport with constitutional requirements for due process presents a question of law.²

[3] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings; however, when the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other.³

V. ANALYSIS

1. JURISDICTION OVER APPEAL

[4] We first address whether we have jurisdiction over the order denying Joshua's motion for placement that is being appealed in case No. S-20-009. Under Neb. Rev. Stat. § 25-1911 (Reissue 2016), for an appellate court to acquire jurisdiction

¹ See *In re Interest of Enyce J. & Eternity M.*, 291 Neb. 965, 870 N.W.2d 413 (2015).

² *In re Interest of Kane L. & Carter L.*, 299 Neb. 834, 910 N.W.2d 789 (2018).

³ *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012).

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of an appeal, there must be a final judgment or final order entered by the tribunal from which the appeal is taken.⁴ Also, Neb. Rev. Stat. § 43-2,106.01(1) (Reissue 2016) provides that “[a]ny final order or judgment entered by a juvenile court may be appealed to the Court of Appeals in the same manner as an appeal from district court to the Court of Appeals,” and § 43-2,106.01(2)(c) specifies that such appeal may be taken by “[t]he juvenile’s parent.”

Because the juvenile proceedings are still ongoing, there has yet to be a judgment.⁵ The State asserts that the December 23, 2019, order denying Joshua’s motion for placement is not a final, appealable order as defined by Neb. Rev. Stat. § 25-1902 (Supp. 2019). The State acknowledges that orders governing temporary placement away from a parent ordinarily constitute final orders pursuant to § 25-1902(1)(b), as orders affecting a substantial right made during a special proceeding.⁶ It argues, however, that the denial of Joshua’s motion for placement was a mere continuation of the court’s prior order on October 17 of temporary physical custody remaining with DHHS, outside of the mother’s home, and that the December 23 order therefore did not have a substantial effect on Joshua’s substantial rights.

We have said that when an “‘order from a juvenile court is already in place and a subsequent order merely extends the time for which the previous order is applicable, the subsequent order by itself does not affect a substantial right and does not extend the time in which the original order may be appealed.’”⁷ But when we have thus found a subsequent

⁴ *State v. Lotter*, 301 Neb. 125, 917 N.W.2d 850 (2018).

⁵ See Neb. Rev. Stat. § 25-1301(1) (Reissue 2016).

⁶ See, *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991); *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), *disapproved on other grounds*, *O’Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998).

⁷ See, e.g., *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 931, 621 N.W.2d 289, 295 (2000).

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order to “‘merely extend[] the time’” of the prior order, the interests of the person who wished to appeal the subsequent order had been specifically adjudicated by the prior order and that person had notice of the prior proceedings and accordingly had the opportunity to appeal it.⁸

Here, the October 17, 2019, order was issued before Joshua intervened. He was given no notice of the proceedings leading up to the October 17 order, did not participate in that placement hearing, and was not given notice of the order itself. Furthermore, in making its placement decision in the October 17 order, the court had not been presented with Joshua as a possible placement. The juvenile court had not been asked, pursuant to a motion for placement, to adjudicate B.C.’s temporary custody in light of the parental preference doctrine as applies to Joshua. Rather, the court considered only whether the mother was at that time unfit for physical custody such that B.C. should remain outside of her home. Different rights were affected by the October 17 order maintaining B.C.’s temporary custody outside of the mother’s home and the December 23 order denying Joshua’s motion for temporary custody.

The court’s December 23, 2019, order denying Joshua’s motion for custody did not merely extend the time of the applicability of the October 17 order of temporary custody outside of the mother’s home and in foster care. Instead, it was the juvenile court’s first adjudication of Joshua’s parental right to temporary physical custody of B.C. over the State’s interest in custody. The December 23 order presented Joshua’s first opportunity to appeal its determination of that issue. The December 23 order was final under § 25-1902(1)(b), and we have jurisdiction over the appeal in case No. S-20-009.

2. SUBJECT MATTER JURISDICTION

Joshua makes several arguments that seek to vacate the underlying order granting the State temporary legal custody over B.C., which necessitated Joshua’s motion for placement

⁸ See *id.*

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so that B.C. would not be in foster care. He believes that the October 17, 2019, order is “void”⁹ for lack of subject matter jurisdiction. We disagree.

Joshua’s reasoning is complicated. He argues that the October 14, 2019, ex parte order of emergency temporary custody was void for four reasons. First, he argues there was no order of temporary custody filed within 48 hours as required by Neb. Rev. Stat. § 43-250(2) (Cum. Supp. 2018), which, he notes, does not expressly exclude nonjudicial days. Second, Joshua asserts that the ex parte order was void because there was no petition filed in accordance with § 43-247 and Neb. Rev. Stat. § 43-261(1)(a) (Reissue 2016) at the time of the ex parte order and because there is no statute authorizing a juvenile court to issue such an order in the absence of a petition. Third, Joshua takes issue with the fact that the motion for the ex parte order was file stamped at the exact same time as the order granting the same, this allegedly being “problematic”¹⁰ and implicating procedural due process because the order was not in response to a motion. Fourth, he alleges that because the ex parte order did not attach the affidavit, it is “impossible to know for certain”¹¹ whether the affidavits relied on by the court were made part of the record of the proceedings as required in *In re Interest of R.G.*¹²

The alleged voidness of the ex parte order in turn allegedly rendered the October 16, 2019, hearing void, which, in turn, allegedly rendered the October 17 order continuing temporary custody void, “because it was premised on a hearing that, legally, was never ordered to occur.”¹³ Joshua asserts that it does not matter that a petition for adjudication under § 43-247(3)(a) was filed between the filing of the ex parte

⁹ Brief for appellant in case No. S-20-009 at 19.

¹⁰ *Id.* at 48.

¹¹ *Id.*

¹² *In re Interest of R.G.*, *supra* note 6.

¹³ Brief for appellant in case No. S-20-009 at 20.

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order and the hearing, because the untimely petition could not “resuscitate a void order” and “there is no statutory or judicial authority in Nebraska for a juvenile court ordering or holding a hearing on the issue of a juvenile’s pre-adjudication detention or placement in the absence of a prior, valid pre-adjudication detention or placement order or a properly filed motion by the State.”¹⁴

[5,6] Subject matter jurisdiction deals with the court’s ability to hear a case.¹⁵ Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.¹⁶

[7] We have held that to obtain jurisdiction over a juvenile and the juvenile’s parents, the court’s only concern is whether the condition in which the juvenile presently finds himself or herself fits within the asserted subsection of § 43-247.¹⁷ The juvenile court’s subject matter jurisdiction in this case was conferred by § 43-247, which provides that “[t]he juvenile court . . . shall have . . . jurisdiction of” any juvenile defined in § 43-247(3) and of the “parent, guardian, or custodian.” Section 43-247(3) describes the circumstances of the juvenile, including one who is in a situation dangerous to life or limb or injurious to the health or morals of such juvenile. Section 43-247(5) describes “[t]he parent, guardian, or custodian of any juvenile described in this section.”

While procedural due process requires that a petition for adjudication allege specific factual allegations as to why the juvenile falls under § 43-247(3)(a),¹⁸ it has been held that

¹⁴ *Id.* at 42 (emphasis omitted).

¹⁵ *In re Interest of Devin W. et al.*, 270 Neb. 640, 707 N.W.2d 758 (2005).

¹⁶ *Id.*

¹⁷ See, *In re Interest of Sloane O.*, 291 Neb. 892, 870 N.W.2d 110 (2015); *In re Interest of Devin W. et al.*, *supra* note 15.

¹⁸ See, e.g., *In re Interest of Trenton W. et al.*, 22 Neb. App. 976, 865 N.W.2d 804 (2015).

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even inadequacies in the petition pertaining to parental notice do not divest the juvenile court of its subject matter jurisdiction.¹⁹ Not all juveniles over which the juvenile court exercises subject matter jurisdiction pursuant to § 43-247 have been temporarily removed from the home pursuant to an ex parte order. There is nothing in the juvenile code indicating that the procedures governing ex parte orders are integral to the juvenile court's subject matter jurisdiction to subsequently issue a temporary custody order following a petition for adjudication under § 43-247 and an evidentiary hearing.

Irregularities pertaining to the ex parte custody order could not render the October 17, 2019, order void. We need not address the merits of these alleged irregularities leading to the October 14 temporary ex parte order that is no longer in effect and is moot.²⁰ The ex parte order has no bearing on the December 23 order on Joshua's motion for placement. The juvenile court has jurisdiction to determine the proper placement of B.C. while the juvenile case brought under the petition for adjudication under § 43-247(3)(a) remains open. We proceed to the merits of its December 23 order.

3. PLACEMENT

Joshua argues that when a petition under § 43-247(3)(a) is based on the conduct of one parent, unless the State affirmatively pleads and proves the unfitness of the other parent who does not reside in the home the child was removed from, the parental preference doctrine requires that the child be placed with the other parent instead of in foster care. Joshua elaborates that procedural due process requires that the noncustodial parent be given notice of specific allegations of unfitness before the State can deprive such parent of temporary custody pursuant to that parent's constitutionally protected parental

¹⁹ See *In re Interest of Taeven Z.*, 19 Neb. App. 831, 812 N.W.2d 313 (2012).

²⁰ See *State on behalf of Pathammavong v. Pathammavong*, 268 Neb. 1, 679 N.W.2d 749 (2004).

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preference. And a parent who is not described in a petition for adjudication is not given the necessary notice unless other filings are made.

Joshua points out that the State never alleged in any filings in juvenile court that he was unfit or had forfeited his superior right to custody, and he asserts that the court violated his due process rights both by litigating unfitness and by placing upon him at the hearings on his motion for placement the burden of demonstrating that he was fit to parent B.C. He argues that once he established his constitutionally protected status as a parent, the motion for placement should have been granted without further inquiry. He was not required to cooperate with DHHS in forming a plan that would provide assurances of B.C.'s safety, because the parental preference doctrine dictates that absent a showing of unfitness, he has a superior right to custody without undue State interference. Alternatively, Joshua argues that the evidence did not establish by a preponderance of the evidence that he was unfit.

The State, for its part, points out that it has been granted temporary legal custody over B.C. and is attempting to dutifully exercise its *parens patriae* responsibility to ensure B.C.'s welfare wherever he is placed. And the juvenile code contemplates jurisdiction over not only the child described therein, but also over such child's parents.²¹ The State notes that the juvenile court concluded that B.C.'s welfare could not be ensured without more cooperation from Joshua in creating a safety plan. Thus, the juvenile court determined that the State had proved that at least at the moment, Joshua was "unfit." It denies that it placed the burden on Joshua to prove himself fit.

The question presented in this appeal is where the net weight lies in the balance between the State's *parens patriae* interest in protecting B.C.'s welfare and Joshua's liberty and privacy interests in the care, custody, and management of his

²¹ See, § 43-247(5); *In re Interest of Devin W. et al.*, *supra* note 15; *In re Interest of Sabrina K.*, 262 Neb. 871, 635 N.W.2d 727 (2001).

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child.²² This case specifically raises questions concerning what level of State intrusion into the rights of a noncustodial parent, against whom no allegations have been made, is justified by a pending adjudication of the child under § 43-247(3)(a) due to allegations against the custodial parent and after a determination that the child would be at significant risk of harm if maintained in the custodial parent's home. It also raises issues of how the noncustodial parent's disability is treated in relation to determining temporary custodial rights.

[8-10] The relationship between parent and child is constitutionally protected and cannot be affected without procedural due process.²³ Due process of law is the "basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."²⁴ But due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."²⁵ The concept of due process embodies the notion of fundamental fairness and defies precise definition.²⁶ Due process is flexible and calls for such procedural protections as the particular situation demands.²⁷

The constitutional protections in the realm of parental rights and *parens patriae* responsibilities must be "elaborated with care."²⁸ In determining where the net weight lies, we must evaluate Joshua's interests that were at stake in the temporary placement of B.C. in foster care rather than in Joshua's

²² See *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

²³ *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994).

²⁴ *In re Gault*, 387 U.S. 1, 20, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

²⁵ *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

²⁶ *In re Interest of Sloane O.*, *supra* note 17.

²⁷ *Id.*

²⁸ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 101, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (Kennedy, J., dissenting).

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home. We must determine the risk of erroneous deprivation of such interests through the procedures used and the probable value, if any, of additional or substitute procedural safeguards. And we must evaluate the State's interest in the placement decision, including the function involved and the fiscal and administrative burdens that additional procedural requirements would entail.²⁹

[11] “[P]arents have a fundamental liberty interest in caring for and guiding their children, and a corresponding privacy interest—absent exceptional circumstances—in doing so without the undue interference of strangers to them and to their child”; these interests, however, ““do not spring full-blown from the biological connection between parent and child.””³⁰ The “mere existence of a biological link does not merit [substantial] constitutional protection.”³¹ Rather, such liberty interest stems from the more enduring relationship developed upon a biological parent's “commitment to the responsibilities of parenthood.”³² If the parent fails to grasp the opportunity to develop a relationship with the parent's offspring and does not accept “some measure of responsibility for the child's future,” “the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.”³³

[12] The U.S. Supreme Court has held that an unwed biological father who has grasped the opportunity to establish

²⁹ See, *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Lassiter v. Department of Social Services*, *supra* note 22; *Mathews v. Eldridge*, *supra* note 25.

³⁰ *Troxel v. Granville*, *supra* note 28, 530 U.S. at 87 (Stevens, J., dissenting). See, also, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944); *In re Interest of Enyce J. & Eternity M.*, *supra* note 1. See, also, *State on behalf of Tina K. v. Adam B.*, *ante* p. 1, 948 N.W.2d 182 (2020).

³¹ *Lehr v. Robertson*, 463 U.S. 248, 261, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983).

³² *Id.*

³³ *Id.*, 463 U.S. at 262.

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a familial relationship with his biological child has an interest in personal contact with his child, which interest is given substantial protection under the Due Process Clause of the 14th Amendment.³⁴ “The private interest . . . of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection.”³⁵ It has been established both that Joshua is B.C.’s biological father and that he has cared for and supported B.C. throughout most of B.C.’s life. Joshua is also B.C.’s legal father by virtue of the acknowledgment of paternity. Under these facts, Joshua has a fundamental liberty interest in the care, custody, and management of B.C. that is entitled to substantial protection under the Due Process Clause of the 14th Amendment.

[13] The State has an interest in the placement of B.C. that is derived from its role as *parens patriae*.³⁶ That interest is also important.³⁷ *Parens patriae* means, in essence, that the State has a right to protect the welfare of its resident children.³⁸ When parental control fails, the State must play its part as *parens patriae*.³⁹ The State has an interest in determining the status and custody that will best meet the child’s needs and wants, which is invoked both in proceedings under the juvenile code and when the State must adjudicate custody rights as between two parents.⁴⁰

³⁴ See, e.g., *Lehr v. Robertson*, *supra* note 31; *In re Adoption of Corbin J.*, 278 Neb. 1057, 775 N.W.2d 404 (2009).

³⁵ *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972).

³⁶ *In re Interest of Enyce J. & Eternity M.*, *supra* note 1.

³⁷ See *In re Interest of Anthony G.*, 255 Neb. 442, 586 N.W.2d 427 (1998).

³⁸ *In re Interest of Karlle D.*, *supra* note 3.

³⁹ See *In re Interest of S.R., D.R., and B.R.*, 239 Neb. 871, 479 N.W.2d 126 (1992).

⁴⁰ See, e.g., *Copple v. Copple*, 186 Neb. 696, 185 N.W.2d 846 (1971); *State ex rel. Cochrane v. Blanco*, 177 Neb. 149, 128 N.W.2d 615 (1964); *Meyerkorth v. State*, 173 Neb. 889, 115 N.W.2d 585 (1962); *In re Application of Reed*, 152 Neb. 819, 43 N.W.2d 161 (1950); *In re Interest of Stephanie H. et al.*, 10 Neb. App. 908, 639 N.W.2d 668 (2002).

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When called upon, the State, through the juvenile court, merely performs its duty of seeing that the child was properly cared for.⁴¹ The juvenile court is a product of the solicitude of the law for the welfare of infants.⁴² Its powers and duties are described in detail in our statutes, and because of their humanitarian and beneficent purpose, these statutes should be liberally construed to the end that their manifest purpose may be effectuated to the fullest extent compatible with their terms.⁴³ Neb. Rev. Stat. § 43-246 (Supp. 2019) provides in relevant part that the juvenile code shall be construed to ensure the rights of all children to care and protection and a safe and stable living environment, “with due regard to parental rights.”

[14-16] The “‘rights of parenthood,’” even of a fit parent, are not “‘beyond limitation,’”⁴⁴ by the State’s powers and duties as *parens patriae*. Thus, for example, the State may impose through laws of neutral and general applicability certain educational requirements, restrictions on child labor, and compulsory vaccination, even when against the parents’ wishes.⁴⁵ But, as the U.S. Supreme Court has explained, the “State registers no gain towards its declared goals when it separates children from the custody of fit parents.”⁴⁶ Where a child is cared for by a fit parent, the State’s interest in caring for the child is “*de minimis*.”⁴⁷ “[T]he State cannot presume that a child and his parents are adversaries.”⁴⁸ Only the paramount interest

⁴¹ See *DeBacker v. Brainard*, 183 Neb. 461, 161 N.W.2d 508 (1968).

⁴² *Stewart v. McCauley*, 178 Neb. 412, 133 N.W.2d 921 (1965).

⁴³ See *id.*

⁴⁴ *Douglas Cty. v. Anaya*, 269 Neb. 552, 560, 694 N.W.2d 601, 607 (2005), quoting *Prince v. Massachusetts*, *supra* note 30. See, also, *Copple v. Copple*, *supra* note 40; *State ex rel. Cochrane v. Blanco*, *supra* note 40; *Meyerkorth v. State*, *supra* note 40.

⁴⁵ See, e.g., *Prince v. Massachusetts*, *supra* note 30; *Douglas Cty. v. Anaya*, *supra* note 44.

⁴⁶ *Stanley v. Illinois*, *supra* note 35, 405 U.S. at 652.

⁴⁷ *Id.*, 405 U.S. at 657 (emphasis omitted).

⁴⁸ *Santosky v. Kramer*, *supra* note 29, 455 U.S. at 760.

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which the public has in the protection of the rights of the child can subjugate the rights of parents to maintain custody of their children.⁴⁹

Due to the allegations against the mother, the State has been called upon to play its role as *parens patriae* for B.C. And during proceedings under § 43-247(3)(a), the juvenile court has broad jurisdiction regarding placement.⁵⁰ B.C. was removed from his mother's home upon probable cause that he was seriously endangered in his surroundings and that immediate removal was necessary for his protection.⁵¹ B.C. remained in DHHS' continuing temporary physical custody pending adjudication in accordance with the juvenile code's requirement that the court find that being placed back in the mother's home would be contrary to B.C.'s health, safety, or welfare.⁵² But aside from its general mandate that due regard be given to parental rights,⁵³ the juvenile code's provisions governing physical custody pending disposition do not specifically contemplate situations where only one parent resides in the home from which the child was removed.

[17-19] We have held in situations where a child is removed from one parent's home pursuant to the juvenile code that the juvenile court's discretion regarding placement pending disposition is limited by Nebraska's "parental preference doctrine," which governs the rights of the other parent against whom no allegations have been made.⁵⁴ The parental preference doctrine holds that in a child custody controversy between a biological parent and one who is neither a biological nor an adoptive parent, the biological parent has a superior right to the custody

⁴⁹ See *In re Interest of Sloane O.*, *supra* note 17.

⁵⁰ See, e.g., *In re Interest of Karlie D.*, *supra* note 3.

⁵¹ See § 43-248.

⁵² See Neb. Rev. Stat. § 43-254 (Cum. Supp. 2018).

⁵³ § 43-246(2).

⁵⁴ See *In re Interest of Kamille C. & Kamiya C.*, 302 Neb. 226, 233, 922 N.W.2d 739, 746 (2019).

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of the child.⁵⁵ Under the parental preference doctrine, unless the State affirmatively shows a parent is unfit or has forfeited the right to custody, due regard for the parent's natural right to the custody of a child requires that a parent be presumptively regarded as the proper guardian.⁵⁶ Only exceptional circumstances involving proof of serious physical or psychological harm to the child or a substantial likelihood of such harm will negate the superior right of a fit parent who has not forfeited parental rights to custody under the parental preference doctrine.⁵⁷

Thus, in *In re Interest of Sloane O.*,⁵⁸ we held that due process protected the custody rights of a mother whose child had been adjudicated due to the faults or habits of the father, which rights were "subject only to the State's interest in protecting [the child] from harm."⁵⁹ In considering the mother's motion for temporary custody, we held that the juvenile court should have presumed under the parental preference doctrine that the mother was the best person to parent the child unless and until the State affirmatively demonstrated otherwise.⁶⁰

The mother in *In re Interest of Sloane O.* had been physically separated from the father, and a divorce action was pending. We held that evidence that the mother had previously witnessed incidents of the father's chaining the child to a couch was insufficient to meet the State's burden to prove the mother unfit and overcome parental preference.⁶¹ We reversed

⁵⁵ *Id.*

⁵⁶ See, e.g., *In re Interest of Sloane O.*, *supra* note 17; *In re Interest of Jaydon W. & Ethan W.*, 25 Neb. App. 562, 909 N.W.2d 385 (2018); *In re Interest of Miah T. & DeKandyce H.*, 23 Neb. App. 592, 875 N.W.2d 1 (2016); *In re Interest of Stephanie H. et al.*, *supra* note 40.

⁵⁷ See *State on behalf of Tina K. v. Adam B.*, *supra* note 30.

⁵⁸ *In re Interest of Sloane O.*, *supra* note 17.

⁵⁹ *Id.* at 903, 870 N.W.2d at 118.

⁶⁰ See *id.*

⁶¹ See *In re Interest of Sloane O.*, *supra* note 17.

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the juvenile court's denial of the mother's motion for custody and remanded the cause for further proceedings to consider the most up-to-date information regarding the child.⁶²

The Court of Appeals, in *In re Interest of Stephanie H. et al.*,⁶³ held similarly when it reversed the juvenile court's order denying the noncustodial mother's motion for placement after her children had been removed from the custodial father's home under allegations of sexual abuse. The Court of Appeals held that fundamental fairness demanded that the mother "be given prompt notice of any allegations against her which the State or [DHHS] contends make placement of her children with her contrary to the children's best interests."⁶⁴ The burden of proof was thereafter upon the State to overcome the parental preference doctrine.

Evidence in *In re Interest of Stephanie H. et al.* that the mother was living with a man for the preceding 6 months, knowing he was on "'work release'"⁶⁵ but not knowing whether he had a criminal record, did not "remotely resembl[e] an affirmative showing"⁶⁶ that the mother was unfit or that she had forfeited her parental rights. The State had neither alleged nor proved that the mother should not have custody of her children.⁶⁷ The Court of Appeals reversed the order of the juvenile court and remanded the cause with directions to place the children with the mother pending adjudication. The court noted, however, that its mandate did not preclude the State from coming forward in the future "with allegations and proof that [the mother was] not a fit custodial parent of her children."⁶⁸

⁶² See *id.*

⁶³ *In re Interest of Stephanie H. et al.*, *supra* note 40.

⁶⁴ *Id.* at 921-22, 639 N.W.2d at 680.

⁶⁵ *Id.* at 913, 639 N.W.2d at 674.

⁶⁶ *Id.* at 924, 639 N.W.2d at 682.

⁶⁷ *In re Interest of Stephanie H. et al.*, *supra* note 40.

⁶⁸ *Id.* at 926, 639 N.W.2d at 683.

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Likewise, in *In re Interest of Jaydon W. & Ethan W.*,⁶⁹ the Court of Appeals reversed the juvenile court's denial of the noncustodial father's motion for custody in ongoing proceedings for a child adjudicated due to the fault or habits of the custodial mother. DHHS had objected to the father's custody based on regression in the children's behavior after visitation and a protection order that had expired approximately 1½ years earlier. The juvenile court indicated custody would be revisited after DHHS completed further assessments ordered by the court. But, relying on the parental preference doctrine, the Court of Appeals described that the initial question must be whether the presumption that the children's best interests are served by reuniting them with their father has been rebutted by clear and convincing evidence that the father is unfit or has forfeited his right to custody. The Court of Appeals found that it had not.

While the Court of Appeals expressed in *In re Interest of Jaydon W. & Ethan W.* that it understood the juvenile court's "reluctance to uproot the children from their long-term foster home, especially given their recent behavioral concerns,"⁷⁰ it held that the father's right to custody could be "disrupted only upon a finding that he is unfit or has forfeited his right to custody."⁷¹ Still, the Court of Appeals explained that the juvenile court was not required to "order the children be turned over to [the father] immediately."⁷² It was constitutionally permissible and in the children's best interests to implement a transition plan. The Court of Appeals remanded the cause with directions for the court to do so.

[20] Our case law is clear that when the allegations of a petition for adjudication invoking the jurisdiction of the juvenile court are against one parent only, the State cannot deny

⁶⁹ *In re Interest of Jaydon W. & Ethan W.*, *supra* note 56.

⁷⁰ *Id.* at 576, 909 N.W.2d at 396.

⁷¹ *Id.*

⁷² *Id.* at 576-77, 909 N.W.2d at 397.

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the other parent's request for temporary physical custody in lieu of a foster care placement unless it pleads and proves by a preponderance of the evidence that the other parent is unfit or has forfeited custody or that there are exceptional circumstances involving serious physical or psychological harm to the child or a substantial likelihood of such harm.

[21] We note, however, that the State is not required to grant a nonoffending biological parent's request for custody before confirming that the parent has actually acquired constitutionally protected parental status. We observe that in *In re Interest of Sloane O.* and *In re Interest of Stephanie H. et al.*, the custody and visitation rights of the nonoffending parent had been adjudicated by the district court.⁷³ Because parental preference derives not simply from biology but from the enduring relationship developed upon a biological parent's commitment to the responsibilities of parenthood, children removed from their homes due to the fault or habits of one parent need not immediately and without some minimal investigation be placed with the other biological parent whose status as having "an actual relationship of parental responsibility"⁷⁴ is unknown. Only once that relationship is established does such a parent who wishes for temporary physical custody during the pendency of juvenile proceedings have a parental preference that cannot be denied without notice and an affirmative showing by a preponderance of the evidence⁷⁵ that the parent is unfit or has forfeited the parental relationship or that an exceptional circumstance of serious physical or psychological harm to the child or a substantial likelihood of such harm exists.

[22-24] Furthermore, as the Court of Appeals recognized in *In re Interest of Jaydon W. & Ethan W.*, due process is

⁷³ *In re Interest of Sloane O.*, *supra* note 17; *In re Interest of Stephanie H. et al.*, *supra* note 40.

⁷⁴ *Lehr v. Robertson*, *supra* note 31, 463 U.S. at 260.

⁷⁵ *In re Interest of R.G.*, *supra* note 6.

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“flexible,”⁷⁶ not “a fixed content unrelated to time, place and circumstances.”⁷⁷ Accordingly, the nonoffending parent’s exercise of the parental preference of custody is not entirely unfettered during the juvenile court’s continuing jurisdiction under the juvenile code. The juvenile court, in the exercise of its *parens patriae* responsibilities, may develop a transition plan constituting a reasonable intrusion of limited duration into the nonoffending parent’s rights to autonomy in the care and custody of the child. Likewise, it does not violate due process for the juvenile court in its determination of the child’s best interests and in its role as adjudicator of the custody rights between two parents to require the nonoffending parent’s cooperation with goals of reunification back into the home from where the child was taken.⁷⁸ After all, the parental preference doctrine serves no role in determining the custody rights between two biological or legal parents.

[25-27] It was established at the hearing on Joshua’s motion for placement that he is a parent entitled to substantial protection under the Due Process Clause of the 14th Amendment. Yet, there was never a formal allegation placing Joshua on notice that he would have to defend against an attempt by the State to prove he had lost the presumption of parental preference. Procedural due process generally requires that notice be given of such a nature as to reasonably convey the required information.⁷⁹ In the context of denying parental preference in a placement decision during proceedings under § 43-247(3)(a), reasonable notice must include the factual bases for seeking to prove that the parent is unfit or has forfeited parental

⁷⁶ *In re Interest of Jaydon W. & Ethan W.*, *supra* note 56, 25 Neb. App. at 572, 909 N.W.2d at 394.

⁷⁷ *Mathews v. Eldridge*, *supra* note 25, 424 U.S. at 334.

⁷⁸ See Vivek S. Sankaran, *Parens Patriae Run Amuck: The Child Welfare System’s Disregard for the Constitutional Rights of Nonoffending Parents*, 82 Temple L. Rev. 55 (2009).

⁷⁹ See *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

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rights or that exceptional circumstances exist involving serious physical or psychological harm to the child or a substantial likelihood of such harm.⁸⁰ While as to the parent from whose home the child was removed, such notice is ordinarily contained in the petition for adjudication,⁸¹ allegations as to the fault or habits of the custodial parent do not operate to give notice to the noncustodial parent that the State seeks to rebut that parent's right to parental preference in its placement decisions.

We agree with Joshua that because he was not given notice that his fitness, forfeiture, or exceptional circumstances were to be adjudicated at the hearing on his motion for placement, the juvenile court could not properly deprive him of his right to custody under the parental preference doctrine. The court found Joshua unfit, but without specific allegations of unfitness. The court violated Joshua's rights to procedural due process. Without a proper adjudication that the State had rebutted Joshua's parental preference by a preponderance of the evidence, the parental preference doctrine required temporary placement of B.C. with Joshua, who has developed an enduring relationship with B.C. and has committed to the responsibilities of parenthood. We therefore reverse the district court's order denying Joshua's motion for placement on procedural due process grounds and remand the cause with directions to grant Joshua temporary physical placement after establishing, with the most up-to-date information, an appropriate plan for B.C.'s transition into Joshua's temporary physical custody.

Granting Joshua's motion for temporary physical placement does not mean that the juvenile court lacks any authority over B.C. and Joshua.⁸² At the time of B.C.'s removal, the mother was the de facto custodial parent, and the State's current goal is reunification with her and placement back into the home B.C. was removed from. Joshua has not sought custody in

⁸⁰ See *id.*

⁸¹ See *In re Interest of Xavier H.*, 274 Neb. 331, 740 N.W.2d 13 (2007).

⁸² See, § 43-247(3) and (5); *In re Interest of Devin W. et al.*, *supra* note 15.

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district court or through a bridge order⁸³ in juvenile court. The juvenile court has the power to require cooperation with orders of visitation with the mother and its reunification plan. Temporary physical custody with a noncustodial parent ought not create a “substantial and unnecessary hindrance to efforts of reunification” with the custodial parent.⁸⁴ Furthermore, a plan for B.C.’s welfare during the transition from his foster placement to Joshua’s care is an appropriate exercise of the State’s *parens patriae* jurisdiction so long as the plan is a temporary and minor intrusion into Joshua’s parental rights.

We note that on remand, the State is free to attempt to properly plead factual bases for an allegation that Joshua is unfit and again try to prove that placement with Joshua is not required under the parental preference doctrine. Parents have no double jeopardy defense against repeated efforts by the State to modify temporary placement during a juvenile proceeding.⁸⁵ Therefore, in order to provide guidance for an issue that is likely to resurface on remand, we discuss the lower court’s approach to its fitness determination for Joshua, who is currently experiencing a physical disability. It appears that the State and the juvenile court were operating under the wrong standards.

Instead of evaluating whether the State had affirmatively proved Joshua unfit, the juvenile court seemed to shift the burden onto Joshua to prove himself fit. The court concluded that Joshua’s lack of “cooperation” in allaying “concerns” rendered him unfit. But the “concerns” described did not themselves establish unfitness. Rather, they were questions about how Joshua, wheelchair bound, would be able to address hypothetical scenarios that may or may not arise. The court and DHHS were worried about Joshua’s testimony that he required assistance from home health care aides in

⁸³ See Neb. Rev. Stat. § 43-246.01 (Reissue 2016).

⁸⁴ *In re Interest of Ethan M.*, 15 Neb. App. 148, 158, 723 N.W.2d 363, 371 (2006).

⁸⁵ See *Santosky v. Kramer*, *supra* note 29.

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the morning getting into his wheelchair, that he could not sit up on his own yet, and that he did not have overnight care. They had concerns about the fact that Joshua did not prepare his own meals.

Joshua testified that he did not believe the lack of an overnight caretaker would endanger B.C., and he listed ways in which he could provide adequate food for B.C. When specific overnight scenarios were presented to Joshua during his testimony, he had adequate answers as to how he would handle them. For example, when asked about what he would do if there were a fire, Joshua responded that he would call the fire department. Joshua owns a four-bedroom home in the center of town which DHHS evaluated as being in appropriate condition. Joshua is able to support himself and B.C. on his disability income. Joshua has made arrangements for B.C.'s transportation to and from school, as well as to and from any appointments B.C. might have. While Joshua is not able to prepare meals himself, he testified as to several different options that would provide B.C. with sufficient food. B.C. lived with Joshua up until Joshua developed Guillain-Barre syndrome, the mother having described Joshua and B.C. as well bonded, and Joshua described a daily routine for B.C.'s care. Joshua described disability services, family, and members of the community he could reach out to as needed when difficult situations arise.

Still, the juvenile court, in its determination of unfitness, relied on the lack of a written safety plan developed in cooperation with DHHS that would address in more detail how B.C. would be cared for when Joshua lacked home health care or when B.C. would be in the home for longer periods of time. The court had concerns about the details of how Joshua would care for B.C. on weekends, snow days, and holidays, and how he might address nosebleeds and fevers developed in the middle of the night. The court appeared to presume that because of Joshua's disability, Joshua was unfit unless he could provide a detailed response to all of the posed hypothetical scenarios,

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to be memorialized in a safety plan. Such a presumption is unlawful.

[28] While not directly controlling, we note that the Legislature has declared in Neb. Rev. Stat. § 42-364.18 (Cum. Supp. 2018) that individuals with disabilities “continue to face unfair, preconceived, and unnecessary societal biases as well as antiquated attitudes regarding their ability to successfully parent their children.” And in Neb. Rev. Stat. § 42-364(2) (Cum. Supp. 2018), the Legislature declared that “no presumption shall exist that either parent is more fit or suitable than the other” based on either “the sex or [the] disability of the parent.” Likewise, we hold that there is no presumption that a disabled parent is unfit, that a disabled parent has forfeited parental rights, or that exceptional circumstances exist involving serious physical or psychological harm to the child or a substantial likelihood of such harm because a parent is disabled.

[29] It is conceivable that a lack of adequate accommodations could render a disabled parent unable to care for a child, thereby affecting the State’s placement decision. However, the simple fact that a parent is disabled does not overcome the presumption that the parent is a better caretaker of the parent’s own child than the State is. The lack of a detailed safety plan to account for possible hypothetical scenarios that Joshua may have to address differently from a parent who is not wheelchair bound did not affirmatively prove him unfit.

The only evidence of unfitness presented at the hearing that was not related to Joshua’s disability was a couple of “hectic” visitations involving both B.C. and his half siblings, “unfounded” past intakes, the mother’s description of the incident in 2015, and the mother’s general concern over excessive drinking. Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which caused, or probably will result in, detriment to a child’s wellbeing.⁸⁶ The juvenile court did not appear to rely

⁸⁶ *Tilson v. Tilson*, ante p. 275, 948 N.W.2d 768 (2020).

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on such evidence in finding Joshua unfit under that definition, and, having reversed on procedural due process grounds, we need not determine in this appeal whether it would have been sufficient to sustain the State's burden.

We appreciate the juvenile court's concern for the welfare of the child it has been called upon to protect due to the fault or habits of the mother. And the State is not bound to wait until a tragedy has befallen a child before intervention occurs upon proof that the fault or habits of a parent present a risk of harm to the child.⁸⁷ But no notice was provided to Joshua that his fitness was at issue; therefore, the court erred in finding him unfit and in denying his parental preference to physical custody, which he sought to enforce through his motion for temporary placement. In the event the State attempts again to prove Joshua unfit after proper notice has been given, we clarify that a physical disability does not shift the burden to the disabled parent to prove fitness despite such disability.

4. EQUAL PROTECTION

Because we reverse the December 23, 2019, order on procedural due process grounds, we need not address Joshua's arguments that the denial of his motion for placement violated equal protection.

5. JURISDICTION OVER ADJUDICATION
PENDING APPEAL

We next address Joshua's argument in case No. S-20-244 that his appeal from the December 23, 2019, order denying his motion for placement deprived the juvenile court of jurisdiction to accept B.C.'s mother's plea and adjudicate B.C. due to the fault or habits of his mother. Joshua points out that he is a party to the case in which the adjudication order was rendered and that his parental rights are affected by the adjudication order that establishes with more permanency the court's

⁸⁷ See *In re Interest of M.B. and A.B.*, 239 Neb. 1028, 480 N.W.2d 160 (1992).

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jurisdiction and legal custody over B.C., as well as its jurisdiction over Joshua pursuant to § 43-247(5).

[30] Nebraska case law generally holds that once an appeal has been perfected, the lower court is divested of its subject matter jurisdiction over that case.⁸⁸ However, we have held that a juvenile court is not wholly divested of jurisdiction during the pendency of an appeal from a final order.⁸⁹

Neb. Rev. Stat. § 43-295 (Reissue 2016), which is directly applicable to the separate juvenile courts, states:

Except when the juvenile has been legally adopted, the jurisdiction of the court shall continue over any juvenile brought before the court or committed under the Nebraska Juvenile Code and the court shall have power to order a change in the custody or care of any such juvenile if at any time it is made to appear to the court that it would be for the best interests of the juvenile to make such change.

Additionally, state law clearly provides, through Neb. Rev. Stat. § 43-2,106 (Reissue 2016), that in counties where there is no separate juvenile court, the county court sitting as a juvenile court shall continue to exercise supervision of the juvenile until a hearing is had in the appellate court and the appellate court enters an order making other disposition. Section 43-2,106 states in full:

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,

⁸⁸ See, e.g., *State v. Abram*, 284 Neb. 55, 815 N.W.2d 897 (2012); *Billups v. Scott*, 253 Neb. 293, 571 N.W.2d 607 (1997); *Anderzhon/Architects Inc. v. 57 Oxbow II Partnership*, 250 Neb. 768, 553 N.W.2d 157 (1996); *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995).

⁸⁹ See *In re Interest of Jedidiah P.*, 267 Neb. 258, 673 N.W.2d 553 (2004).

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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. If the appellate court adjudges the juvenile to be a juvenile meeting the criteria established in subdivision (1), (2), (3), or (4) of section 43-247, the appellate court shall affirm the disposition made by the county court unless it is shown by clear and convincing evidence that the disposition of the county court is not in the best interest of such juvenile. Upon determination of the appeal, the appellate court shall remand the case to the county court for further proceedings consistent with the determination of the appellate court.

Somewhat similarly, in dissolution proceedings, Neb. Rev. Stat. § 42-351(2) (Reissue 2016) provides that when final orders are pending on appeal

the court that issued such orders shall retain jurisdiction to provide for such orders regarding support, custody, parenting time, visitation, or other access, orders shown to be necessary to allow the use of property or to prevent the irreparable harm to or loss of property during the pendency of such appeal, or other appropriate orders in aid of the appeal process. Such orders shall not be construed to prejudice any party on appeal.

In *In re Interest of Jedidiah P.*,⁹⁰ we noted that while there is no statute governing the separate juvenile courts which, similarly to § 43-2,106, clearly articulates such courts' continuing jurisdiction during the pendency of an appeal, we could "discern no reason for a juvenile court not to retain such authority, regardless of whether it is a county court sitting as a juvenile court or a separate juvenile court." Therefore, we

⁹⁰ *In re Interest of Jedidiah P.*, *supra* note 89, 267 Neb. at 263, 673 N.W.2d at 557.

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held that a separate juvenile court continues to exercise supervision of the juvenile during an appeal.⁹¹

[31] The extent of the continuing jurisdiction of the separate juvenile courts and the county courts sitting as juvenile courts during the pendency of an appeal is not without limits and must be determined by the facts of each case.⁹² The question is the level of supervision the separate juvenile court may properly exercise during the pendency of the appeal, which is governed by §§ 43-295 and 43-2,106.⁹³

[32] We have held that the juvenile courts' continuing jurisdiction does not include the power to terminate a juvenile's relationship with the child's parents.⁹⁴ In contrast, our courts have found juvenile courts to have continuing jurisdiction during the pendency of an appeal to issue an order to show cause seeking enforcement of prior orders requiring a speech and language assessment⁹⁵ and to order the temporary suspension of visitation.⁹⁶ In *In re Interest of Andrew H. et al.*,⁹⁷ the Court of Appeals held that an order of permanent disposition during the pendency of an appeal of an adjudication order went beyond the court's continuing jurisdiction to exercise supervision over

⁹¹ See *id.*

⁹² See *In re Interest of Becka P. et al.*, 296 Neb. 365, 894 N.W.2d 247 (2017); *In re Interest of Jedidiah P.*, *supra* note 89. See, also, e.g., *In re Interest of Phoenix L.*, 270 Neb. 870, 708 N.W.2d 786 (2006), *disapproved on other grounds*, *In re Interest of Destiny A. et al.*, 274 Neb. 713, 742 N.W.2d 758 (2007); *In re Interest of Stacey D. & Shannon D.*, 12 Neb. App. 707, 684 N.W.2d 594 (2004).

⁹³ *In re Interest of Jedidiah P.*, *supra* note 89.

⁹⁴ See *id.*

⁹⁵ *In re Interest of Becka P. et al.*, *supra* note 92.

⁹⁶ *In re Interest of Angeleah M. & Ava M.*, 23 Neb. App. 324, 871 N.W.2d 49 (2015), *disapproved on other grounds*, *In re Estate of Abbott-Ochsner*, 299 Neb. 596, 910 N.W.2d 504 (2018).

⁹⁷ *In re Interest of Andrew H. et al.*, 5 Neb. App. 716, 564 N.W.2d 611 (1997).

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the juvenile; but in *In re Interest of Jedidiah P.*,⁹⁸ we held that the juvenile court had continuing jurisdiction during the pendency of an appeal of the adjudication order to issue an order of disposition changing the juvenile's custody from the juvenile detention center to a residential treatment center and granting temporary legal custody of the juvenile to DHHS. The difference was that in *In re Interest of Jedidiah P.*, the order of disposition was a temporary placement order, while in *In re Interest of Andrew H. et al.*, the court had issued a permanent dispositional order adopting a case plan and ordering custody outside the home until completion.

Under the specific facts presented here, we find that the juvenile court had continuing jurisdiction to accept the mother's plea and adjudicate B.C. while Joshua's appeal from the order denying his motion for placement was pending. Joshua's reliance on *In re Interest of Joshua M. et al.*⁹⁹ to argue otherwise is misplaced. We held in *In re Interest of Joshua M. et al.* that the juvenile court lacked jurisdiction to terminate parental rights to three children during the pendency of appeals from a final order of placement outside the home preadjudication as to one child and from final orders modifying dispositional orders to place outside the home the two other children. The juvenile court did not proceed in this case to a termination of parental rights.

We note that successful appeals challenging orders of adjudication would eliminate a juvenile court's jurisdiction over the juvenile and its power to issue permanent dispositional orders, while successful appeals from temporary placement orders would not. Neb. Rev. Stat. § 43-278 (Reissue 2016) provides that absent a showing of good cause, an adjudication hearing shall be held no more than 90 days after a petition is filed. As the juvenile court noted, B.C.'s mother had an interest in promptly adjudicating her children so that she could

⁹⁸ *In re Interest of Jedidiah P.*, *supra* note 89.

⁹⁹ *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997).

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more quickly proceed to a rehabilitative plan and placement of the children back in her care. Joshua's appeal from the denial of his motion for temporary placement can have no effect on the juvenile court's underlying jurisdiction in this case to promptly proceed with its statutory duties. The court's order of adjudication was a proper exercise of the juvenile court's ongoing supervisory powers during the pendency of Joshua's appeal in case No. S-20-009. Accordingly, we hold that the order of adjudication is not void.

6. DISQUALIFICATION

Lastly, because judicial disqualification is not subject to a harmless error analysis¹⁰⁰ and this is a continuing matter, we address Joshua's assignments of error challenging the juvenile court judge's impartiality. Joshua argues that the juvenile court judge demonstrated personal bias and prejudice against him through leading questions of Knott during the December 23, 2019, hearing and the statement in the order of adjudication that "[t]he current goal in this case is to return the juveniles to the custody of [their mother]."

[33] The Nebraska Revised Code of Judicial Conduct requires that "[a] judge shall hear and decide matters assigned to the judge, except when disqualification is required" ¹⁰¹ The code further states that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned" ¹⁰² 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" ¹⁰³ The issue of judicial disqualification

¹⁰⁰ See *Tierney v. Four H Land Co.*, 281 Neb. 658, 798 N.W.2d 586 (2011).

¹⁰¹ Neb. Rev. Code of Judicial Conduct § 5-302.7.

¹⁰² Neb. Rev. Code of Judicial Conduct § 5-302.11(A).

¹⁰³ § 5-302.11(A)(1).

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is timely if submitted at the earliest practicable opportunity after the disqualifying facts are discovered.¹⁰⁴

[34,35] Assuming without deciding that the question of the juvenile court judge's disqualification was not waived, we find no merit to Joshua's assertion that the juvenile court judge should have been disqualified. There exists a presumption of judicial impartiality, and a party alleging that a judge acted with bias or prejudice bears a heavy burden of overcoming that presumption.¹⁰⁵ A judge's opinions based on facts presented during a hearing, even if those opinions are stated before the hearing's conclusion, are not indicative of bias by the judge unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.¹⁰⁶ The juvenile court judge's questioning and comment simply reflected the court's opinions based on the facts presented at the hearings and the judge's understanding of the law. Under the objective standard of reasonableness applicable to disqualification, the juvenile court judge's questions and comment would not cause a reasonable person to question his impartiality.¹⁰⁷

VI. CONCLUSION

In case No. S-20-009, we reverse the December 23, 2019, order denying Joshua's motion for placement and remand the cause with directions for further proceedings to develop a transition plan. In case No. S-20-244, we affirm the order of adjudication.

JUDGMENT IN No. S-20-009 REVERSED, AND
CAUSE REMANDED WITH DIRECTIONS.
JUDGMENT IN No. S-20-244 AFFIRMED.

¹⁰⁴ *Tierney v. Four H Land Co.*, *supra* note 100.

¹⁰⁵ *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011).

¹⁰⁶ *See In re Interest of J.K.*, 300 Neb. 510, 915 N.W.2d 91 (2018).

¹⁰⁷ *See id.*

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Nebraska Supreme Court

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IN RE INTEREST OF SETH C., A CHILD
UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V.
SETH C., APPELLANT.
951 N.W.2d 135

Filed November 20, 2020. No. S-20-026.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. **Statutes: Legislature: Intent.** In construing 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.
4. **Statutes.** A court must give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
5. **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.
6. **Juvenile Courts: Minors.** The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests.
7. ____: _____. The Nebraska Juvenile Code must be liberally construed to serve the best interests of juveniles who fall within it.
8. **Juvenile Courts: Restitution: Words and Phrases.** The word "including," as used in Neb. Rev. Stat. § 43-286(1)(a) (Supp. 2017), introduces examples, not an exhaustive list, and connotes that the provided list

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of components is not exhaustive and that there are other items includable that are not specifically enumerated.

9. **Juvenile Courts: Restitution.** The Nebraska Juvenile Code shall be construed to offer selected juveniles the opportunity to take direct personal responsibility for their individual actions by reconciling with the victims and fulfilling the terms of any resulting agreement which may require restitution and community service.
10. ____: _____. Neb. Rev. Stat. § 43-286(1)(a) (Supp. 2017) contains a non-exhaustive list of what terms and conditions a juvenile court may order.
11. **Juvenile Courts.** A juvenile court has broad discretion as to the disposition of a delinquent child.
12. _____. A juvenile court proceeding is not a prosecution for a crime, but a special proceeding that serves as an ameliorative alternative to a criminal prosecution.
13. **Juvenile Courts: Restitution: Records.** Strict rules of evidence do not apply at dispositional hearings in juvenile cases, but a court's order imposing restitution must still be supported by the record.
14. **Juvenile Courts: Restitution.** A restitution order imposed in an appropriate manner serves the salutary purpose of making the offender understand that he or she has harmed not merely society in the abstract, but also individual human beings, and that he or she has a responsibility to the victim. This salutary purpose would be undermined by the imposition of a restitution order that the juvenile is financially unable to pay.
15. **Juvenile Courts: Restitution: Proof.** When a juvenile court enters an order of restitution, the court may use any rational method of fixing the amount of restitution, as long as the amount is rationally related to the proofs offered at the dispositional hearing, and the amount is consistent with the purposes of education, treatment, rehabilitation, and the juvenile's ability to pay.

Appeal from the Separate Juvenile Court of Lancaster County: REGGIE L. RYDER, Judge. Affirmed.

Joe Nigro, Lancaster County Public Defender, and Megan Kielty for appellant.

No appearance for appellee.

HEAVICAN, C.J., MILLER-LEMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

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FUNKE, J.

Seth C. appeals an order of restitution entered by the separate juvenile court after Seth admitted to an amended allegation of disturbing the peace and quiet of another person. As a term of probation, the juvenile court ordered Seth to pay \$500 in restitution for the victim's medical expenses. Seth argues that the Nebraska Juvenile Code does not authorize a juvenile court to order restitution for medical expenses incurred by a victim.¹ We disagree and affirm the order of restitution for medical expenses.

BACKGROUND

On August 9, 2018, the State filed a juvenile petition in the separate juvenile court of Lancaster County alleging that Seth was a juvenile as defined under Neb. Rev. Stat. § 43-247 (Reissue 2016) and further alleging that Seth had committed conduct that would constitute assault in the third degree. Seth denied the allegation in the petition.

On October 4, 2018, the juvenile petition was amended by interlineation to allege that Seth disturbed the peace and quiet of another person. That same day, Seth entered an admission to the amended petition. On October 16, the juvenile court entered an order of adjudication finding Seth to be a juvenile as defined by § 43-247(1), continuing his disposition to a later date and ordering the preparation of a predisposition investigation report.

According to police reports included with the predispositional report, Seth and the victim were occupants in different vehicles involved in a road rage incident. Once both vehicles came to a stop, Seth got out of his vehicle, went to the victim's vehicle, and began punching the victim while the victim was still sitting in his vehicle. The victim was punched four to five times in the head before he got out of his vehicle and confronted Seth. Seth claimed that it was a mutual fight and

¹ See Neb. Rev. Stat. § 43-286(1)(a)(i) (Supp. 2017).

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that the victim's hand was injured when the victim punched a concrete median.

In June 2019, the juvenile court entered an "Agreement and Order of Probation" placing Seth on probation and outlining specific terms and conditions Seth was to complete. One of the terms required Seth to "pay restitution as ordered."

On December 12, 2019, a restitution hearing was held where evidence in the form of medical bills was received and testimony from the victim's mother was given. The medical bills showed that the victim received treatment from a local hospital and that \$3,330.96 was still due and owing. The victim's mother testified that though insurance paid for a portion of the medical expenses, the remaining balance had not been paid. Additionally, a victim impact statement was received which indicated that the medical expenses stemmed from the injury the victim sustained during the altercation with Seth.

Seth testified that at the time of the hearing, he was 18 years of age and would be turning 19 in January 2020. He further testified that he was working approximately 40 hours per week at a wage of \$10 per hour, for a net income of \$800 to \$900 per month. Seth also testified that he was living in an apartment with his girlfriend and received no financial support from his parents. He explained that he pays his own bills, which include monthly expenses of \$375 for rent, \$60 for his phone, and other costs for groceries and clothing.

Because Seth was less than a month from turning 19 years old and because of Seth's current financial status, the court acknowledged that it would be unrealistic to expect Seth to pay the full amount of restitution, \$3,330.96, in the time he had remaining on probation. However, the court determined it would be in Seth's rehabilitative interests to make a good faith effort to make the victim and his family whole. In response, Seth argued that under § 43-286, the juvenile court was authorized to order restitution for stolen or damaged property, but was not authorized to order restitution for medical expenses incurred as the result of physical damages (bodily injury).

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In its order filed on December 13, 2019, the juvenile court rejected Seth’s argument. The court stated that the “very nature of the statute gives the court broad discretion as to what those terms may be.” The court opined that the inclusion of the provisions of restitution and community service programs in the statute provides mere examples of what the court may order, not the exclusive list of what the court is authorized to order. The court ordered Seth to pay restitution to the victim in the amount of \$500, again noting that although Seth should be required to pay the full amount of restitution, the circumstances did not allow for it. Seth appeals.

ASSIGNMENTS OF ERROR

Seth assigns, restated, renumbered, and consolidated, that the juvenile court erred in finding that (1) an order of restitution for bodily injury was authorized by statute, (2) there was sufficient evidence to support an order of restitution, and (3) Seth had the ability to pay the ordered restitution.

STANDARD OF REVIEW

[1,2] An appellate court reviews juvenile cases *de novo* on the record and reaches its conclusions independently of the juvenile court’s findings.² Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.³

ANALYSIS

STATUTORY AUTHORITY

In his first assignment of error, Seth asserts that the language of § 43-286 authorizes a juvenile court to order restitution only for any property stolen or damaged and that as such, the court lacked the requisite statutory authority to order Seth to pay restitution for the medical expenses the victim incurred. We recognize that as a statutorily created court of

² *In re Interest of Octavio B. et al.*, 290 Neb. 589, 861 N.W.2d 415 (2015).

³ *In re Interest of Marcella G.*, 287 Neb. 566, 847 N.W.2d 276 (2014).

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limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute.⁴ But we disagree that the statutes authorizing dispositions in juvenile cases are as limited as Seth argues.

[3-5] A court determines a statute's meaning based on its text, context, and structure.⁵ In construing 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 A court must give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.⁷ 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

[6,7] As we have routinely said, the foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests.⁹ Additionally, the Nebraska Juvenile Code must be liberally construed to serve the best interests of juveniles who fall within it.¹⁰

Section 43-286, in relevant part, provides:

(1) When any juvenile is adjudicated to be a juvenile described in subdivision (1), (2), or (4) of section 43-247:

(a)(i) . . . The court may continue the dispositional portion of the hearing, from time to time upon such terms

⁴ See *In re Interest of Donald B. & Devin B.*, 304 Neb. 239, 933 N.W.2d 864 (2019).

⁵ *Ash Grove Cement Co. v. Nebraska Dept. of Rev.*, 306 Neb. 947, 947 N.W.2d 731 (2020).

⁶ *Id.*

⁷ *Id.*

⁸ *First State Bank Neb. v. MP Nexlevel*, ante p. 198, 948 N.W.2d 708 (2020).

⁹ *In re Interest of Veronica H.*, 272 Neb. 370, 721 N.W.2d 651 (2006).

¹⁰ See *id.* See, also, Neb. Rev. Stat. § 43-2,128 (Reissue 2016).

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and conditions as the court may prescribe, including an order of restitution of any property stolen or damaged or an order requiring the juvenile to participate in community service programs, if such order is in the interest of the juvenile's reformation or rehabilitation

[8] Section 43-286(1)(a) uses the word “including” when it lists what the court may order as part of the disposition. We note that it is a widely accepted interpretation that the word “including” introduces examples, not an exhaustive list.¹¹ In fact, we have previously stated that the word “include,” as used in a statute, connotes that the provided list of components is not exhaustive and that there are other items includable that are not specifically enumerated.¹² Thus, it is clear and consistent with our jurisprudence that the word “including,” as used in § 43-286(1)(a), connotes that the provided list of terms and conditions that the court may order is not exhaustive and that there may be other terms and conditions that are includable but not specifically enumerated in the statute. In other words, § 43-286(1)(a) does not limit the types of restitution a juvenile court may order to only restitution for property stolen or damaged.

[9] Further, Neb. Rev. Stat. § 43-246(3) (Reissue 2016) provides that the Nebraska Juvenile Code shall be construed to reduce the possibility of juveniles committing future law violations through the provision of social and rehabilitative services to such juveniles. Additionally, according to § 43-246(4), the Nebraska Juvenile Code shall be construed to offer selected juveniles the opportunity to take direct personal responsibility for their individual actions by reconciling with the victims and fulfilling the terms of any resulting agreement which may require restitution and community service.

¹¹ Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 132 (2012).

¹² *State v. Jedlicka*, 305 Neb. 52, 938 N.W.2d 854 (2020). See *Stephens v. Stephens*, 297 Neb. 188, 899 N.W.2d 582 (2017).

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Because §§ 43-246(3) and (4) and 43-286(1)(a) all relate to the juvenile code, § 43-286(1)(a) must be construed so as to maintain a sensible and consistent scheme with § 43-246(3) and (4). We believe it is consistent with the language of § 43-246(3), which makes reference to reducing the possibility of the juvenile's committing additional law violations, and § 43-246(4), which makes reference to requiring juveniles to make amends in various ways, including paying restitution, to interpret the reference to restitution for stolen or damaged property as merely one example of an offense for which the juvenile court could order restitution.

[10] As a result, we conclude that § 43-286(1)(a) contains a nonexhaustive list of what terms and conditions a juvenile court may order when continuing disposition and that statutorily, the court was authorized to order Seth to pay restitution for medical expenses. However, we must also consider whether ordering restitution was in the interest of Seth's reformation and rehabilitation.

[11,12] As we previously indicated, § 43-286(1)(a) allows a juvenile court to prescribe certain terms and conditions as long as it is in the interest of the juvenile's reformation or rehabilitation. Additionally, a juvenile court has broad discretion as to the disposition of a delinquent child.¹³ We have long recognized that a juvenile court proceeding is not a prosecution for a crime, but a special proceeding that serves as an ameliorative alternative to a criminal prosecution.¹⁴

When liberally construing the Nebraska Juvenile Code, we conclude that requiring Seth to pay restitution for the victim's medical bills is essential for Seth's reformation and rehabilitation, because it gives Seth the opportunity to take direct personal responsibility for his actions.

Seth's first assignment of error is without merit.

¹³ See *In re Interest of J.M.*, 223 Neb. 609, 391 N.W.2d 146 (1986).

¹⁴ *In re Interest of Brandon M.*, 273 Neb. 47, 727 N.W.2d 230 (2007).

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SUFFICIENCY OF EVIDENCE

Seth's second assignment of error contends that even if the juvenile court has the statutory authority to order restitution for medical expenses, the State presented insufficient evidence to support the award of restitution. In particular, Seth argues that there was insufficient evidence to find that the victim's injuries were caused by Seth and that \$500 was the appropriate amount of restitution.

Seth is correct that there is evidence in the record that the victim's injuries may have occurred when the victim struck a concrete median during the incident. Nonetheless, we conclude that the State presented sufficient evidence to prove the victim's physical injuries were caused by Seth.

It is undisputed that Seth admitted to the allegation of disturbing the peace and quiet of another person stemming from the altercation with the victim. It is also undisputed that Seth was the initial physical aggressor in the incident, because the police reports show that Seth got out of his vehicle, walked over to the victim's vehicle, and began punching the victim. Seth struck the victim four to five times before the victim got out of his vehicle and took Seth to the ground. As such, the record supports that the victim's injuries were caused by Seth.

As to the amount of the medical damages, Seth points to the fact that the medical bills do not indicate or list the victim's injuries and that the only details regarding how the victim sustained the injuries, and the type of injuries the victim suffered, are found in the victim impact statement, which was filled out by the victim's mother. Seth argues that the victim impact statement is hearsay and therefore not admissible evidence to be considered by the court.

[13] According to Neb. Rev. Stat. § 43-283 (Reissue 2016), strict rules of evidence do not apply at dispositional hearings. As such, Seth's hearsay argument lacks merit. However, we have said that despite § 43-283, a court's order imposing restitution must still be supported by the record.¹⁵

¹⁵ *Id.*

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Here, the juvenile petition alleged that the incident occurred on April 10, 2018; the medical bills indicate that the victim received treatment that same day; and the victim's mother testified that \$3,330.96 of the medical bills remains outstanding. Additionally, despite the evidence as to the unpaid portion of the medical bills, the court ordered Seth to pay restitution only in the amount of \$500. Therefore, we conclude that on the record before us, there is sufficient evidence to support the amount of restitution which Seth was required to pay to the victim.

Seth's second assignment of error has no merit.

ABILITY TO PAY RESTITUTION

Seth's third assignment of error is that the juvenile court erred in finding he had the ability to pay the \$500 in restitution.

[14] We have previously stated that a restitution order “‘imposed . . . in an appropriate manner serves the salutary purpose of making the offender understand that he has harmed not merely society in the abstract but also individual human beings, and that he has a responsibility to’ the victim.”¹⁶ We have also recognized that this “salutary purpose” would be undermined by the imposition of a restitution order that the juvenile is financially unable to pay.¹⁷

[15] In *In re Interest of Laurance S.*,¹⁸ we noted that § 43-286(1)(a) does not prescribe any particular method by which to determine whether restitution is appropriate or the amount of restitution to be awarded. We further noted that when a juvenile court enters an order of restitution, the court should consider, among other factors, the juvenile's earning

¹⁶ *In re Interest of Laurance S.*, 274 Neb. 620, 625, 742 N.W.2d 484, 489 (2007) (quoting *In re Brian S.*, 130 Cal. App. 3d 523, 181 Cal. Rptr. 778 (1982)).

¹⁷ *In re Interest of Laurance S.*, *supra* note 14.

¹⁸ *Id.*

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ability, employment status, financial resources, and other obligations.¹⁹ Ultimately, we concluded that juvenile courts may use any rational method of fixing the amount of restitution, as long as the amount is rationally related to the proofs offered at the dispositional hearing, and the amount is consistent with the purposes of education, treatment, rehabilitation, and the juvenile's ability to pay.²⁰

At the restitution hearing in this matter, Seth testified that he works around 40 hours per week, earns around \$800 to \$900 per month (after taxes), and pays approximately \$435 in various bills. The order of restitution was filed on December 13, 2019, and because Seth would reach the age of majority in January 2020, the court ordered him to pay \$500 by that date. Seth contends that the court was essentially asking him to pay an amount more than he could afford, thus undermining the salutary purpose of restitution.

In the original order of probation, the court ordered Seth to pay restitution in an amount to be determined. At the December 2019 hearing, evidence substantiated the total amount of restitution to be \$3,330.96. Based upon the short time Seth could remain on probation, the court reduced the amount of restitution to \$500. Additionally, the evidence showed that after paying his monthly expenses, Seth had approximately \$500 to \$600 of disposable income remaining each month. As such, the court took into consideration the fact that Seth would not be able to pay the full amount of restitution of \$3,330.96 and reduced the restitution to an amount Seth would be able to pay. Therefore, we conclude that the juvenile court ordered restitution in an amount rationally related to the proofs offered at the dispositional hearing and that the amount was consistent with the purposes of education, treatment, rehabilitation, and the juvenile's ability to pay. As such, the court did not

¹⁹ *Id.*

²⁰ *Id.*

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violate the salutary purpose of ordering Seth to pay restitution in the amount of \$500.

Seth's third assignment of error has no merit.

CONCLUSION

We conclude that the language of § 43-286(1)(a) contemplates a nonexhaustive list of examples of terms and conditions that a juvenile court may order, and thus the juvenile court had the authority to order restitution for medical expenses as long as such order was in the interest of the juvenile's reformation or rehabilitation. We find there was sufficient evidence in the record to support a finding that Seth caused the victim's injuries and to support the amount of restitution ordered, that Seth had the ability to pay the \$500 in restitution, and that the order to pay such restitution was made in the interest of Seth's reformation and rehabilitation. Accordingly, we affirm the order of the juvenile court.

AFFIRMED.

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STATE v. BLOCHER

Cite as 307 Neb. 874



Nebraska Supreme Court

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of this certified document.

-- Nebraska Reporter of Decisions

STATE OF NEBRASKA, APPELLEE, V.
SAMANTHA R. BLOCHER, APPELLANT.

951 N.W.2d 499

Filed December 4, 2020. No. S-19-1076.

1. **Judgments: Speedy Trial: Appeal and Error.** A trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
3. **Speedy Trial.** If a defendant is not brought to trial before the running of the time for trial as provided for in Neb. Rev. Stat. § 29-1207 (Reissue 2016), as extended by excluded periods, he or she shall be entitled to his or her absolute discharge from the offense charged and for any other offense required by law to be joined with that offense.
4. _____. To calculate the deadline for trial under the speedy trial statutes, a court must exclude the day the State filed the information, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 2016).

Appeal from the District Court for Lancaster County: LORI A. MARET, Judge. Affirmed.

Matt Catlett, of Law Office of Matt Catlett, for appellant.

Douglas J. Peterson, Attorney General, and Jordan Osborne for appellee.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

307 NEBRASKA REPORTS

STATE v. BLOCHER

Cite as 307 Neb. 874

HEAVICAN, C.J.

INTRODUCTION

Samantha R. Blocher was arrested in Lancaster County and charged with one count of possession of methamphetamine. The day before her pretrial docket call, Blocher was arrested in Douglas County for shoplifting. Blocher did not appear for her Lancaster County docket call, and the district court issued a bench warrant for Blocher's arrest.

Blocher was arrested on the warrant by authorities at Douglas County Department of Corrections, but was not returned to Lancaster County. She was eventually convicted and sentenced for the shoplifting charge in Douglas County. After serving her sentence in Douglas County, Lancaster County sheriff's deputies took custody of Blocher and transported her to Lancaster County. Blocher was again ordered to appear for a pretrial docket call. She filed a motion to discharge, which was denied. Blocher appeals.

The issue presented by this appeal is whether the time Blocher spent incarcerated in Douglas County was properly attributable to Blocher for purposes of her speedy trial rights. The district court found that it was. We affirm the decision of the district court.

BACKGROUND

On February 7, 2019, Blocher was charged by information with possession of methamphetamine, a Class IV felony. She filed several pretrial motions on February 11, and those motions were disposed of by the district court on February 19.

Blocher was ordered to appear for a jury docket call on April 17, 2019, but on April 16, Blocher was arrested for shoplifting in Douglas County. As a result, Blocher did not appear at the pretrial hearing in Lancaster County and a bench warrant was sought. That warrant was issued on April 19. Blocher was arrested on the warrant by authorities at Douglas County Department of Corrections on April 21, but was not transported back to Lancaster County.

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Blocher was eventually convicted in Douglas County of third-offense shoplifting, a Class IV felony, and sentenced to jail time, most of it already served. She served the remainder of her sentence. Immediately upon release on July 11, 2019, Blocher was arrested by Lancaster County sheriff's deputies and transported to Lancaster County. A bond hearing was held on July 16. At that hearing, the Lancaster County District Court waived its earlier finding that Blocher had forfeited her bond, reasoning that Blocher had been in custody in Douglas County.

On August 7, 2019, Blocher was ordered to appear in Lancaster County on August 21 for a docket call hearing in preparation for trial set during the jury term beginning September 9. On August 16, Blocher filed a motion for absolute discharge. A hearing was held, after which the district court issued a written order denying the motion. Blocher appeals.

ASSIGNMENT OF ERROR

Blocher assigns, restated, that the Lancaster County District Court erred in excluding from her speedy trial calculation the time she spent incarcerated while awaiting charges in Douglas County and while serving her sentence, and in turn denying her motion for discharge.

STANDARD OF REVIEW

[1] Generally, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.¹

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

¹ *State v. Lovvorn*, 303 Neb. 844, 932 N.W.2d 64 (2019).

² *Id.*

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ANALYSIS

[3] The statutory right to a speedy trial is set forth in Neb. Rev. Stat. §§ 29-1207 and 29-1208 (Reissue 2016).³ Section 29-1207(1) provides that “[e]very person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section.” If a defendant is not brought to trial before the running of the time for trial as provided for in § 29-1207, as extended by excluded periods, he or she shall be entitled to his or her absolute discharge from the offense charged and for any other offense required by law to be joined with that offense.⁴

[4] To calculate the deadline for trial under the speedy trial statutes, a court must exclude the day the State filed the information, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4).⁵ Section 29-1207(4) provides in relevant part:

The following periods shall be excluded in computing the time for trial:

(a) The period of delay resulting from other proceedings concerning the defendant, including, but not limited to, an examination and hearing on competency and the period during which he or she is incompetent to stand trial; the time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence, motions to quash the indictment or information, demurrers and pleas in abatement, and motions for a change of venue; and the time consumed in the trial of other charges against the defendant;

. . . .

(d) The period of delay resulting from the absence or unavailability of the defendant.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

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We have held that a defendant who is given notice to appear for trial and fails to do so is absent or unavailable for purposes of § 29-1207(4)(d). In such a case, the time from the failure to appear until the “next reasonably available trial date” after the defendant reappears is attributable to the defendant.⁶ A trial date within 6 months of the reappearance of the defendant is presumed to be reasonable.⁷

The information in Lancaster County was filed against Blocher on February 7, 2019, so the State initially had until August 7 to bring Blocher to trial. But the State and Blocher agree that Blocher had filed pretrial motions on February 11. Those motions were disposed of on February 19. Under § 29-1207(4)(a), this delay of 8 days was attributable to Blocher and pushed the date by which the State had to try her until August 15.

Blocher was ordered to appear for a pretrial docket call on April 17, 2019. She did not appear. On appeal, Blocher argues that she was ordered to appear unless “incarcerated” and that because she had been arrested and was confined in Douglas County, she therefore was not absent or unavailable. Blocher further asserts that even if she was absent or unavailable, the time spent in Douglas County was not attributable to her, because Lancaster County was aware of her presence in Douglas County and did not do enough to ensure her presence at trial.

We turn first to Blocher’s assertion that she was not absent or unavailable on April 17, 2019. The record shows that on April 3, the district court filed its order to appear at a docket call. That filing consisted of a cover letter that ordered “[a]ll defendants (except those incarcerated)” to appear. It also included a list of those individuals on the docket call which separately denoted those that were incarcerated. The filing

⁶ See *State v. Petty*, 269 Neb. 205, 213, 691 N.W.2d 101, 107 (2005). See, also, *State v. McKenna*, 228 Neb. 29, 421 N.W.2d 19 (1988).

⁷ See *Petty*, *supra* note 6.

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ended by noting that “[t]he defendant can only be excused from appearing at docket call upon order of the Court.” Blocher’s name is listed and is not separately denoted as incarcerated. Nor does Blocher argue that she did not receive notice that she was to attend.⁸ We conclude that when Blocher failed to appear, she was absent or unavailable for purposes of § 29-1207(4)(d). At least on these facts, her arrest in Douglas County did not act to relieve her of her responsibility to appear.

We turn next to Blocher’s assertion that even if she was initially absent or unavailable, that time is nevertheless unattributable to her, because Lancaster County “did not prove that it took any efforts to secure [her] appearance and that such efforts were unsuccessful, or that such efforts would have been futile.”⁹

We disagree that on these facts, Lancaster County did not make any effort to secure Blocher’s presence. The record shows that upon Blocher’s failure to appear, a warrant was ordered for her arrest. That warrant was actually issued the next day and was served on Blocher 2 days later. At that time, Blocher was arrested by authorities at Douglas County Department of Corrections, but remained in Douglas County until the charges against her there were concluded and she finished serving her sentence. Blocher was immediately taken into custody by Lancaster County authorities and transported to Lancaster County.

Blocher asserts only that she was charged, not by an individual county, but by the State, and that as such, it was within the power of Lancaster County to have her returned to Lancaster County for trial. But she directs us to no authority that would support the conclusion that one county in Nebraska may require another county to transfer custody of a defendant, and our research has revealed none.

⁸ See, e.g., *State v. Richter*, 240 Neb. 223, 481 N.W.2d 200 (1992).

⁹ Brief for appellant at 8.

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Moreover, while there is no Nebraska case law directly on point, we have said, under similar facts but in the context of a constitutional speedy trial analysis, that requiring a county to take steps to secure the presence of defendant “ignores the fact that such action could have affected his availability for pretrial proceedings and trial on the . . . charges [pending in another county], resulting in the delay of their disposition.”¹⁰

The record shows that the State, acting through the Lancaster County Attorney, sought a bench warrant, which was issued within a few days after Blocher’s failure to appear. Blocher was arrested on that warrant a few days after it was issued. The warrant was eventually returned on July 12, 2019, noting that Lancaster County had taken custody of Blocher on July 11, as soon as she was released from her sentence in Douglas County. At that time, Blocher was returned to Lancaster County. We conclude that on these facts, Lancaster County acted with sufficient diligence to secure Blocher’s presence.

We are not persuaded by Blocher’s reliance on *State v. Steele*,¹¹ because we find it distinguishable. In *Steele*, the defendant was out on bond on charges in Lancaster County, when a warrant was issued for his arrest in Colorado. Lancaster County arrested him on that warrant and later voluntarily returned the defendant to Colorado. However, the county failed to lodge a detainer against the defendant. In this case, though, Lancaster County did not voluntarily transfer custody to Douglas County, nor did it fail to take any necessary legal steps to secure Blocher’s return.

Finally, we observe that while the district court relied on § 29-1207(4)(d) to support the entire time between Blocher’s arrest and eventual release in Douglas County, at least a portion of that time period would also appear to be properly excluded under § 29-1207(4)(a), which excludes “[t]he

¹⁰ *State v. Tucker*, 259 Neb. 225, 232, 609 N.W.2d 306, 312 (2000).

¹¹ *State v. Steele*, 261 Neb. 541, 624 N.W.2d 1 (2001).

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period of delay resulting from other proceedings concerning the defendant, including, but not limited to . . . the time consumed in the trial of other charges against the defendant.”

While Blocher pled no contest to the charge in Douglas County and so did not go to trial, she was incarcerated during the pendency of charges against her in Douglas County. Broadly construed, § 29-1207(4)(a) applies to proceedings in the pending case as well as to proceedings in other pending cases; in addition, the plain language envisions that the periods of delay are not limited to those listed.

The district court did not err in excluding the time period from April 17, 2019, until the September 9 trial date. That trial date was within 6 months of Blocher’s reappearance in Lancaster County and presumed to be the next reasonably available trial date. In turn, the district court did not err in denying Blocher’s motion to discharge.

CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

TIMOTHY H. WEILAND, APPELLEE AND
CROSS-APPELLANT, v. ANN M.
WEILAND, APPELLANT AND
CROSS-APPELLEE.

951 N.W.2d 519

Filed December 4, 2020. No. S-20-034.

1. **Divorce: Judgments: Appeal and Error.** The meaning of a divorce decree presents a question of law, in connection with which an appellate court reaches a conclusion independent of the determination reached by the court below.
2. **Divorce: Property Division: Pensions.** Marital assets are subject to equitable division in a dissolution proceeding, and retirement benefits whether vested or not vested are eligible for inclusion in the marital estate.
3. **Divorce: Property Division: Armed Forces: Pensions.** A military pension is a marital asset.

Appeal from the District Court for Douglas County:
GREGORY M. SCHATZ, Judge. Affirmed in part, vacated in part,
and in part reversed and remanded with directions.

Andrew J. Hilger, of Law Office of Andrew J. Hilger, for
appellant.

Steven J. Riekes and Elizabeth Stuhrt Borchers, of Marks,
Clare & Richards, L.L.C., for appellee.

HEAVICAN, C.J., MILLER-LEMAN, CASSEL, STACY, FUNKE,
PAPIK, and FREUDENBERG, JJ.

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MILLER-LERMAN, J.

NATURE OF CASE

This case arises from a divorce action between Timothy H. Weiland, appellee and cross-appellant, and Ann M. Weiland, appellant and cross-appellee, who were married in 1984 and whose marriage was dissolved in 1996. Timothy served in the U.S. Marine Corps Reserve from 1982 through 2005. In the dissolution decree, Ann was “granted one-half of the points accumulated during the marriage by [Timothy] up to the time of the decree, and shall receive the credits for those points and the equivalent amount of money in the event that [Timothy’s] retirement benefits vest.” After the retirement benefits vested and in order for Ann to start receiving retirement benefits, the parties each moved the district court for Douglas County for clarification of the decree.

Following a hearing, the district court ordered Timothy to pay Ann a fixed award of \$465.38 per month for the retirement benefits and further ordered Timothy to pay Ann her share of Timothy’s retirement benefits he had received and not paid to Ann. Ann appeals, and Timothy cross-appeals, each challenging the fixed monthly amount of Ann’s marital share of Timothy’s military pension. As explained below, the district court erred when it assigned a fixed monthly dollar value. Although we honor Ann’s entitlement to an award of military pension benefits and affirm Ann’s entitlement to back payments, we vacate the fixed monthly benefit award and the fixed monthly amount of back payments; further, we reverse, and remand with directions to determine the equitable distribution of Timothy’s military retirement expressed as a formula that honors the points awarded in the decree and is consistent with a hypothetical retired pay award valued as of the date of the decree.

STATEMENT OF FACTS

Timothy entered the U.S. Marine Corps Reserve on August 6, 1982, and the parties were married in 1984 in Omaha, Douglas County, Nebraska. When the parties divorced on

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September 30, 1996, Timothy had not yet retired from the military. The only issue on appeal is the equitable distribution of Timothy's military retired pay consistent with the divorce decree and applicable legal principles. The divorce decree provided, in relevant part, as follows:

17. That the Petitioner [Timothy] accumulates points which apply to his retirement in the military. The Respondent [Ann] is granted one-half of the points accumulated during the marriage by the Petitioner up to the time of the decree, and shall receive the credits for those points and the equivalent amount of money in the event that Petitioner's retirement benefits vest.

Timothy retired from the military on January 12, 2005, and his pension rights vested after he turned age 60 on September 5, 2017. During his career, Timothy had earned a total of 5,822 retirement points, and after the pension rights vested, he began receiving \$2,050 per month from the pension. Thereafter, Ann applied for her share of the pension to the Defense Finance and Accounting Service of the U.S. Department of Defense. However, the accounting service would not calculate or pay Ann's share to her until the district court clarified certain information necessary to determine Ann's share.

Through cross-motions, Ann and Timothy each requested that the district court clarify the decree. Ann also filed a motion to modify the decree to state the number of military retirement points earned during the marriage and a motion for back payments to require Timothy to pay Ann her share of the pension he had already received.

At trial, the parties stipulated that at the time of the September 30, 1996, decree, Timothy had earned 3,334 Reserve retirement points. However, Ann and Timothy assign different values to the cash value of one-half of 3,334 points and propose different formulas to determine the fixed amount Ann should receive monthly from Timothy's military retirement amount. We examine the proposed formulas in the analysis section, below. Ann valued her interest at \$586 per month, and Timothy valued Ann's interest at \$383 per month.

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The district court filed a supplemental order on January 6, 2020, in which it found that it had jurisdiction to modify and clarify the decree to the extent necessary to effect its terms. The court awarded Ann \$465.38 per month, beginning November 2019. The court also ordered Timothy to pay \$9,549.60 to Ann, representing back payments of \$465.38 per month for the 27 months between September 2017 and November 2019, less the income taxes already paid by Timothy.

Ann appeals, and Timothy cross-appeals.

ASSIGNMENTS OF ERROR

Ann claims, summarized and restated, that the district court erred because its clarification of the parties' decree did not award her an amount based on a proportion of Timothy's total retirement points.

Timothy cross-appeals and claims, summarized and restated, that the district court erred in the amount it awarded to Ann by not utilizing a hypothetical date of retirement as of the date of the decree to determine Ann's interest in his retirement.

STANDARD OF REVIEW

[1] The meaning of a divorce decree presents a question of law, in connection with which an appellate court reaches a conclusion independent of the determination reached by the court below. *Braun v. Braun*, 306 Neb. 890, 947 N.W.2d 694 (2020).

ANALYSIS

On appeal and cross-appeal, Ann and Timothy each contend that the district court erred by modifying the decree and awarding Ann the fixed monthly amount of \$465.38. Ann claims that the fixed monthly amount should be \$586, whereas Timothy claims that the fixed monthly amount should be \$383. We reject both proposals. Instead, in order to be faithful to the language of the original equitable decree and consistent with Nebraska jurisprudence as well as federal authority, we conclude that the district court erred when it awarded a fixed monthly amount. We vacate the fixed dollar amount and

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reverse, and remand to clarify that Ann is entitled to a hypothetical retired pay award valued as of the date of the decree plus back payments as explained below.

[2,3] In Nebraska, marital assets are subject to equitable division in a dissolution proceeding and retirement benefits “whether vested or not vested” are eligible for inclusion in the marital estate. Neb. Rev. Stat. § 42-366(8) (Reissue 2016). In *Longo v. Longo*, 266 Neb. 171, 663 N.W.2d 604 (2003), we recognized that a military pension was a marital asset. When, as here, a decree is entered prior to the retirement of one of the parties who is a military service member, a clarifying order may later be necessary to determine the rights of the parties. See *Schwartz v. Schwartz*, 275 Neb. 492, 747 N.W.2d 400 (2008), *overruled on other grounds*, *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010). Our cases have recognized that it is proper for a court to compensate a spouse only for the years for which the marriage coincided with the military service in determining the nonmilitary spouse’s share of pension benefits. See *Longo v. Longo*, *supra*.

Historically, spousal interests in military retirement have been determined in several different ways consistent with federal law, including the Uniformed Services Former Spouses’ Protection Act (USFSPA), Pub. L. No. 97-252, § 1001, 96 Stat. 730 (codified as amended at 10 U.S.C. § 1408 (2018)), and Department of Defense rules and regulations. See Department of Defense Financial Management Regulation (DoD FMR) 7000.14-R, vol. 7B. Federal law has evolved over time. See, e.g., *Longo v. Longo*, *supra* (discussing history of division of military pensions). In considering military pension orders subsequent to dissolution, we have affirmed a fixed monthly dollar amount where the decree so provided, see *Longo v. Longo*, *supra*, and recognized the validity of a point-value method, see *Schwartz v. Schwartz*, *supra*.

It is generally agreed that the purpose of the passage of the USFSPA in 1982 was, in part, to permit the States to apply their state dissolution law to division of nondisability

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military retired pay. See *Starr v. Starr*, 70 Va. App. 486, 828 S.E.2d 257 (2019). A Senate report stated that the USFSPA was intended to remove the federal pre-emption found to exist by the United States Supreme Court [in *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981),] and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisible. Nothing in this [USFSPA] requires any division; it leaves that issue up to the courts applying community property, equitable distribution or other principles of marital property determination and distribution. S. Rep. No. 97-502, at 12 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1555, 1596, 1611. Thus, Nebraska's equitable division of military pensions is compatible with federal law.

A limitation on former spouses' retired pay was included in the National Defense Authorization Act for Fiscal Year 2017. See Pub. L. No. 114-328, 130 Stat. 2164 (Dec. 23, 2016). The amendment to 10 U.S.C. § 1408(a)(4)(B) reads as follows:

[I]n the case of a division of property as part of a final decree of divorce . . . that becomes final prior to the date of a member's retirement, the total monthly retired pay to which the member is entitled shall be[:]

. . . the amount of retired pay to which the member would have been entitled using the member's retired pay base and years of service on the date of the decree of divorce, dissolution, annulment or legal separation, as computed [with appropriate] cost-of-living adjustments[.]

Prior to the 2016 amendment to 10 U.S.C. § 1408, "states could determine the marital share of a military retirement based on the length of service to either the date of retirement or to the date of divorce." *Starr v. Starr*, 70 Va. App. at 494, 828 S.E.2d at 261.

As stated in *Fulgium v. Fulgium*, 240 Md. App. 269, 281-82, 203 A.3d 33, 40-41 (2019),

[t]his amendment to § 1408 was intended to modify "the division of military retired pay in a divorce decree to

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the amount the member would be entitled based upon the member's pay grade and years of service at the time of the divorce rather than at the time of retirement." S. Rept. 114-255, National Defense Authorization Act for Fiscal Year 2017, at 168 (114th Congress, 2016); Kristy N. Kamarck, Cong. Research Serv., RL31663, *Military Benefits for Former Spouses: Legislation and Policy Issues*, at 15 (2018) (hereinafter "CRS Report"). Rather than dividing actual retired pay at the time of retirement, the benefit would be frozen at the time of divorce. The rationale for using a "date of divorce" method for pension valuation was that a former spouse would not receive a windfall benefit from promotions and other pay increases that accrued from the date of divorce to the date of retirement, to which the former spouse made no contribution. See CRS Report, 15.

. . . In the National Defense Authorization Act for Fiscal Year 2018, Congress made technical corrections to this provision to clear up language problems in the [National Defense Authorization Act for Fiscal Year 2017]. See Pub. L. 115-91, 131 Stat. 1283, 1429 (Dec. 12, 2017); Brentley Tanner & Amelia Kays, *Winds of Change: New Rules for Dividing the Military Pension at Divorce*, 30 J. Am. Acad. Matrimonial Law 491, 497 (2017-2018). The current version of the statute provides that, in the situation where there is a final decree of divorce prior to the date of the member's retirement, disposable retirement pay is based on "the amount of retired pay to which the member would have been entitled using the member's retired pay base and years of service on the date of the decree of divorce, dissolution, annulment, or legal separation, as computed under section 1406 or 1407 of this title, whichever is applicable, increased by the sum of specified cost of living adjustments[.]" 10 U.S.C. § 1408(a)(4)(B).

As stated in *Starr v. Starr*, 70 Va. App. 486, 491, 828 S.E.2d 257, 260 (2019),

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[i]n summary, in determining the total interest of a member's military retirement for purposes of [state] equitable distribution, . . . the Amendment simply requires that the trial court use the date of divorce as the hypothetical date of retirement so that the amount of retired pay "us[es] the member's retired pay base and years of service on the date of the decree of divorce." 10 U.S.C. § 1408(a)(4)(B).

In the view of *Starr v. Starr*, after its adoption, this provision freezes a spouse's interest in the service member's military service as of the date of divorce, precluding consideration of military service or pay increases after the date of divorce.

At this juncture, we read the language of the decree against the foregoing legal authority. In the decree, Ann was awarded points having a future value which were "accumulated during the marriage" but only "up to the time of the decree." Given the language of the decree, we conclude that Ann is entitled to an award reflecting her property interest in Timothy's retired pay valued as if he had retired at the time of property division and further conclude that this approach is consistent with Nebraska jurisprudence as well as federal authority. Because the decree was expressed as points rather than a fixed dollar amount, we now discuss the parties' competing formulas.

The approaches advanced by the parties have been called the *date of retirement approach* as advocated for by Ann and the *date of divorce approach* as advocated for by Timothy. See 2 Brett R. Turner, *Equitable Distribution of Property*, § 6:25 (4th ed. 2019).

Using the *date of retirement approach*, Ann claims that the best interpretation of the decree would mean that the equivalent value of her half of the points is \$586 per month. She arrives at this figure by dividing half the points Timothy had earned on the date of the decree (1,667) by his total number of retirement points (5,822) and multiplying this fraction of his career earnings (1667/5822) by Timothy's monthly retirement amount (\$2,050) to determine her share of a fixed monthly benefit.

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Timothy contends that the value of the pension benefit is governed by 10 U.S.C. § 1408, including the 2016 amendment codifying the *date of divorce approach*, and Department of Defense rules and regulations. Timothy's approach requires developing a hypothetical retired pay award and is essentially a frozen benefit, as reflected in DoD FMR 7000.14-R, vol. 7B, ch. 29, ¶ 290213:

Hypothetical retired pay award is an award based on a percentage of retired pay that is calculated using variables provided in a court order that are different from the member's actual retirement variables. The retired pay calculated using the ordered variables is called the member's hypothetical retired pay. A hypothetical award typically attempts to define the property interest in the retired pay as if the member had retired at the time the court divided the member's military retired pay based upon the member's rank, or high-3 amount, and years of service accrued to that point in time. Thus, the former spouse does not benefit from the member's pay increases due to promotions or increased service time after the divorce.

Formulas to determine the value of military retirement and hypothetical retirement dates based on the laws in effect at the time of the decree are available in DoD FMR 7000.14-R, vol. 7B, ch. 29.

Under the approach quoted above, Timothy contends that Ann's 1,667 retirement points are equivalent to \$383 per month, reached by calculating the hypothetical value of his retirement points as though he was able to retire on the date of the decree with the same military record, years of service, salary, and rank as of the date of the decree.

As we have noted, the decree entered in this case provided Ann credit for "one-half of the points accumulated [by Timothy] during the marriage" and "up to the time of the decree." We agree with Timothy that a hypothetical retired pay award is most consistent with the language of the parties' decree and with principles of equitable distribution. However,

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contrary to Timothy's contention, given the plain language of the decree describing Ann's interest in the retirement benefit as points rather than a fixed dollar amount, the resulting court order should not be a fixed award, but should be expressed as a formula that honors the original decree and freezes Ann's points to the value of Timothy's retirement amount as of the date of the decree. Given the decree, the marital estate includes only that portion of the pension which is earned during the marriage, which is an acceptable division in Nebraska. *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994). See *Longo v. Longo*, 266 Neb. 171, 663 N.W.2d 604 (2003). Under the decree, the value of Ann's points should not be inflated to allow her to benefit from Timothy's pay increases after the divorce decree due to subsequent promotions or length of service. Ann's *date of retirement approach* would inappropriately compensate her in excess of the original decree by taking into account the advancement of Timothy's career from 1996 through 2005, after they had divorced.

Although the parties could estimate the present value of Ann's points using the hypothetical retired pay formulas provided by the Department of Defense regulations, as Timothy did in his briefing, we find that a fixed dollar award is inappropriate given the language of the original decree. Changing Ann's interest from a portion of points, as stated in the decree, to a fixed dollar award, as ordered by the district court, may well be appropriate at present, but ultimately modifies Ann's interest over time. A fixed award ignores the long-term effect of cost-of-living adjustments, and thus Ann would earn relatively less over time than was reflected in her original award. The district court erred when, at the behest of the parties, it strayed from provisions of the decree and entered judgment for Ann based on a theory of a fixed dollar retirement award.

We reverse and vacate the district court's order and remand the matter with directions to value Timothy's hypothetical retired base pay, to be determined based on the average basic

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pay for the most recent 36 months (known as high-3) prior to the hypothetical retirement date of September 30, 1996. Applicable Department of Defense regulations provide guidance for the district court to create a hypothetical retired pay formula based on the relevant facts. To enable the Defense Finance and Accounting Service to calculate the hypothetical retired pay amount, the clarifying court order must provide the following: (1) the percentage the former spouse was awarded; (2) the hypothetical years of creditable service, or, in the case of a reservist, the Reserve retirement points on which the hypothetical retired pay is to be based; (3) the hypothetical retired pay base; and (4) the hypothetical retirement date. See DoD FMR 7000.14-R, vol. 7B, ch. 29, ¶ 290608(F). The decree should be clarified to reflect that Ann is awarded 50 percent of the disposable military retired pay Timothy would have received had he become eligible to receive military retired pay with a “retired pay base (high-3) of [\$]_____” and with 3,334 Reserve retirement points on September 30, 1996. See DoD FMR 7000.14-R, vol. 7B, ch. 29, figure 29-1.

CONCLUSION

Under the parties’ 1996 divorce decree, the district court erred when it assigned a fixed monthly dollar value to Ann’s interest in Timothy’s military retirement benefits. Although we honor Ann’s entitlement to an award of military pension benefits and affirm Ann’s entitlement to back payments, we vacate the award of fixed past and future monthly retirement benefits to Ann and remand the matter for further clarification of the decree, consistent with directions in this opinion, to determine the equitable distribution of Timothy’s military retirement expressed as a formula that honors the points awarded in the decree and consistent with a hypothetical retirement date as of the date of the decree, September 30, 1996.

AFFIRMED IN PART, VACATED IN PART, AND IN PART
REVERSED AND REMANDED WITH DIRECTIONS.

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IN RE ESTATE OF MARSH
Cite as 307 Neb. 893



Nebraska Supreme Court

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-- Nebraska Reporter of Decisions

IN RE ESTATE OF GALE H. MARSH, DECEASED.
SARAH J. MARSH AND CARLA M. MARSH, COTRUSTEES OF
THE GALE H. MARSH REVOCABLE TRUST AGREEMENT,
APPELLEES, V. COUNTY OF RICHARDSON,
NEBRASKA, APPELLANT.

951 N.W.2d 486

Filed December 4, 2020. No. S-20-102.

1. **Decedents' Estates: Taxation: Appeal and Error.** On appeal of an inheritance tax determination, an appellate court reviews the case for error appearing on the record.
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. **Decedents' Estates: Appeal and Error.** In reviewing a judgment of the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
4. ____: _____. The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.
5. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
6. **Motions for Continuance: Appeal and Error.** A motion for continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
7. **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.

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8. ____: _____. If the court from which an appeal was taken lacked jurisdiction, then the appellate court acquires no jurisdiction.
9. **Jurisdiction.** One who invokes the power of the court on an issue other than the court's jurisdiction over one's person makes a general appearance so as to confer on the court personal jurisdiction over that person.
10. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
11. **Decedents' Estates: Taxation: Jurisdiction.** Neb. Rev. Stat. § 77-2018.02(1) (Supp. 2019) confers upon the county court subject matter jurisdiction of an independent proceeding brought for the sole purpose of determining Nebraska inheritance tax.
12. **Statutes.** Basic principles of statutory interpretation require a court to give statutory language its plain and ordinary meaning.
13. **Decedents' Estates: Taxation: Jurisdiction: Notice.** Published notice is not a prerequisite of a county court's subject matter jurisdiction of an independent proceeding for the sole purpose of determining Nebraska inheritance tax; rather, such jurisdiction is invoked by the filing of a petition to initiate the proceeding.
14. **Appeal and Error.** Error without prejudice is not a ground for reversal.
15. **Gifts: Intent.** To make a valid inter vivos gift, there must be an intention to transfer title to property, delivery by the donor, and acceptance by the donee.
16. **Gifts.** Ordinarily, actual delivery is necessary where the subject of the gift is capable of manual delivery, but where actual manual delivery cannot be made, the donor may do that which, under the circumstances, will in reason be considered equivalent to actual delivery.
17. _____. The exercise by the donee of dominion over the property which is the subject of a gift, or an assertion of a right to the property by the donee, generally will constitute an acceptance.
18. **Deeds: Intent.** Whether a deed or other instrument conveying an interest in property has been delivered is largely a question of intent to be determined by the facts and circumstances of the particular case.

Appeal from the County Court for Richardson County:
CURTIS L. MASCHMAN, Judge. Affirmed.

Douglas E. Merz, Richardson County Attorney, Samantha K. Scheitel, and Thomas J. Gist for appellant.

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Steven J. Mercure and Lindy L. Mahoney, of Nestor & Mercure, for appellees.

HEAVICAN, C.J., MILLER-LEMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

CASSEL, J.

I. INTRODUCTION

After Gale H. Marsh died, his daughters brought a proceeding to determine the amount of inheritance tax due. The dispute centered on the ownership interest of Marsh's revocable trust in a limited liability company valued at over \$12 million. The county court determined that assignments signed by Marsh rather than the trustees were valid. The County of Richardson (County) appeals. Finding no error by the county court in the respects alleged, we affirm.

II. BACKGROUND

1. PROCEDURAL BACKGROUND

Marsh, a domiciliary of Richardson County, Nebraska, died on April 6, 2017. On March 22, 2018, his daughters, Sarah J. Marsh and Carla M. Marsh, filed in the county court for Richardson County a petition for determination of inheritance tax. The petition alleged that Sarah and Carla (collectively cotrustees) were cotrustees of the Gale H. Marsh Revocable Trust Agreement, that they had a legal interest in the property involved in the determination of inheritance tax, that they were the beneficiaries of the trust property, and that they were the only persons against whom an inheritance tax may be assessed.

Together with the petition, the cotrustees filed a number of documents, including an inventory and an inheritance tax worksheet. The inventory stated that the Gale H. Marsh Revocable Trust owned a 15.62152-percent interest in Marcasa, LLC; that the total value of Marcasa was \$12,914,162; and that the

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trust's interest amounted to \$1,412,171.88. The inheritance tax worksheet showed assets of the estate of \$1,476,720.88 and total deductions of \$585,250.26, for a net value of property subject to Nebraska inheritance tax of \$891,470.62. According to the inheritance tax computation, Sarah owed \$4,081.22 and Carla owed \$4,033.49. On March 26, 2018, the cotrustees filed an application and moved the court for an order allowing payment of tentative inheritance tax by Sarah and by Carla in the amounts computed on the worksheet.¹

The County filed an objection to the inheritance tax worksheet. According to the County, the worksheet did not reflect the fair market value of the assets owned by Marsh.

2. HEARING

Nearly 1½ years later, the court commenced an evidentiary hearing. The hearing was held on two dates in 2019: August 14 and September 20.

(a) Revocable Trust

Evidence was adduced concerning the trust. Marsh, identified as the settlor, created the inter vivos revocable trust on November 4, 1988. As mentioned, he designated his daughters as cotrustees. Sarah testified that she did not actually serve as a trustee or cotrustee during Marsh's lifetime, explaining that "he managed his own affairs."

Article II of the trust agreement addressed trust property. It stated that trust property was listed on an attached "Schedule 'A'" and that insurance policies were listed on an attached "Schedule 'B'"; however, Sarah was unable to find either document. Marsh "reserve[d] the right to add property to the trust or to withdraw property from the trust in the manner provided for alteration of the trust in ARTICLE IV."

Article IV of the trust agreement dealt with changes to the trust. It stated that Marsh "reserve[d] the right at any time

¹ See Neb. Rev. Stat. § 77-2018.07(1) (Reissue 2018).

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. . . to amend, alter, revoke or terminate this trust . . . by an instrument in writing signed by the Settlor and delivered to the Trustee in the lifetime of the Settlor, or by the Settlor's Last Will and Testament at his death." The trust was never amended or revoked.

(b) Marsh Company, Limited

In 1998, Marsh created Marsh Company, Limited, a partnership used for ownership of his property. He transferred all of his real estate holdings in Richardson County to Marsh Company.

Initially, Marsh owned 100 percent of Marsh Company. In 1998 and 1999, he gave to each of the cotrustees, their spouses, and to a grandson an undivided "65/100ths" of 1 percent limited partnership interest in Marsh Company. Marsh reported these transfers on gift tax returns. In 2001, Marsh made several assignments of an undivided "40/100[ths]" of 1 percent limited interest in Marsh Company to family members. On December 31, 2001, Marsh owned a 91.6-percent interest in Marsh Company.

In 2002, Marsh gave Sarah and Carla each an undivided 26.63-percent limited partnership interest in Marsh Company. He filed a gift tax return with respect to those gifts. He also gave a .456-percent interest to the cotrustees' spouses and to trusts for three of his grandchildren. Marsh's percentage of ownership at the end of 2002 was 36.1 percent. Marsh transferred small amounts of his interest in 2003, 2004, and 2005. On December 31, 2006, Marsh owned a 34.17-percent interest in Marsh Company.

During the August 2019 hearing, Sarah testified that the gifts in Marsh Company came from the trust. But during the September hearing, Sarah testified that when her attorney "pulled out the deeds," she learned that Marsh's ownership in Marsh Company was his individually and was not placed in the trust. She clarified that the trust never held an interest in Marsh Company.

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(c) Marcasa

In 2007, Marsh created Marcasa, a limited liability company. The operating agreement showed members of Marcasa to be Marsh, the cotrustees, the cotrustees' spouses, and the cotrustees in their capacity as trustees of qualified trusts for their respective children. The operating agreement stated that "any Member may transfer all or any part of his or her interest in the Company by gift, in trust or otherwise, to or for the benefit of himself or herself, his or her spouse or his or her descendants." Sarah was not aware of any modifications to the Marcasa operating agreement.

On March 21, 2007, Marsh Company merged into Marcasa and ceased to exist. The membership interests of Marsh, the cotrustees, the cotrustees' spouses, and the trusts for the children of the cotrustees in Marsh Company were converted to membership interests in Marcasa. Sarah was not aware of any additional contributions to Marcasa other than what was in Marsh Company. Approximately 1 month after the merger, Marsh and his wife executed a quitclaim deed to Marcasa, but Sarah stood by her testimony that no additional contributions to Marcasa were made after the merger. She testified that after that transfer, there was no change in Marsh's ownership interest. On December 31, 2007, Marsh held approximately a 34.17-percent interest in Marcasa, just as he had held in Marsh Company at the end of 2006.

On January 2, 2008, Marsh assigned interests of approximately .382 percent in Marcasa to each of the cotrustees, their spouses, and their children's trusts. On May 27, Marsh signed a memorandum of action concerning the trust. With that instrument, he assigned to the trust the ownership of various properties, including Marsh's interest in Marcasa.

Each year from 2009 to 2013, when Marsh assigned a percentage ownership of Marcasa to the cotrustees, their spouses, and their children's trusts, he signed the document as grantor of the trust. From January 31, 2014, to December 31, 2016, the

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trust owned a 15.62-percent interest in Marcasa, the cotrustees each owned a 27.92-percent interest, and their spouses and children's trusts each owned a 4.76-percent interest.

(d) Motion for Continuance

During the August 2019 hearing, the County requested a continuance. The County stated that it needed research on recently discovered deeds. The court continued the hearing from August 14 to September 20.

On September 10, 2019, the County filed a motion to continue. According to the motion, the County needed to engage in formal discovery because certain requested documents had not been provided. The County asserted that it was necessary to have the complete ledger of ownership interests for all years of Marsh Company. The cotrustees objected to a continuance. The court took the motion under advisement and later denied it.

(e) County's Witnesses

The County adduced testimony from three attorneys and a certified public accountant. One attorney testified that the cotrustees were the only people who could transfer from the trust and that the provisions to effectuate a gift would apply if there were transfers being made by Marsh as grantor of his own trust. The second attorney testified that "[t]he trust property would be under the title or authority of the co-trustees." The third attorney testified that "[a]ssets that are in the trust would be subject to the power over title of the Co-Trustees." In other words, the attorneys testified that the cotrustees were the people who could transfer assets in the trust.

The certified public accountant reviewed a number of documents for Marcasa. The documents included Schedule L forms for tax years 2007 through 2013, the complete 2014 tax return, and two pages of bank statements from 2006. The accountant testified that to properly determine capital contributions, she would need the full tax returns and all bank statements.

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3. COURT'S ORDER

The county court reasoned that although the trust was the legal owner of Marcasa's interests, Marsh was the beneficial owner of those interests. It noted that Marsh retained authority to change the terms of the trust and that trustees are bound by duties of the Nebraska Uniform Trust Code.

After reciting the elements of a gift, the court determined that tax filings and other documentation showed the transfers were completed and consented to by the legal owner of the interests—the trust. The court overruled the County's objections to the worksheet and stated that the transfers of interests signed by Marsh should be considered. However, the court reduced the valuation discount on Marcasa from 30 percent to 25 percent, thereby increasing the value of the estate by \$98,720.50 and the inheritance tax by \$987.21.

The County filed a timely appeal, which we moved to our docket.²

III. ASSIGNMENTS OF ERROR

The County alleges, reordered, that the court erred by (1) failing to order published notice, (2) failing to allow a continuance for the County's expert to review the capital contributions made to Marsh Company and Marcasa, (3) determining that certain attempted transfers of ownership shares of Marsh Company and Marcasa were valid transfers that reduced the taxable value of the estate for inheritance tax purposes, and (4) failing to determine that Marsh retained possession or enjoyment of the property he claimed to have transferred to Marsh Company and Marcasa during his lifetime.

IV. STANDARD OF REVIEW

[1,2] On appeal of an inheritance tax determination, an appellate court reviews the case for error appearing on the

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

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record.³ 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

[3,4] In reviewing a judgment of the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.⁵ The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.⁶

[5] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.⁷

[6] A motion for continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.⁸

V. ANALYSIS

1. PUBLICATION OF NOTICE

[7,8] The County asserts that the county court failed to order published notice of the proceeding and that the court thus lacked jurisdiction and “any rulings by the [c]ourt are invalid.”⁹ It relies on Neb. Rev. Stat. § 77-2018.02 (Supp.

³ *In re Estate of Hasterlik*, 299 Neb. 630, 909 N.W.2d 641 (2018). See, also, *In re Estate of Baer*, 273 Neb. 969, 735 N.W.2d 394 (2007).

⁴ *In re Estate of Hasterlik*, *supra* note 3.

⁵ *In re Estate of Karmazin*, 299 Neb. 315, 908 N.W.2d 381 (2018).

⁶ *Id.*

⁷ *In re Estate of Reed*, 271 Neb. 653, 715 N.W.2d 496 (2006).

⁸ *Eddy v. Builders Supply Co.*, 304 Neb. 804, 937 N.W.2d 198 (2020).

⁹ Brief for appellant at 19.

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2019). The County's argument in brief consists of only 97 words and amounts to little more than a bare recital of its assignment of error, which would ordinarily preclude us from considering the argument.¹⁰ But 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.¹¹ If the court from which an appeal was taken lacked jurisdiction, then the appellate court acquires no jurisdiction.¹² Thus, in order to determine that we have jurisdiction of this appeal, we must determine whether the county court had jurisdiction of the proceeding below. We conclude that it did.

[9] Although the County does not say so, it must be arguing that the statute requires publication to confer subject matter jurisdiction upon the county court. Here, all of the parties were plainly before the court. One who invokes the power of the court on an issue other than the court's jurisdiction over one's person makes a general appearance so as to confer on the court personal jurisdiction over that person.¹³ The cotrustees, who were the petitioners, were also the sole beneficiaries of Marsh's trust. They clearly invoked the court's power. The County sought a determination that the entire value of Marcasa was subject to inheritance tax. It thereby invoked the court's power on an issue other than personal jurisdiction. The County does not identify, nor does the record disclose, any other party having an interest in Marsh's estate or in the property of the trust. Because the county court clearly had personal jurisdiction of all of the parties, only the matter of subject matter jurisdiction remains.

¹⁰ See *Marcuzzo v. Bank of the West*, 290 Neb. 809, 862 N.W.2d 281 (2015) (appellate court will not address argument that does little more than restate assignment of error).

¹¹ *Cinatl v. Prososki*, ante p. 477, 949 N.W.2d 505 (2020).

¹² *State v. Irish*, 298 Neb. 61, 902 N.W.2d 669 (2017).

¹³ *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001).

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[10,11] In a general sense, the county court had subject matter jurisdiction. Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.¹⁴ The statute at issue here authorizes an “independent proceeding for the sole purpose of determining the [inheritance] tax.”¹⁵ It specifies that the “independent proceeding . . . may be instituted in the county court.”¹⁶ We hold that § 77-2018.02(1) confers upon the county court subject matter jurisdiction of an independent proceeding brought for the sole purpose of determining Nebraska inheritance tax.

Here, the cotrustees initiated this type of proceeding. The only remaining question of subject matter jurisdiction is whether the statute requires such jurisdiction to be invoked in a particular manner that specifically demands published notice. We conclude that it does not. Our opinion does not address the nature of publication required by the general notice statute under the probate code.¹⁷

[12] Applying the usual standard of statutory interpretation, the pertinent language dictates only the method of giving notice of hearing. Basic principles of statutory interpretation require a court to give statutory language its plain and ordinary meaning.¹⁸ Upon the filing of a petition to initiate this type of independent proceeding, the statute requires the court to “order the petition set for hearing” and to “cause notice thereof to be given to all persons interested in the estate of the deceased and the property described in the petition . . . in the manner provided for in subsection (3).”¹⁹ Subsection (3), in turn,

¹⁴ *Benjamin M. v. Jeri S.*, ante p. 733, 950 N.W.2d 381 (2020).

¹⁵ § 77-2018.02(1).

¹⁶ *Id.*

¹⁷ See Neb. Rev. Stat. § 30-2220 (Reissue 2016).

¹⁸ *State v. Amaya*, 305 Neb. 36, 938 N.W.2d 346 (2020).

¹⁹ § 77-2018.02(2).

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requires the notice “provided for by subsection (2)” to be given by “one publication in a legal newspaper of the county.”²⁰ In subsection (2), “notice thereof” refers to the “hearing.” Properly understood, publication under this statute is required only to give notice of the hearing.

Section 77-2018.02(2) specifically provides that notice may be dispensed under certain circumstances. Notice is not necessary when no assessment of inheritance tax could result.²¹ Nor is published notice required when the county attorney “has executed a waiver of notice upon him or her to show cause, or of the time and place of hearing, and has entered a voluntary appearance in such proceeding in behalf of the county and the State” and either all persons against whom an inheritance tax may be assessed “are either a petitioner or have executed a waiver of notice upon them to show cause, or of the time and place of hearing, and have entered a voluntary appearance” or a party has agreed to pay the full inheritance tax determined.²² By adding provisions in which notice may be dispensed with, the Legislature signaled that notice is not a jurisdictional prerequisite.

Moreover, the statute requires that the “county attorney of each county in which the property described in the petition is located” be given “personal service of notice of the hearing.”²³ This reinforces our understanding of the publication requirement.

[13] In contrast, the first clause of § 77-2018.02(2) plainly mandates “the filing of a petition to initiate such an independent proceeding.” In other words, the proceeding is “initiate[d]” by “the filing of a petition.” We hold that published notice is not a prerequisite of a county court’s subject matter jurisdiction

²⁰ § 77-2018.02(3).

²¹ See § 77-2018.02(4).

²² § 77-2018.02(5).

²³ § 77-2018.02(3).

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of an independent proceeding for the sole purpose of determining Nebraska inheritance tax; rather, such jurisdiction is invoked by the filing of a petition to initiate the proceeding. Because that was precisely what happened here, the County's assertion that the county court lacked jurisdiction fails.

[14] Even if notice was not published, any error in failing to do so was harmless. Error without prejudice is not a ground for reversal.²⁴ Here, the county attorney and the cotrustees—the only persons against whom an inheritance tax may be assessed—were actively involved in this matter from the time of filing of the petition and all appeared at the hearing. The County suffered no prejudice by any lack of published notice of the hearing.

2. FAILURE TO CONTINUE MATTER

The County argues that the court should have sustained its motion for a continuance. On September 10, 2019, the County filed the motion, asserting that it needed to engage in formal discovery and that “it is necessary to have the complete ledger of ownership interests for all years of Marsh Company.” In the County's brief, it argues that a continuance was necessary so that the certified public accountant could determine if the capital accounts of Marsh Company and Marcasa were accurate.

The cotrustees objected to the motion for several reasons. First, they had made arrangements based on the court's scheduling of the second day of trial, including Sarah's application of leave from her employment and Carla's purchase of a non-refundable airline ticket. Next, they noted that for over 1 year, the attorney representing the County had not served any formal discovery. Finally, in urging against further delay, they pointed out that any additional inheritance taxes assessed would draw interest at 14 percent from April 6, 2018.

²⁴ *Connolly v. Connolly*, 299 Neb. 103, 907 N.W.2d 693 (2018).

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We find no abuse of discretion by the court in denying a continuance. We are mindful that the petition was filed on March 22, 2018; that such a petition should be set for hearing within 2 to 4 weeks²⁵; and that the County's motion was filed nearly 1½ years after the filing of the petition. This assignment of error lacks merit.

3. WHETHER ATTEMPTED TRANSFERS
WERE EFFECTIVE

The County contends that any attempted transfers of ownership interest in Marsh Company and Marcasa were ineffective. The County's witnesses testified that for transfers to be valid, they had to be executed by the cotrustees, as prescribed by the terms of the trust. The County focuses on the fact that the transfers were executed by Marsh, not the cotrustees.

The evidence established that Marsh conveyed interests in Marsh Company to his family. It also established that the trust never held an ownership interest in Marsh Company. Thus, the County's argument that assignments of ownership interests in Marsh Company were ineffective because they were not made by the cotrustees lacks merit.

The situation differs with respect to Marsh's assignments of interest in Marcasa beginning in 2009. In January 2008, Marsh executed eight assignment forms in his individual capacity. Then, in May, Marsh assigned his interest in Marcasa to his trust. Thereafter, the assignment forms executed between 2009 and 2013 showed that they were signed by Marsh as grantor of the trust.

[15,16] To make a valid inter vivos gift, there must be an intention to transfer title to property, delivery by the donor, and acceptance by the donee.²⁶ The first two elements relate to intent and actions of the donor. The donor must have a present donative intent and a clear and unmistakable intent to

²⁵ See § 77-2018.02(2).

²⁶ *Zelenka v. Pratte*, 300 Neb. 100, 912 N.W.2d 723 (2018).

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make a gift.²⁷ Ordinarily, actual delivery is necessary where the subject of the gift is capable of manual delivery, but where actual manual delivery cannot be made, the donor may do that which, under the circumstances, will in reason be considered equivalent to actual delivery.²⁸ The Ninth Circuit explained that interests in a limited liability company “do not lend themselves to manual delivery. Instead, they are delivered through the execution of papers. As a result, . . . it is somewhat artificial to separate the ‘delivery’ of [a limited liability company] interest from the intention to donate it.”²⁹ Here, intent and delivery are demonstrated by Marsh’s history of assigning interests to his daughters and their family members, his execution of the assignments, and his cessation of acting as the owner of those interests after execution of the assignments.

[17] The final element of a gift calls for action by the donee. The exercise by the donee of dominion over the property which is the subject of a gift, or an assertion of a right to the property by the donee, generally will constitute an acceptance.³⁰ The donees accepted the gifts by acting as the rightful owner of the interests in Marcasa, and their ownership took effect immediately. Their interests were reported on Schedule K-1 tax forms, thereby subjecting them to payment of income taxes attributable to their ownership interests.

[18] The County contends that no transfer of ownership interests occurred, because the cotrustees never executed any of the transfer documents. But under the trust agreement, Marsh retained authority “to withdraw property from the trust.” The trust agreement provided the manner to do so—“by an instrument in writing signed by the Settlor and delivered to the Trustee in the lifetime of the Settlor.” Here, the assignments at issue were all in writing. And the cotrustees, as

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Linton v. U.S.*, 630 F.3d 1211, 1217 (9th Cir. 2011).

³⁰ See *Zelenka v. Pratte*, *supra* note 26.

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either the recipients or the spouses or parents of the recipients, were aware of the assignments. Further, we have stated that whether a deed or other instrument conveying an interest in property has been delivered is largely a question of intent to be determined by the facts and circumstances of the particular case.³¹ Marsh's parting with the ownership interests given as gifts and the cotrustees and other donees acting as owners of those respective interests manifest evidence of delivery. The court's decision conforms to the law, is supported by competent evidence, and is not unreasonable.

4. POSSESSION AND ENJOYMENT
POST-TRANSFER

The County asserts that Marsh continued to retain an ownership interest in the claimed transfers and that thus, the total value of Marcasa should be subject to inheritance tax. We disagree.

The County relies upon *In re Estate of Fries*,³² but that case provides little guidance. *In re Estate of Fries* concerned whether the value of real property should be part of the decedent's augmented estate in calculating his widow's elective share. In the decedent's lifetime, he transferred his entire interest in real estate to his children, but he continued to perform management functions for, receive income from, and pay taxes on the properties. We noted that "in the case of real property, the terms 'possession' and 'enjoyment' have been interpreted to mean 'the lifetime use of the property.'"³³

Here, Marsh engaged in a pattern of transferring ownership interests to his family for nearly 20 years. He, and then his trust, retained an interest in Marcasa. Although Marsh was the manager of Marcasa, neither he nor the trust ever owned a majority interest in the limited liability company. And as his

³¹ *Caruso v. Parkos*, 262 Neb. 961, 637 N.W.2d 351 (2002).

³² *In re Estate of Fries*, 279 Neb. 887, 782 N.W.2d 596 (2010).

³³ *Id.* at 894-95, 782 N.W.2d at 603.

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ownership interest decreased, so too did his share of Marcasa's income. Tax records show that the cotrustees, their spouses, and their children were subject to federal income taxes based upon their interests in Marcasa. Competent evidence supports the court's decision to not subject 100 percent of Marcasa to inheritance tax.

VI. CONCLUSION

We conclude that published notice of the hearing was not a prerequisite of the county court's subject matter jurisdiction and that even if notice was not published, the County suffered no prejudice. We find no abuse of discretion in the overruling of the County's motion for a continuance. Finally, we conclude that the court's determination that ownership interests in Marcasa were validly transferred from the trust conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

AFFIRMED.

307 NEBRASKA REPORTS

JAEGER v. JAEGER

Cite as 307 Neb. 910



Nebraska Supreme Court

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of this certified document.

-- Nebraska Reporter of Decisions

STACEY R. JAEGER, APPELLANT, v.

DUKE E. JAEGER, APPELLEE.

951 N.W.2d 367

Filed December 4, 2020. No. S-20-122.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court. Although reviewed de novo on the record, the trial court's determination will generally be affirmed absent an abuse of discretion.
2. **Rules of Evidence.** In proceedings where the Nebraska rules of evidence apply, they control the admissibility of evidence, and judicial discretion is allowed only insofar as the rules make it a factor.
3. **Trial: Evidence: Appeal and Error.** Judicial discretion is allowed to determine the relevancy of evidence, and such determination will not be disturbed on appeal unless it constitutes an abuse of discretion.
4. **Motions for New Trial: Appeal and Error.** An appellate court reviews a trial court's ruling on a motion for a new trial or reconsideration for an abuse of discretion.
5. **Judges: Words and Phrases.** An abuse of discretion occurs when a trial court's decision or reasoning is clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
6. **Modification of Decree: Child Custody: Proof.** Custody of a minor child will not ordinarily be modified absent a material change in circumstances, which shows either that the custodial parent is unfit or that the best interests of the child require such action.
7. ____; ____; _____. It is the burden of the party seeking modification of a child custody order to show two elements: first, that since entry of the most recent custody order, there has been a material change in circumstances that affects the child's best interests, and second, that it would be in the child's best interests to change custody.
8. **Modification of Decree: Child Custody: Words and Phrases.** A material change in circumstances is the occurrence of something that, if it

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had been known at the time the most recent custody order was entered, would have persuaded that court to decree differently.

9. **Modification of Decree: Child Custody.** Circumstances having occurred before the most recent custody order are relevant only insofar as they bear on whether the change in circumstances since the most recent custody order are material and substantial.
10. ____: _____. Before custody is modified, it should be apparent that any material change in circumstances alleged will be permanent or continuous, not merely transitory or temporary.
11. **Child Custody.** The wishes of a child are not controlling in determinations of child custody.
12. _____. If a child is of sufficient age and has expressed an intelligent preference regarding child custody, the child's preference is entitled to consideration, alongside other factors.
13. _____. The amount of consideration given to a child's stated preference regarding child custody will depend on the child's age and ability to give reasons for his or her preference.
14. **Child Custody: Appeal and Error.** Where a trial court's order modifying child custody demonstrates that the child's age and reasoning have been duly considered alongside the child's stated preference, an appellate court will generally defer to the trial court's credibility determinations in the assessment of facts.
15. **Child Custody.** Certain factors that must be considered in the determination of a child's best interests in the context of child custody include (1) the relationship of the child to each parent prior to the commencement of the action; (2) the desires and wishes of a sufficiently mature child, if based on sound reasoning; (3) the general health, welfare, and social behavior of the child; (4) credible evidence of abuse inflicted on any family or household member; and (5) credible evidence of child abuse or neglect or domestic intimate partner abuse.
16. _____. Certain factors that may be considered in the determination of a child's best interests in the context of child custody include the stability of the child's existing routine, minimization of contact and conflict between the parents, and the general nature and health of the child.
17. **Trial: Evidence: Appeal and Error.** The admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.
18. ____: ____: _____. Erroneous exclusion of evidence does not require reversal if the evidence would have been cumulative and other relevant evidence, properly admitted, supports the trial court's finding.

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Appeal from the District Court for Lancaster County: SUSAN I. STRONG, Judge. Affirmed.

Amie C. Martinez and Mona L. Burton, of Anderson, Creager & Wittstruck, P.C., L.L.O., for appellant.

Jeanelle S. Kleveland, of Kleveland Law Offices, for appellee.

HEAVICAN, C.J., MILLER-LERMAN, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

HEAVICAN, C.J.

I. INTRODUCTION

A modified divorce decree in 2011 granted Stacey R. Jaeger sole physical custody over her son, C.J., subject to parenting time between C.J. and his father, Duke E. Jaeger. In 2018, Duke petitioned to modify custody.

After hearing C.J. and the parties testify, the district court transferred sole legal and physical custody over C.J. to Duke, subject to Stacey's parenting time. We affirm.

II. FACTUAL BACKGROUND

Stacey and Duke married in 2004 and lived together in Imperial, Nebraska. They raised two sons: H.J., born in 1997 to Stacey's previous marriage and adopted by Duke, and C.J., born in 2005 to Stacey and Duke. Only custody of C.J. is at issue in this appeal.

Stacey filed for a divorce in 2006. A divorce decree was entered in 2007. Under the divorce decree, Stacey and Duke were granted joint legal custody over their sons, and Stacey was granted sole physical custody, subject to Duke's parenting time.

In January 2008, Stacey filed a petition to modify the divorce decree. She sought sole legal custody over H.J. and C.J., and she requested that any visits between Duke and their sons be supervised. Stacey alleged that Duke had physically abused their sons.

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In September 2009, before her petition was adjudicated, Stacey moved with her sons to Waverly, Nebraska. Based on this move, Stacey petitioned for the court to further limit Duke's visits with their sons to once every other weekend and renewed her request that such visits be supervised. Stacey also requested that the parties be ordered to meet in Lexington, Nebraska, which was closer to her new home, to exchange their sons between visits.

Around this time, conflict arose between Duke and H.J., who alleged that Duke had physically abused him. Stacey and Duke agreed that H.J. would no longer spend time with Duke. Since then, H.J. and Duke have remained estranged from each other.

Between 2007 and 2010, Stacey made numerous allegations that Duke was physically abusing C.J. The Nebraska Department of Health and Human Services, the Nebraska State Patrol, and the police department for the city of Imperial all investigated. The district court appointed a guardian ad litem, who "reviewed voluminous material and spoke with investigators with the State Patrol, the Imperial Police Department, DHHS investigators, some of the medical personnel, the counselor for the children, and the children," but concluded that the evidence did not support Stacey's allegations of abuse against Duke. The guardian ad litem also did not recommend that Duke be limited to supervised visits, but did recommend that he complete family counseling.

In March 2011, the district court entered an order modifying the divorce decree. Under the 2011 divorce decree, the parties retained joint legal custody over C.J. and Stacey retained sole physical custody over C.J. Duke was entitled to a minimum of one visit every other weekend with C.J. during the school year and 6 consecutive weeks' visitation during the summer. The district court declined Stacey's request to require that visits between Duke and C.J. be supervised. Weekday visitation was eliminated, and the parties were ordered to exchange

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C.J. in Kearney, Nebraska. Duke was ordered to complete family counseling.

Stacey appealed the district court's denial of her request for sole legal custody over C.J. On appeal, in case No. A-11-330, the Nebraska Court of Appeals affirmed the order in an unpublished memorandum opinion filed on March 2, 2012.

On March 1, 2018, Duke filed a petition for modification of the divorce decree in the district court for Chase County. Stacey filed a motion to transfer pursuant to Neb. Rev. Stat. § 25-410 (Reissue 2016), and the case was transferred to the district court for Lancaster County.

The issue before the district court was whether Duke had shown a material change in circumstances that had not been foreseeable when custody was last adjudicated in 2011. Duke alleged that over the past 7 years, C.J. had grown, and that now, as a 14-year-old child, he had expressed a mature desire to live with Duke. The district court heard in camera testimony from C.J. during which time only C.J., the parties' attorneys, and the judge were in the courtroom.

During this testimony, C.J. stated that he loved both of his parents but desired to live with Duke. According to the district court:

[C.J.] wants to live with his Dad because [they have] the same interests in farming and working on tractors and lawn mowers. They both enjoy hunting and fishing, especially together. [C.J.] would like to have a future in farming and hopes to inherit his Dad's farms in Nebraska and Colorado.

Because this reasoning was sound and C.J. was an eighth grade student who "does well in school," the district court found C.J.'s testimony persuasive.

In contrast, the district court viewed Stacey's testimony at trial more skeptically. The district court found that Stacey "was often not truthful or forthcoming in her testimony" and that she had made coparenting very difficult for Duke.

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The district court also considered evidence in the record that Stacey was not meeting C.J.'s needs as his parent. The district court noted that Stacey, a real estate broker, had earned an adjusted gross income of only \$21,817 in 2018, while Duke, in retirement, had earned \$52,141 in 2018. Further, Stacey's home, which the district court noted is "owned by her parents and [for which she] pays only as much as she can afford for rent," was "cluttered and dirty," according to testimony. In contrast, Duke owned a home and significant farmland.

Additionally, the district court stated that "[i]n the Court's opinion, [Stacey] is extremely overprotective and engage[d] in parental alienation to the extent that it may be harmful to [C.J.'s] general health, welfare, development and social well-being." The district court specifically noted the deterioration of H.J.'s relationship with Duke as evidence that Stacey had already "successfully alienated" one son from Duke. As to H.J.'s allegations that Duke had been physically abusive, the district court concluded, based on its observations at trial, that Stacey "may have coached the children to say that [Duke] had hit them." The district court refused Stacey's testimony about her pre-2011 allegations of abuse against Duke, finding that they were irrelevant to C.J.'s circumstances since 2011.

With these findings of fact, the district court concluded there had been a material change in circumstances since 2011 to justify modification of the divorce decree. That is, had the district court in 2011 "known that [Stacey] would continue to engage in such behavior, [it] may have decided differently" about C.J.'s living situation. Thus, the district court held that it would be in C.J.'s best interests to be moved to Duke's sole legal and physical custody. Stacey was granted parenting time on every other weekend and ordered to pay \$305 per month to Duke in child support.

Stacey filed a motion, pursuant to Neb. Rev. Stat. § 25-1144 (Reissue 2016), for a new trial and reconsideration. She alleged that certain irregularities in the proceedings had prevented a fair trial and that the judgment was not sustained by sufficient evidence. On January 23, 2020, the district court

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overruled Stacey's motion for a new trial, though it amended the previous order to designate C.J.'s in camera testimony as confidential.

Stacey timely appealed, and we moved the case to our docket.¹

III. ASSIGNMENTS OF ERROR

Stacey assigns, consolidated and restated, that the district court erred in (1) modifying the divorce decree to grant Duke sole legal and physical custody over C.J.; (2) excluding, as irrelevant, Stacey's testimony about her past abuse allegations against Duke; and (3) overruling her motion for a new trial or reconsideration.

IV. STANDARD OF REVIEW

[1] Child custody determinations are matters initially entrusted to the discretion of the trial court.² Although reviewed de novo on the record, the trial court's determination will generally be affirmed absent an abuse of discretion.³

[2,3] In proceedings where the Nebraska rules of evidence⁴ apply, they control the admissibility of evidence, and judicial discretion is allowed only insofar as the rules make it a factor.⁵ Judicial discretion is allowed to determine the relevancy of evidence, and such determination will not be disturbed on appeal unless it constitutes an abuse of discretion.⁶

[4] An appellate court reviews a trial court's ruling on a motion for a new trial or reconsideration for an abuse of discretion.⁷

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

² See *State on behalf of Tina K. v. Adam B.*, ante p. 1, 948 N.W.2d 182 (2020).

³ See *id.*

⁴ See Neb. Rev. Stat. § 27-101 et seq. (Cum. Supp. 2016 & Supp. 2019).

⁵ See *Tilson v. Tilson*, ante p. 275, 948 N.W.2d 768 (2020).

⁶ See *id.*

⁷ See *Jacobs Engr. Group v. ConAgra Foods*, 301 Neb. 38, 917 N.W.2d 435 (2018).

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[5] An abuse of discretion occurs when a trial court's decision or reasoning is clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.⁸

V. ANALYSIS

1. MODIFICATION OF CHILD CUSTODY

The main issue presented on appeal is whether the district court erred in modifying the 2011 divorce decree when it transferred sole legal and physical custody over C.J. to Duke, subject to Stacey's parenting time. Stacey contends that this modification was an abuse of discretion.

[6,7] Custody of a minor child will not ordinarily be modified absent a material change in circumstances, which shows either that the custodial parent is unfit or that the best interests of the child require such action.⁹ It is the burden of the party seeking modification to show a material change in circumstances.¹⁰ Specifically, the movant must show two elements: First, that since entry of the most recent custody order, there has been a material change in circumstances that affects the child's best interests, and second, that it would be in the child's best interests to change custody.¹¹

Here, because it was Duke who sought to modify the district court's 2011 custody order, he had the burden of proving both elements to justify modification.

(a) Material Change in Circumstances

[8-10] We have defined a material change in circumstances as the occurrence of something that, if it had been known at the time the most recent custody order was entered,

⁸ See *Dycus v. Dycus*, ante p. 426, 949 N.W.2d 357 (2020).

⁹ See *Tilson*, supra note 5.

¹⁰ See *id.*

¹¹ See *id.*

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would have persuaded that court to decree differently.¹² Circumstances having occurred before the most recent custody order are relevant only insofar as they bear on whether the change in circumstances since the most recent custody order are material and substantial.¹³ Before custody is modified, it should be apparent that any material change in circumstances alleged will be permanent or continuous, not merely transitory or temporary.¹⁴

The district court found that C.J.'s testimony that he preferred to reside primarily with Duke was one factor that weighed in favor of a conclusion that there had been a material change in circumstances. C.J. was approximately 6 years old in 2011, when custody was last modified. But in 2018, during in camera testimony, the district court found that C.J. had persuasively stated his preference and reasoning for being moved to Duke's sole legal and physical custody.

Stacey contends that it was an abuse of discretion for the district court to rely so heavily on C.J.'s stated preference. Stacey warned at oral argument that if a child's stated preference alone could establish a material change in circumstances, then children throughout the state would become capable at any time of asking for and being granted a change in custody. According to Stacey, under a recent Court of Appeals opinion, *State on behalf of Slingsby v. Slingsby*,¹⁵ a child's stated preference can constitute a material change in circumstances only if it is coupled with evidence about an evolving relationship between the child and parent.

We agree with Stacey that the Court of Appeals' reasoning in *Slingsby* is instructive here, but we disagree that it supports her position. In *Slingsby*, a father petitioned to modify

¹² See *Jones v. Jones*, 305 Neb. 615, 941 N.W.2d 501 (2020).

¹³ See *Metcalf v. Metcalf*, 278 Neb. 258, 769 N.W.2d 386 (2009).

¹⁴ See *Jones*, *supra* note 12.

¹⁵ *State on behalf of Slingsby v. Slingsby*, 25 Neb. App. 239, 903 N.W.2d 491 (2017).

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a divorce decree in an effort to gain primary physical custody over his 15-year-old son. After the district court heard the son testify that he preferred to live with his father because of their shared interests in hunting, raising livestock, and being outdoors, the district court granted the father's motion to modify custody. The Court of Appeals affirmed, reasoning that it was not an abuse of discretion for the district court to conclude that "[the son's] stated preference to live with [his father] and his evolving relationship with [the father] constituted a material change in circumstances."¹⁶

Among the factors in *Slingsby* that indicated an evolving relationship between the parent and child were that the son (1) was 10 years older than the last time a divorce decree was entered; (2) had developed interests in working outdoors and hunting, interests that he shared with his father; (3) felt "trapped" living at his mother's house because he could not get outdoors much or practice his new interests; and (4) was struggling in school under his mother's tutelage, but believed his grades would improve at the school near his father's house because it offered an "ag class," smaller class sizes, and study halls.¹⁷ The Court of Appeals found that individually, these factors each provided evidence of a material change in circumstances, and collectively, they also helped to explain the son's stated preference, entitling it to greater consideration.¹⁸

The Court of Appeals' reasoning, as set forth in *Slingsby*, models how courts should consider children's stated preferences in custody disputes. We have never held, nor do we read *Slingsby* to hold, that a child's stated preference, alone, will suffice to establish a material change in circumstances. Stacey's fear that children could at any time be granted a change in custody simply by asking is unwarranted.

¹⁶ *Id.* at 254, 903 N.W.2d at 501.

¹⁷ See *id.*

¹⁸ See *Slingsby*, *supra* note 15.

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[11] To the contrary, we have specifically held that “the wishes of a child are not controlling” in determinations of child custody.¹⁹ Trial courts should consider a variety of factors that bear on the best interests of the child.²⁰ Due consideration of these factors will determine whether finding a material change in circumstances is justified.²¹

[12-14] But “if a child is of sufficient age and has expressed an intelligent preference, the child’s preference is entitled to consideration,” alongside other factors.²² The amount of consideration will depend on the child’s age and ability to give reasons for his or her preference.²³ For example, in cases where we have given the child’s stated preference significant consideration, the child was typically over 10 years old.²⁴ And, as *Slingsby* demonstrates, more consideration will be afforded where additional factors that bear on the child’s best interests undergird the child’s stated preference and reasoning.²⁵ Where a trial court’s order demonstrates that the child’s age and reasoning have been duly considered alongside the child’s stated preference, we will generally defer to the trial court’s credibility determinations in our assessment of facts.²⁶

Here, we find no basis for Stacey’s assertion that the district court gave undue consideration to C.J.’s stated preference. After hearing C.J. testify in camera and respond to questions about his stated preference, the district court made

¹⁹ *Leners v. Leners*, 302 Neb. 904, 912, 925 N.W.2d 704, 711 (2019), *disapproved on other grounds, State on behalf of Kaaden S. v. Jeffery T.*, 303 Neb. 933, 932 N.W.2d 692 (2019).

²⁰ See *Jones*, *supra* note 12.

²¹ See *id.*

²² *Leners*, *supra* note 19, 302 Neb. at 912, 925 N.W.2d at 711.

²³ See *id.*

²⁴ *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002).

²⁵ See *Slingsby*, *supra* note 15.

²⁶ See *Tilson*, *supra* note 5.

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specific findings about how much consideration to give C.J.'s stated preference. According to the district court, C.J. was a mature 14-year-old child who demonstrated a capacity for critical reasoning.

Additionally, many of the same factors that indicated an evolving relationship and supported the son's reasoning in *Slingsby* were also present here. The district court specifically noted that since 2011, C.J. had grown 7 years older and become significantly more mature; he had developed interests in hunting, fishing, and working outdoors on tractors and lawn-mowers, all interests that he now shared with Duke but not with Stacey; he had spent time at Duke's farm and realized a healthy father-son relationship with him; he had earned money for various jobs that he had performed on visits to Duke's farm; he had decided to become a farmer himself in the future and wished to learn to farm from Duke, who was retired and had time to teach C.J. about farming; and he had begun to show independence by helping to manage Duke's farmland.

Further, the district court found that Stacey's behavior had worsened over the past 7 years, raising questions about her ability to meet C.J.'s needs and to effectively coparent with Duke. Given all of these factors, the district court found that if the court in 2011 had "known that [Stacey] would continue to engage in such behavior, [it] may have decided differently" about C.J.'s living situation.

Thus, contrary to Stacey's assertion, there were many factors that the district court considered and found demonstrated a material change in circumstances in addition to C.J.'s stated preference. We do not find that the district court abused its discretion in its consideration of these factors and its determination that there had been a material change in circumstances that affected C.J.'s best interests.

(b) Best Interests of Child

Next, we consider the second element in a review of a child custody modification: whether the modified custody

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arrangement was in C.J.'s best interests. Stacey argues that even if the district court did not err in finding a material change in circumstances, it abused its discretion in determining that a move of C.J.'s sole legal and physical custody to Duke was in C.J.'s best interests.

[15] Consideration of the child's best interests involves a combination of both mandatory and permissive factors. Neb. Rev. Stat. § 43-2923(6) (Reissue 2016) requires that certain factors must be considered, including (1) the relationship of the child to each parent prior to the commencement of the action; (2) the desires and wishes of a sufficiently mature child, if based on sound reasoning; (3) the general health, welfare, and social behavior of the child; (4) credible evidence of abuse inflicted on any family or household member; and (5) credible evidence of child abuse or neglect or domestic intimate partner abuse.²⁷

[16] Other relevant considerations that may also be considered include the stability of the child's existing routine, minimization of contact and conflict between the parents, and the general nature and health of the child.²⁸ No one factor is dispositive, and various factors may weigh more or less heavily, depending on the case.²⁹

In support of her argument that the district court abused its discretion in finding that C.J.'s interests would be best served by the modified decree, Stacey again cites to *Slingsby*.³⁰ To distinguish this case, Stacey contends that the district court's "lack of analysis and reasoning in this case pales in comparison to the trial court's thorough analysis in *Slingsby*."³¹ We disagree.

²⁷ *Jones*, *supra* note 12.

²⁸ See *id.*

²⁹ See *id.*

³⁰ See *Slingsby*, *supra* note 15.

³¹ Brief for appellant at 16.

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Contrary to Stacey’s assertions, the district court thoroughly analyzed how a change in custody would be in C.J.’s best interests. The district court gave particular weight to the shared interests between C.J. and Duke in farming. It found that C.J. wished to become a farmer and determined that Duke, who was retired but owned farmland, could teach C.J. to farm if they lived together. Based on Duke’s testimony, the district court deemed him “an honest and sincere man who wants the best for [C.J.] and is a good role model for his son.”

The district court also found that Duke and C.J. had worked well together and enjoyed each other’s company during Duke’s parenting time over the years. Thus, the district court found that C.J.’s stated preference to live with Duke made sense and provided strong evidence that a change in custody would be in C.J.’s best interests.

Moreover, the district court found that living with Duke would be in C.J.’s best interests because Stacey had demonstrated that she was “extremely overprotective” and tended to alienate her sons from Duke in a way that was damaging to C.J.’s “general health, welfare, development and social well-being.” According to the district court:

In comparing [Stacey’s and Duke’s] character, their attitude and stability, their capacity to provide the physical care and satisfy the educational needs of [C.J.], and considering the general health, welfare, development and social behavior of [C.J.], the Court finds that it would be in [C.J.’s] best interest for him to reside with [Duke].

Based on the district court’s due consideration of these factors, which meet the statutory criteria, we do not find that it was an abuse of discretion for the district court to find that a modification of custody was in C.J.’s best interests.

We hold that Duke met his burden for a modification of the 2011 divorce decree. Thus, the district court did not abuse its discretion in modifying the divorce decree in 2018 to move C.J.’s sole legal and physical custody to Duke. Stacey’s first assignment of error is without merit.

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2. EXCLUSION OF TESTIMONY

Stacey assigns, second, that the district court failed to consider relevant evidence that Duke had physically abused both H.J. and C.J. in the past.

During direct examination at trial, Stacey's counsel asked Stacey whether she had made any allegations in the past against Duke regarding physical abuse. Duke objected before Stacey could answer, and the district court sustained Duke's objection. According to the district court, Stacey's answer to the question was irrelevant to the present case because it would pertain only to allegations of physical abuse made prior to 2011, and hence before the most recent decree was entered. Stacey contends that it was reversible error for the district court to sustain Duke's objection and exclude her testimony as irrelevant.

[17,18] The admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.³² Erroneous exclusion of evidence does not require reversal if the evidence would have been cumulative and other relevant evidence, properly admitted, supports the trial court's finding.³³

As analyzed above, the district court found ample evidence that the modified order would be in the best interests of C.J. Even if the district court had considered Stacey's testimony about her pre-2011 abuse allegations against Duke, such evidence would not have undermined the evidence in the record. When the Court of Appeals in 2012 reviewed Stacey's challenge to the 2011 divorce decree in case No. A-11-330, it observed in an unpublished memorandum opinion that "[t]he record is replete with evidence regarding Stacey's concerns about the children while in Duke's care. However, the instances of alleged abuse have all been unfounded."

³² *AVG Partners I v. Genesis Health Clubs*, ante p. 47, 948 N.W.2d 212 (2020).

³³ See *id.*

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The record before the district court contained ample evidence of these pre-2011 allegations. The earlier Court of Appeals opinion was in the record and cited by the district court. Stacey does not assert that any of her testimony would have raised allegations not already expressed in the record.

Thus, even if it was error for the district court to exclude Stacey's testimony about past abuse allegations, it was not reversible error because Stacey's testimony would have been cumulative. We hold that the district court did not abuse its discretion in excluding Stacey's testimony. Stacey's second assignment of error is without merit.

3. MOTION FOR NEW TRIAL
OR RECONSIDERATION

Stacey assigns, third, that the district court abused its discretion in not fully granting her motion for a new trial or reconsideration. The district court granted Stacey's motion in part when it designated as confidential its summaries and quotations from C.J.'s testimony. However, Stacey assigns that this remedy was too little and that an entirely new trial should have been ordered.

Neb. Rev. Stat. § 25-1142 (Reissue 2016) sets forth eight grounds on which a motion for new trial may be sustained.³⁴ Stacey cites to the first and sixth among these, which require that a new trial be granted if

(1) [i]rregularity in the proceedings of the court, jury, referee, or prevailing party or any order of the court or referee or abuse of discretion by which the party was prevented from having a fair trial [or] (6) that the verdict, report, or decision is not sustained by sufficient evidence or is contrary to law.³⁵

Neither of these bases for a new trial are availing here. As analyzed above, the district court's decision was not contrary

³⁴ See *Cinatl v. Prososki*, ante p. 477, 949 N.W.2d 505 (2020).

³⁵ § 25-1142.

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to law. Instead, it was amply supported by evidence in the record. And aside from conclusory statements in her brief, Stacey offers no evidence that she was in fact deprived of a fair trial.

We hold that the district court did not abuse its discretion in denying Stacey's motion for new trial. Stacey's third assignment of error is without merit.

VI. CONCLUSION

We do not find that it was an abuse of discretion for the district court to move C.J. to Duke's sole legal and physical custody. Nor do we find that the district court abused its discretion in excluding Stacey's testimony about past abuse allegations and overruling Stacey's motion for a new trial. Accordingly, we affirm the decision of the district court.

AFFIRMED.

CASSEL, J., not participating.

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PARKS v. HY-VEE

Cite as 307 Neb. 927



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

DONNA PARKS, APPELLEE, v.

HY-VEE, INC., APPELLANT.

951 N.W.2d 504

Filed December 4, 2020. No. S-20-195.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2018), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: _____. On appellate review, the factual findings made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. **Workers' Compensation: Judgments: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact in a workers' compensation case, an appellate court considers the evidence in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the appellate court gives the successful party the benefit of every inference reasonably deducible from the evidence.
4. **Workers' Compensation.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony.
5. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
6. **Actions: Appeal and Error.** The law-of-the-case doctrine reflects the principle that an issue litigated and decided in one stage of a case should not be relitigated at a later stage.

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7. **Stipulations.** In Nebraska, parties are free to make stipulations that govern their rights, including the issues to be decided, and such stipulations will be respected and enforced by courts so long as the agreement is not contrary to public policy or good morals.
8. **Workers' Compensation.** A preexisting disease and an aggravation of that disease may combine to produce a compensable injury.
9. **Statutes: Intent.** When interpreting a statute, the starting point and focus of the inquiry is the meaning of the statutory language, understood in context.
10. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
11. **Statutes.** It is not within the province of the courts to read meaning into a statute that is not there or to read anything direct and plain out of a statute.

Appeal from the Workers' Compensation Court: DANIEL R. FRIDRICH, Judge. Affirmed.

Paul T. Barta and Micah C. Hawker-Boehnke, of Baylor Evnen, L.L.P., for appellant.

Travis Allan Spier and Nolan Niehus, Senior Certified Law Student, of Atwood, Holsten, Brown, Deaver & Spier Law Firm, P.C., L.L.O., for appellee.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, FUNKE, PAPIK, and FREUDENBERG, JJ.

PAPIK, J.

Donna Parks incurred a work-related injury in 2008 while employed by Hy-Vee, Inc., and sought workers' compensation benefits. The initial award granted compensation for past and future medical expenses for her low-back injury but found that she had not reached maximum medical improvement (MMI). It did not address aggravation of Parks' mental health issues.

In 2017, following the filing of motions by both parties, the parties stipulated to the compensation court's resolution of several issues. After a trial, the compensation court resolved

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those issues and entered a further award. Relying on expert opinions, the compensation court granted Parks compensation for chronic pain and aggravation of her mental health issues, both caused by the work-related low-back injury. The compensation court later modified the further award upon Parks' motion pursuant to Neb. Rev. Stat. § 48-180 (Cum. Supp. 2018).

Hy-Vee now appeals, alleging that the compensation court failed to properly apply the law-of-the-case doctrine and exceeded its power in modifying the further award. Finding no merit to Hy-Vee's arguments, we affirm.

BACKGROUND

Injury and Initial Award.

In 2008, Parks was working in the Hy-Vee floral department when she was partially pulled into a trash compactor while emptying a heavy bin. In 2010, she sought workers' compensation benefits for injuries she claimed to have incurred.

At trial on the matter, the compensation court received evidence that Parks had sustained a work-related low-back injury. Further, Parks testified on direct examination that she was not claiming an aggravation of preexisting mental health issues as a result of the work accident. She further testified that her state of mind had been stable since she began working for Hy-Vee in 2004. Parks did not seek temporary disability benefits, because she was employed by Hy-Vee at the time of trial.

The compensation court determined that Parks suffered a compensable low-back injury during her employment with Hy-Vee. It did not address Parks' mental health issues. The award concluded that Parks had not reached MMI regarding her low-back injury and made no finding as to permanent loss of earning power or entitlement to vocational rehabilitation services. It ordered Hy-Vee to pay past and future medical expenses reasonably necessary for evaluation and nonsurgical treatment of the low-back injury.

Thereafter, Parks received regular and varying treatment for her compensable low-back injury, but she continued to

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experience pain. In 2012, her treating physician, Dr. Daniel M. Wik, recommended implanting a spinal cord stimulator. In 2014, Wik and an orthopedic surgeon agreed that Parks had reached MMI, and she was assigned work restrictions. Shortly thereafter, a functional capacity evaluation by the agreed-upon vocational rehabilitation counselor concluded that Parks was permanently and totally disabled. Hy-Vee voluntarily paid permanent partial disability benefits from 2014 until 2018.

Subsequent Motions.

Meanwhile, in 2017, Parks filed a motion to enforce the award. She requested that Hy-Vee pay for or authorize (1) a psychological evaluation to determine her candidacy for a spinal cord stimulator, (2) a back brace and massage therapy, and (3) various medications. Parks also sought medical expenses incurred after April 28, 2011, permanent disability benefits, and vocational rehabilitation.

Hy-Vee subsequently filed a petition for modification of the award. It asserted, among other things, that after the initial award, Parks had alleged she suffered a compensable mental health injury that Hy-Vee disputed, and that she was not totally disabled. In response, Parks filed an answer admitting that she was alleging a mental health injury and requesting that the compensation court dismiss Hy-Vee's petition for modification for failure to state a claim because Hy-Vee sought judicial determinations on MMI and disability status, issues not previously ruled upon by the compensation court.

Evidence at Trial.

The parties presented evidence at a consolidated trial to determine the extent and nature of Parks' compensable disability and associated expenses. Prior to the trial, the parties stipulated the issues to be resolved. Relevant here, those issues included (1) whether the work accident caused Parks to have chronic pain or a chronic pain syndrome, (2) whether the work accident aggravated her preexisting mental health issues, (3) whether medical and mileage expenses identified

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in exhibit 69 were reasonable and necessary for treatment of Parks' work-related conditions, (4) the extent of Parks' permanent disability resulting from the work-related injuries, and (5) "any additional benefits the [c]ourt deems warranted based on evidence at the time of hearing." The parties also stipulated that Parks had reached MMI on March 3, 2014, regarding her low-back injury and associated lower extremity symptoms.

Parks presented evidence that her chronic pain was caused by the work accident. Parks had received treatment from Wik monthly since 2010 for persistent low-back pain. In 2011, Wik attributed Parks' low-back pain to the work injury. In 2018, Wik reported that it remained his opinion that all of Parks' low-back diagnoses were caused by the work accident.

Parks also presented the report of Dr. Dennis P. McGowan, a spine surgeon who examined her in March 2019. He diagnosed Parks with "[s]prain to low back caused by 6/2/2008 work injury with continuous disabling low back pain."

Parks testified that she had experienced constant and varying degrees of low-back pain since the accident. The pain radiated down her legs and involved some numbness and tingling in her right leg and foot. Parks acknowledged significant struggles with her mental health in the past, particularly after her husband suffered an aneurysm in 1990. At that time, Parks was hospitalized for what she called a nervous breakdown. Parks testified that as a result, she obtained Social Security disability benefits. Parks testified that when she started working for Hy-Vee in 2004, she was off those disability benefits and her physical and mental health were good. She stated that she was happy to be working and that it was a good point in her life. Other than Parks' testimony about a cut to her finger, there is no evidence that Parks received medical treatment from 2004 to 2008. Parks testified about her efforts to remain employed in some form after her work accident, within her physical restrictions.

Contrary to Parks, Hy-Vee posited that Parks' chronic pain was caused by a somatic symptom disorder or psychological

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disorder unrelated to the work accident. It presented the February 2017 report of Dr. Terry Davis, a psychiatrist who conducted a psychiatric evaluation and mental status examination and reviewed a chronology of Parks' medical records and the records produced by Wik. He opined that all of Parks' current pain was the result of a preexisting somatic symptom disorder that was not caused or aggravated by the work accident. Davis described the disorder as a state in which psychological factors initiate, exacerbate, or maintain bodily symptoms. That is, Parks' ongoing back pain complaints were most likely psychogenic and not due to any physical, medical, anatomical, or physiologic cause. He noted that Parks had a history of serious emotional and psychological problems that predated the 2008 work accident and included somatic symptoms as early as 1990. Davis explained that a somatic episode can be brought about unconsciously to manipulate or control relationships, express emotions, or cope with stress. Because of his opinion that Parks' back pain was psychogenic and due to the subjective nature of her complaints, Davis concluded that Parks' symptoms were unlikely to respond to any medical or physical treatment, including a spinal cord stimulator.

Dr. John R. Massey conducted a medical examination of Parks in September 2018 and reviewed Davis' evaluation. He agreed with Davis' opinion that Parks' pain was caused by a somatic symptom disorder rather than the work accident.

The parties also presented evidence regarding the causal connection between Parks' mental health issues and the work accident. Parks' evidence showed that her mental health issues were exacerbated by the low-back injury she incurred at work in 2008. In her testimony, Parks acknowledged that she was diagnosed with depression, anxiety, and posttraumatic stress disorder in the 1990's, but, as noted above, she testified that her mental health had stabilized before she began working for Hy-Vee and that it continued to be stable through the initial trial. However, Parks testified that her mental health changed when Hy-Vee denied coverage for the spinal cord stimulator and she had "no hope for any other treatment."

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In February 2017, Wik, who consistently attributed Parks' low-back pain to the work accident, diagnosed Parks with "anxiety due to chronic low back pain." In January 2019, Parks began treatment with Dr. Dianna M. Clyne, a psychiatrist. Parks reported to Clyne that her low-back pain made her depression and anxiety worse. Clyne reviewed Parks' medical documentation, including that of her previous psychiatric hospitalizations. She diagnosed Parks with depressive disorder and anxiety disorder, which she attributed to the work injury and low-back pain. According to Clyne, Parks was at MMI for her depression and anxiety, at least until her low-back condition improved. In March 2019, McGowan reported that Parks' preexisting psychiatric conditions were not related to the work accident, but a few months later, he opined that Parks' preexisting anxiety and depression had worsened as a result of the work-related low-back injury.

Hy-Vee denied any causal connection between the work accident and Parks' depression and anxiety. As explained above, Hy-Vee presented opinion evidence that Parks' chronic pain, which Parks identified as the source of her worsening anxiety and depression, was not caused by the work accident but by a somatic symptom disorder. Further, Davis specifically opined that Parks did not suffer from any psychological symptoms or injury that was caused by or exacerbated by the work accident. He noted that Parks suffered from depression and anxiety for many years before the work accident.

Exhibit 69 set forth medical expenses that Parks alleged were work related. The parties stipulated that exhibit 69 accurately reflected the total billed charges, third-party payments, and writeoffs; Parks' out-of-pocket expenditures and mileage incurred; and the outstanding balances as set forth in itemized billing statements from providers. Parks' testimony did not specifically request compensation for the expenses itemized in exhibit 69, and according to statements in posttrial orders made by the compensation court, nor did her counsel's written closing arguments.

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Further Award.

Following trial, the compensation court dismissed with prejudice Hy-Vee's petition for modification and entered a further award. It awarded Parks permanent total disability benefits but denied vocational rehabilitation.

The compensation court found that while the evidence did not show that Parks had a chronic pain syndrome, it supported a finding of chronic pain caused by the work accident. In analyzing the issue, the compensation court concluded that the opinions of Davis and Massey violated the law-of-the-case doctrine and "should be rejected for that reason alone," but additionally observed that even "[p]utting aside the legal problem with [Hy-Vee's] position," it found Parks' witnesses more persuasive on the issue than Hy-Vee's. In particular, the compensation court noted that it was not persuaded by the opinions of Davis and Massey that Parks' pain was psychogenic in nature and noted that it was persuaded by Wik's opinion that Parks was suffering physical pain caused by her work accident. The compensation court also cited the opinion of McGowan, who had diagnosed Parks with a work-related low-back sprain "with continuous disabling low back pain." Further, the compensation court found Parks' testimony about her pain credible and observed that she had sought treatment for her pain and continued to work. In the court's view, these factors demonstrated that Parks suffered "actual physical pain caused by her work accident," not pain caused by a somatic symptom disorder.

As to Parks' depression and anxiety, the compensation court again relied on the opinion of Wik, whose office notes showed a causal connection between Parks' depression and anxiety, her work accident, and her low-back pain. The compensation court also noted McGowan's opinion that Parks' depression and anxiety were worsened by the work-related low-back injury and Clyne's opinion that her depression and anxiety were exacerbated by it. Further, the compensation court relied on Parks' own testimony that her depression and anxiety were made worse by her pain. It again rejected Hy-Vee's assertion,

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based on Davis' opinion, that Parks suffered from a somatic symptom disorder and that her depression and anxiety were not caused or exacerbated by the work accident.

Finally, the compensation court awarded Parks the mileage expenses identified in exhibit 69. It noted that exhibit 69 also identified medical expenses, but it did not include those expenses in the further award. The compensation court expressed confusion about whether Parks sought an order directing Hy-Vee to reimburse her for medical expenses. It noted that in her testimony, Parks had not asked the compensation court to order that she be reimbursed for those expenses, and that Parks' counsel had not mentioned the medical expenses identified in exhibit 69 in written closing arguments.

Modification of Further Award.

Less than a week after the further award, Parks filed a motion to modify it pursuant to § 48-180. Parks sought past medical expenses identified in exhibit 69, which were not part of the further award.

At the hearing on the motion, the compensation court explained that there was no failure of proof as to compensability for the medical expenses at issue. Instead, the court stated it had not awarded compensation for the medical expenses because Parks had not explicitly asked for it in her testimony or written closing arguments.

The compensation court modified the further award to include all of the medical expenses identified in exhibit 69 and ordered Hy-Vee to pay providers for outstanding balances and reimburse anyone who had already paid the providers, including Parks.

Hy-Vee appeals.

ASSIGNMENTS OF ERROR

Hy-Vee assigns, consolidated and renumbered, that the compensation court erred in (1) applying the law-of-the-case doctrine to disregard the somatic symptom disorder diagnosis and relying on that determination to reject every argument made

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by Hy-Vee, (2) failing to apply the law-of-the-case doctrine to Parks' alleged mental health injury, and (3) using § 48-180 to correct a mistake made by Parks' counsel.

STANDARD OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2018), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Aboytes-Mosqueda v. LFA Inc.*, 306 Neb. 277, 944 N.W.2d 765 (2020).

[2,3] On appellate review, the factual findings made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Id.* In testing the sufficiency of the evidence to support the findings of fact in a workers' compensation case, an appellate court considers the evidence in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the appellate court gives the successful party the benefit of every inference reasonably deducible from the evidence. *Id.*

[4] As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Id.*

[5] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Frans v. Waldinger Corp.*, 306 Neb. 574, 946 N.W.2d 666 (2020).

ANALYSIS

Chronic Pain.

We begin our analysis with Hy-Vee's argument that the compensation court erred in finding that Parks' chronic low-back

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pain was caused by her work injury and not a somatic symptom disorder. Hy-Vee claims that the compensation court entirely based its finding on an incorrect application of the law-of-the-case doctrine. We are not persuaded.

[6] The law-of-the-case doctrine reflects the principle that an issue litigated and decided in one stage of a case should not be relitigated at a later stage. *Gardner v. International Paper Destr. & Recycl.*, 291 Neb. 415, 865 N.W.2d 371 (2015). The compensation court concluded this doctrine precluded it from relying on the opinions of Davis and Massey that Parks' chronic pain resulted from a somatic symptom disorder. The compensation court viewed these opinions as contradictory to the initial award's finding that Parks had injured her lower back in the work accident. Hy-Vee asserts that nothing in the opinions of Davis or Massey calls the work injury itself into question and that thus, the compensation court erroneously based its rejection of a somatic symptom disorder on the law-of-the-case doctrine.

But while the compensation court relied on the law-of-the-case doctrine as a basis for finding that a somatic symptom disorder was not the cause of Parks' pain, that was not the only basis upon which it relied. After analyzing the law-of-the-case doctrine as it related to the opinions of Davis and Massey and stating that their opinions "should be rejected for that reason alone," the compensation court went on to say that even if the "legal problem" posed by the law-of-the-case doctrine were set to the side, it was not persuaded by Davis and Massey that Parks' pain was caused by a somatic symptom disorder. The compensation court then explained why it was not persuaded by Davis and Massey and why it was persuaded by Wik that Parks was suffering from pain due to her work-related low-back injury. The compensation court thus made a factual finding, independent of any of its legal conclusions regarding the law-of-the-case doctrine, that Parks' pain was caused by her work-related low-back injury.

Given the compensation court's independent factual finding regarding the cause of Parks' pain, we need not consider

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Hy-Vee’s law-of-the-case argument so long as the compensation court’s factual finding was not clearly erroneous. We agree with Parks that it was not. In support of its factual finding, the compensation court cited the opinion of Wik, who attributed Parks’ current low-back pain to the work accident. The compensation court acknowledged that this opinion conflicted with the opinions of Davis and Massey but expressly found Wik more persuasive. Hy-Vee is critical of this finding, but it was a credibility determination that the compensation court alone was entitled to make. See *Aboytes-Mosqueda v. LFA Inc.*, 306 Neb. 277, 944 N.W.2d 765 (2020). The compensation court further relied on the report of McGowan, who in 2019 diagnosed Parks with “[s]prain to low back caused by 6/2/2008 work injury with continuous disabling low back pain.” This evidence was sufficient to support the compensation court’s factual determination that Parks’ chronic low-back pain was caused by her work accident.

Reading the further award and the record as a whole, we conclude that the evidence was sufficient to support the compensation court’s factual finding that Parks’ chronic low-back pain resulted from her work accident, as well as the portions of the further award, as modified, stemming from that determination, including the conclusion that Parks was entitled to coverage for various treatments and the expenses set forth in exhibit 69.

Aggravation of Depression and Anxiety.

In challenging the compensation awarded for Parks’ depression and anxiety, Hy-Vee again turns to the law-of-the-case doctrine. But this time Hy-Vee assigns that the compensation court should have applied the doctrine to bar Parks from receiving compensation for an aggravation of her preexisting depression and anxiety. In large part, Hy-Vee argues that the compensation court violated the law-of-the-case doctrine by making determinations that it could not make in modifying the initial award. As we will explain, however, we do not agree that the court entered a modification order and Hy-Vee’s

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reliance on the law-of-the-case doctrine is misplaced. Further, contrary to Hy-Vee's assertions otherwise, the compensation court's award of compensation for an aggravation of Parks' mental health issues was supported by the evidence.

We first address Hy-Vee's argument that the procedural posture of this case precluded Parks from receiving compensation for an aggravation of her depression and anxiety. Hy-Vee classifies the further award as a modification order pursuant to Neb. Rev. Stat. § 48-141(2) (Reissue 2010). According to Hy-Vee, even if Parks' mental health conditions worsened after the initial award, it was not within the scope of a modification order to award compensation for that change in her condition, because it represented a "completely new" injury. Reply brief for appellant at 11.

Section 48-141 provides that "the amount of any agreement or award payable periodically may be modified" upon an application of a party "(2) . . . on the ground of increase or decrease of incapacity due solely to the injury." To establish a change in incapacity as the term is used in § 48-141, an applicant must show a change in impairment and a change in disability; impairment refers to a medical assessment whereas disability relates to employability. See *Rader v. Speer Auto*, 287 Neb. 116, 841 N.W.2d 383 (2013), citing *Jurgens v. Irwin Indus. Tool Co.*, 20 Neb. App. 488, 825 N.W.2d 820 (2013).

The procedural history of this case demonstrates that the further award was not a modification order pursuant to § 48-141. The initial award made no determinations regarding the degree and duration of Parks' disability; nor did it award periodic payments. Hy-Vee subsequently paid some periodic benefits by agreement for a time, but those payments ceased before the trial that produced the further award. In the meantime, Parks filed her motion to enforce the award, raising several issues disputed between the parties, and Hy-Vee filed its motion to modify. In response, Parks asked that Hy-Vee's motion to modify be dismissed for failure to state a claim, because Hy-Vee sought judicial determinations on issues not previously ruled upon by the compensation court.

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The parties thereafter stipulated that the compensation court should consider whether Parks’ work-related low-back injury caused chronic pain; whether Parks’ work-related low-back injury and resulting chronic pain aggravated her preexisting mental health conditions; and whether, having reached MMI, she was permanently disabled, along with “any additional benefits the [c]ourt deems warranted based on evidence at the time of the hearing.” The court tried these issues, among others, at a consolidated trial. These issues were aimed at determining the degree and duration of Parks’ disability for the first time. Because they had not yet been determined and there was no agreement pertaining to them in effect, there was no “agreement or award” regarding “incapacity” for the compensation court to modify. See § 48-141(2). Indeed, the further award recognized as much by dismissing Hy-Vee’s motion to modify the initial award, with prejudice.

Hy-Vee maintains that Parks could obtain compensation for the aggravation of her mental health conditions only by filing a “new petition for this newly emerged claim.” Reply brief for appellant at 12. But Neb. Rev. Stat. § 48-162.03(1) (Cum. Supp. 2018) grants the compensation court broad authority to rule on any motion except motions for new trial. The requests for relief that prompted the further award—Parks’ motion to enforce the award, Hy-Vee’s motion to modify the award, and Parks’ prayer for dismissal of Hy-Vee’s motion to modify—were all related to that pending case and “encompassed by the motion practice under the broad language of § 48-162.03(1).” See *Fentress v. Westin, Inc.*, 304 Neb. 619, 630, 935 N.W.2d 911, 921 (2019). No new petition was necessary.

[7] Further, Hy-Vee stipulated that the compensation court could decide whether the work accident aggravated Parks’ preexisting mental health issues. Hy-Vee is thus now asking us to find that the compensation court erred in taking up an issue that the parties stipulated it should resolve. However, we have said that in Nebraska, parties are free to make stipulations that govern their rights, including the issues to be decided, and that such stipulations will be respected and

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enforced by courts so long as the agreement is not contrary to public policy or good morals. See *Archer Daniels Midland Co. v. State*, 290 Neb. 780, 861 N.W.2d 733 (2015). In this case, we see nothing to persuade us that the compensation court erred in honoring the parties' stipulations regarding the issues to be decided.

Hy-Vee contends that whatever the parties' stipulations, they did not authorize the compensation court to disregard the law-of-the-case doctrine. Hy-Vee argues the doctrine applies here because the compensation court did not find in its initial award that Parks' mental health was affected by the work accident. According to Hy-Vee, this precludes the compensation court from considering the issue. As we have noted, however, the doctrine reflects the principle that an issue *litigated and decided* in one stage of a case should not be relitigated at a later stage. *Gardner v. International Paper Destr. & Recycl.*, 291 Neb. 415, 865 N.W.2d 371 (2015). See, also, 18B Charles Alan Wright et al., *Federal Practice and Procedure* § 4478 at 628 (5th ed. 2019) (“[a]ctual decision of an issue is required to establish the law of the case”; “[l]aw of the case does not reach a matter that was not decided”). Here, the question of whether Parks had suffered an aggravation of her depression and anxiety as a result of her work-related low-back injury was not litigated and decided in the initial trial. Parks did not assert any mental health injuries at that time, and therefore, the initial award made no finding pertaining to the matter. Hy-Vee is thus mistaken that the law-of-the-case doctrine precluded the compensation court from finding compensable mental health injuries in the further award.

Lastly, Hy-Vee contends that the compensation court erred in determining that Parks' aggravated mental health condition was caused by the work accident, contrary to the opinions of Davis upon which Hy-Vee based much of its evidence. However, the compensation court made credibility determinations, discounted Davis' hypotheses, and relied on Parks' evidence, all of which were within its authority to do. See

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Aboytes-Mosqueda v. LFA Inc., 306 Neb. 277, 944 N.W.2d 765 (2020). And Parks’ evidence regarding her mental health was sufficient to support the compensation court’s award.

Parks herself acknowledged her preexisting mental health issues, but said they had stabilized before the accident. Parks testified that her mental health condition continued to be stable until after the initial trial, when Hy-Vee denied coverage for the spinal cord stimulator and she had “no hope” for other treatment of her chronic low-back pain. In 2017, Wik, who attributed Parks’ low-back pain to the work accident, diagnosed Parks with anxiety due to chronic low-back pain. And in 2019, Parks reported to Clyne that her low-back pain made her depression and anxiety worse. Clyne diagnosed Parks with depression and anxiety disorders due to the work injury and low-back pain. A few months later, McGowan opined that Parks’ preexisting anxiety and depression had worsened as a result of the work-related low-back injury.

[8] A preexisting disease and an aggravation of that disease may combine to produce a compensable injury. *Manchester v. Drivers Mgmt.*, 278 Neb. 776, 775 N.W.2d 179 (2009). To be compensable, a subsequent injury or aggravation related to the primary injury must be a direct and natural result of the work accident. See *Sweeney v. Kerstens & Lee, Inc.*, 268 Neb. 752, 688 N.W.2d 350 (2004). Parks’ evidence demonstrated such a direct and natural connection: Her evidence showed that the aggravation of her depression and anxiety was caused by her work-related low-back injury. Accordingly, the compensation court did not err in finding it compensable.

Section 48-180 Modification.

Finally, Hy-Vee claims that the compensation court exceeded the authority granted to it in § 48-180 by modifying the further award to make Hy-Vee responsible for all of the expenses listed in exhibit 69. Section 48-180 provides:

The Nebraska Workers’ Compensation Court may, on its own motion or on the motion of any party, modify

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or change its findings, order, award, or judgment at any time before appeal and within fourteen days after the date of such findings, order, award, or judgment. The time for appeal shall not be lengthened because of the modification or change unless the correction substantially changes the result of the award.

Before addressing Hy-Vee's argument, we briefly note some relevant history regarding § 48-180. Prior to a 2011 amendment, § 48-180 authorized modification by the compensation court, but only "for the purpose of correcting any ambiguity, clerical error, or patent or obvious error." See 2011 Neb. Laws, L.B. 151, § 11. In its earlier form, § 48-180 was understood as a "statutory embodiment of nunc pro tunc principles." *Walsh v. City of Omaha*, 11 Neb. App. 747, 755, 660 N.W.2d 187, 194 (2003). As a result of the 2011 amendment, the compensation court's authority to modify previously entered findings, orders, awards, and judgments is no longer limited to nunc pro tunc orders. See *Carr v. Ganz*, 26 Neb. App. 14, 916 N.W.2d 437 (2018).

Hy-Vee acknowledges that the 2011 amendment to § 48-180 expanded the compensation court's modification authority, but contends that the compensation court nonetheless lacked the authority to modify the further award here. Hy-Vee argues that in its current form, § 48-180 authorizes the compensation court to make substantive modifications to its prior rulings, but only to correct its own mistakes, not to remedy a mistake or oversight of a party. Hy-Vee contends that the compensation court did not initially award compensation for all of the medical expenses identified in exhibit 69 because Parks failed to specifically request such relief and that the compensation court could not, under Hy-Vee's understanding of § 48-180, remedy her failure to do so.

In response to Hy-Vee's argument, we observe initially that the modification at issue is not, in our view, easily categorized as a correction of a mistake or oversight on the part of Parks. The compensation court stated that it did not initially

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include all of the medical expenses identified in exhibit 69 in the further award because Parks did not, in her testimony, express a desire to be reimbursed for medical bills and because the written closing arguments submitted by her counsel also did not specifically request such reimbursement. Hy-Vee does not, however, point us to any procedural rule or other legal authority that required such a request from Parks. Neither are the written closing arguments at issue a part of our record on appeal. Furthermore, the parties stipulated prior to trial that one of the issues to be determined was “[w]hether medical and mileage expenses identified in Trial Exhibit 69 were reasonable and necessary for treatment of [Parks’] work-related injuries/conditions.” And, as the compensation court stated in its modification order, it did not omit the medical bills identified in exhibit 69 from its initial further award because Parks failed to prove an entitlement to compensation for them. Although the compensation court may not have initially understood that Parks was seeking compensation for all of the medical bills identified in exhibit 69, given the foregoing facts, we have doubts about whether that can be attributed to a mistake or oversight of Parks.

In any event, we need not decide whether Parks or the compensation court is to blame for the initial omission from the further award of the medical bills identified in exhibit 69. Such an assignment of fault is not necessary, because the compensation court’s modification authority under § 48-180 does not turn on whether modification is being made to correct a mistake of the court or of a party. We reach this conclusion through application of familiar principles of statutory interpretation.

[9-11] When interpreting a statute, the starting point and focus of the inquiry is the meaning of the statutory language, understood in context. *Rogers v. Jack’s Supper Club*, 304 Neb. 605, 935 N.W.2d 754 (2019). 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. *Id.* It is not

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within the province of the courts to read meaning into a statute that is not there or to read anything direct and plain out of a statute. *Id.*

Hy-Vee’s argument that § 48-180 authorizes modification only to correct an error made by the court cannot survive an application of these principles. The text of § 48-180 does not differentiate between “mistakes” made by the court and those made by parties. Indeed, it does not mention “mistakes” or a similar concept at all. Nor does it otherwise limit the reasons for which a compensation court may modify its findings, order, award, or judgment: Under § 48-180, the court may do so “on its own motion or on the motion of any party.” The interpretation advanced by Hy-Vee thus requires that meaning not found in the text of § 48-180 be read into the statute. We do not interpret statutes in this manner. See, e.g., *State v. Garcia*, 301 Neb. 912, 920 N.W.2d 708 (2018).

Unable to make an argument in support of its preferred interpretation based on the statutory text, Hy-Vee resorts to the absurd results doctrine. Under that doctrine, a court may deviate from the plain language of the statutory text if application of the plain language would lead to “‘manifest absurdity.’” See *Rogers v. Jack’s Supper Club*, *supra*, 304 Neb. at 613, 935 N.W.2d at 761, quoting *Anthony, Inc. v. City of Omaha*, 283 Neb. 868, 813 N.W.2d 467 (2012). But the bar of manifest absurdity is not easily cleared. We have refused to apply the doctrine if the result dictated by the plain language is not “so absurd that the Legislature could not possibly have intended it.” *Thomas v. Peterson*, *ante* p. 89, 97, 948 N.W.2d 698, 705 (2020), citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 234-39 (2012). See, also, *Blank v. Blank*, 303 Neb. 602, 930 N.W.2d 523 (2019) (Papik, J., concurring).

Rather than arguing that application of the plain language will result in an absurd result in this case, Hy-Vee primarily contends that if its preferred interpretation is not adopted, there will be absurd results in other cases. Hy-Vee asks us

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to consider various hypothetical scenarios in which parties, for example, fail to offer key pieces of evidence or fail to adequately plead the relief sought and then later seek to remedy their failure by asking for modification under § 48-180. Hy-Vee's hypothetical scenarios, however, are not before us in this case.

The question raised by Hy-Vee's absurdity argument is whether applying the plain language of § 48-180 to authorize the modification of the further award under these circumstances is a result so absurd that the Legislature could not possibly have intended to allow for it. Hy-Vee comes nowhere near clearing that high bar. As noted above, the parties stipulated prior to trial that whether the medical expenses identified in exhibit 69 were reasonable and necessary for treatment of Parks' work-related injuries was one of the issues presented for resolution. There is also no dispute on appeal that Parks adequately proved at trial that such expenses were, in fact, reasonable and necessary. We see no basis to conclude that the Legislature, in enacting § 48-180, could not possibly have intended to authorize the compensation court to modify the further award in the manner it did under these circumstances.

CONCLUSION

We find that the compensation court's further award was not premised on legal error, that the record supports the findings of fact upon which the further award was based, and that the compensation court did not act in excess of its powers in modifying the further award. Accordingly, we affirm.

AFFIRMED.

STACY, J., not participating.

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

ALYSSA LEE WINDHAM, APPELLEE, v.
REBECCA DIANE KROLL, APPELLANT.

951 N.W.2d 744

Filed December 11, 2020. No. S-20-095.

1. **Modification of Decree: Child Custody: Visitation: Child Support.** The proper legal standard to apply when modifying provisions pertaining to custody, visitation, or support of a minor child is a question of law.
2. **Statutes: Appeal and Error.** On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Modification of Decree: Child Custody: Visitation: Child Support: Appeal and Error.** Modification of a judgment or decree relating to child custody, visitation, or support is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and will be affirmed absent an abuse of discretion.
4. **Parent and Child: Words and Phrases.** In loco parentis is a common-law doctrine that gives standing to a nonparent to exercise the rights of a natural or adoptive parent when the evidence shows the nonparent's exercise of such rights is in the child's best interests.
5. **Parent and Child.** In order to stand in loco parentis, one must assume all obligations incident to the parental relationship.
6. _____. In loco parentis status is not equivalent to status as a parent, and it does not entitle a person to all the same rights that a legal parent would enjoy.
7. _____. In loco parentis status does not, by itself, eclipse the superior nature of the parental preference accorded to biological or adoptive parentage.
8. **Modification of Decree: Parent and Child: Child Custody: Visitation: Child Support.** Judgments establishing in loco parentis rights regarding the custody, visitation, and support of a minor child will ordinarily not be modified absent a material change in circumstances affecting the

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best interests of the child. However, if raised by the parties, whether the in loco parentis relationship has changed is relevant to determining both whether there has been a material change in circumstances and whether modification is in the child's best interests. Moreover, when modifying custody rights as between a natural or adoptive parent and one who stands in loco parentis, the parental preference doctrine applies.

9. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
10. **Modification of Decree: Child Support: Property Settlement Agreements.** The fraud or gross inequity standard is inapplicable to actions involving modification of child support, even when such support was part of a voluntary property settlement agreement approved by the court and incorporated into the decree.
11. **Modification of Decree: Child Support.** Provisions regarding the support of minor children are properly characterized as child support for purposes of the legal standard to be applied in a modification action.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

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

Jamie C. Cooper, of Johnson & Pekny, L.L.C., for appellee.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

STACY, J.

The primary question in this appeal is which legal standard to apply when modifying a judgment establishing custody, visitation, and support of minor children based on the common-law doctrine of in loco parentis. The district court modified several provisions pertaining to the support of the minor children upon finding a material change in circumstances. We conclude the correct modification standard was applied, and we affirm the modification order.

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I. BACKGROUND

Alyssa Lee Windham and Rebecca Diane Kroll were in a relationship for approximately 17 years, but never married. During their relationship, Kroll gave birth to two children, and Windham and Kroll shared parenting responsibilities. Windham is not biologically related to the children, nor did she adopt them.

The couple separated in 2011. Windham moved out of the shared residence, but the parties continued to share parenting duties.

1. 2012 JUDGMENT

In January 2012, Windham filed a complaint against Kroll in the district court for Douglas County. The operative amended complaint alleged Windham stood in loco parentis to the minor children and asked the court to establish custody, set a parenting time schedule, allocate child-related expenses, and order monthly child support based on the Nebraska Child Support Guidelines. Kroll's answer denied that Windham stood in loco parentis to the children and asked the court to award her sole legal and physical custody as their biological mother.

Eventually, Windham and Kroll reached an agreement as to Windham's in loco parentis status, child custody and visitation, and the shared payment of certain expenses related to the children. Both parties were represented by counsel, and the minor children were represented by a guardian ad litem. As relevant to the issues on appeal, the parties agreed as follows:

- Windham stood in loco parentis to the minor children.
- The parties would share joint legal and physical custody of the children, and Windham would have regular parenting time pursuant to a stipulated parenting plan.
- Each party would pay 50 percent of any school or employment-related childcare expenses and 50 percent of any nonreimbursed medical, dental, and vision expenses.
- The minor children would attend private primary and secondary school, and each party would pay 50 percent of "any tuition, school supplies, school dues, after-school programs,

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sports and other extracurricular activities incurred for the benefit of the minor children.”

- Each party would continue making monthly contributions of \$166 to the minor children’s college savings plans.

The district court approved the parties’ settlement agreement and stipulated parenting plan, and it incorporated the same into the judgment entered on October 10, 2012. No party appealed from the 2012 judgment.

2. 2015 STIPULATED MODIFICATION

In October 2015, the parties filed a complaint characterized as a joint stipulation for modification. They stipulated there had been a material change in circumstances that warranted adding a provision to the parenting plan directing that neither party would use or be under the influence of alcohol or controlled substances during their parenting time. The district court approved this stipulated modification, and no party appealed.

3. 2017 COMPLAINT TO MODIFY

In October 2017, Kroll filed a complaint to modify, seeking sole legal and physical custody of both minor children. She alleged there had been a material change in circumstances in that Windham had been charged with abusing the children and had used alcohol in their presence and while transporting them. Kroll also sought an award of monthly child support. Windham’s answer denied the relevant allegations.

(a) Temporary Orders

In February 2018, while Kroll’s complaint for modification was pending, the court entered a “Stipulated Temporary Order” reflecting the parties’ agreement to temporarily modify custody and parenting time and to order temporary child support. Kroll was given sole physical and legal custody of the children, and Windham was awarded specific parenting time. Windham was ordered to pay temporary child support of \$1,300 per month, and Kroll was ordered to pay the first \$480 in nonreimbursed medical expenses, with the parties splitting

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such expenses 50-50 thereafter. Responsibility for “school or employment-related expenses and tuition” was reallocated so that Kroll paid 60 percent and Windham paid 40 percent.

In May 2019, Windham moved to reduce her temporary child support payment, alleging she had lost her previous job and was earning less at her new job. The parties stipulated to a temporary order entered in June 2019 which reduced Windham’s monthly child support obligation to \$1,149 and reallocated responsibility for nonreimbursed medical expenses exceeding \$480 so that Windham paid 45 percent and Kroll paid 55 percent. This temporary order specifically directed that Windham was “no longer responsible for her portion of the minor children’s reasonable and necessary direct expenses, including, but not limited to, clothing and extracurricular expenses.” It also ordered that “until further Order of the Court, [Windham] shall remain responsible for her portion of the children’s school tuition, supplies, and dues.”

(b) Counterclaim

In August 2019, Windham was allowed to file a counterclaim for modification. The counterclaim alleged there had been a material change in circumstances since the entry of the 2012 judgment, in that Windham’s income had decreased and was likely to remain decreased. She asked the court to calculate any child support using the Nebraska Child Support Guidelines. She also asked the court to reduce the amount of her “contribution toward out-of-pocket expenses, including childcare, medical expenses, private school tuition, extracurricular expenses, and contribution to the children’s college savings plan.”

4. TRIAL ON COMPLAINT TO
MODIFY AND COUNTERCLAIM

In November 2019, trial was held on Kroll’s complaint to modify and Windham’s counterclaim. The parties advised the court they had successfully mediated their dispute as to custody and parenting time, and they agreed Kroll should have

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sole legal and physical custody of the minor children. They also agreed Windham should have regular parenting time pursuant to a phased schedule, and they agreed to certain safety and communication provisions. The parties asked the court to modify custody and visitation in accordance with their agreement and to approve and adopt their modified parenting plan.

The parties were unable to agree on how to modify support-related provisions in light of the stipulated custody change. So the matter proceeded to trial on Kroll's request for monthly child support and Windham's request to reduce her responsibility for certain child-related expenses.

(a) Kroll's Testimony

The children were in eighth and sixth grade at the time of trial. Kroll testified that both children had attended a private religious grade school since kindergarten and that their tuition was approximately \$3,000 per year for each child. Kroll estimated tuition for a private religious high school would be approximately \$11,000 per year each. But she testified that actual tuition would depend on the amount of financial aid awarded by the school, which considered the children's academic achievements, the parents' financial resources, and the children's willingness to engage in workstudy programs.

Kroll acknowledged she was seeking monthly child support from Windham based on their agreement that Kroll should have sole custody, and Kroll expected that as the primary physical custodian, she would be 100 percent responsible for the children's clothing and daily food needs. But Kroll asked the court not to modify Windham's responsibility for other child-related expenses under the 2012 judgment, reasoning that provisions regarding school tuition and expenses, college savings, and extracurricular activities were "outside the province of child support."

(b) Windham's Testimony

Windham asked the court to approve the mediated agreement giving Kroll sole legal and physical custody. She also

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asked the court to order her to pay monthly child support based on the Nebraska Child Support Guidelines. But Windham asked the court to modify the expense-sharing provisions of the 2012 judgment so that she was no longer responsible for 50 percent of the children's school tuition and no longer required to pay \$166 per month into the children's college savings accounts.

Windham acknowledged that she had stipulated to these provisions in the 2012 judgment, but claimed they should be modified because of the change in custody and because her financial circumstances had changed. With respect to the latter, she testified she had been terminated from her previous job and earned less money at her new job. Windham submitted a proposed child support calculation to the court that would require her to pay \$1,050 per month for two children. Windham testified that if ordered to pay this amount of monthly child support, she could not also afford to pay half the expenses related to school tuition or contribute to the children's college savings plans at the same level she had in the past.

5. 2020 ORDER OF MODIFICATION

On January 6, 2020, the court entered an order of modification. The order approved and incorporated the parties' mediated parenting plan, finding it was in the children's best interests. Pursuant to that plan, Kroll was awarded sole legal and physical custody of the minor children, subject to Windham's regular parenting time.

The court found the agreed-upon changes to custody and parenting time amounted to a material change in circumstances supporting modification of several support-related provisions, and it modified the 2012 judgment to (1) order Windham to pay monthly child support of \$1,050 for two children and \$763.80 per month when only one child remains entitled to support, (2) eliminate the provision requiring monthly contributions to the children's college savings plans, and (3) reallocate responsibility for the children's "tuition and educational expenses" so that Windham would pay 33⅓ percent of such expenses and Kroll would pay 66⅔ percent. The order of

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modification also stated that any term of the 2012 judgment “not modified herein or by subsequent order” would remain in full force and effect.

Kroll filed this timely appeal, which we moved to our docket on our own motion.

II. ASSIGNMENTS OF ERROR

Kroll assigns that the district court erred by modifying the terms of the October 2012 judgment relating to (1) allocation of school tuition and expenses and (2) contributions to the children’s college savings funds.

Kroll’s primary argument on appeal is that the district court applied the wrong legal standard when it modified these provisions based on a material change in circumstances. She contends that because the provisions were voluntarily agreed to by the parties and incorporated into a consent judgment from which neither party appealed, the provisions could not be modified absent a showing of fraud or gross inequity.¹

III. STANDARD OF REVIEW

[1,2] The proper legal standard to apply when modifying provisions pertaining to custody, visitation, or support of a minor child is a question of law.² On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.³

[3] Modification of a judgment or decree relating to child custody, visitation, or support is a matter entrusted to the discretion of the trial court, whose order is reviewed *de novo* on the record, and will be affirmed absent an abuse of discretion.⁴

¹ See, generally, *Carlson v. Carlson*, 299 Neb. 526, 909 N.W.2d 351 (2018); *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006).

² See *Reinsch v. Reinsch*, 259 Neb. 564, 611 N.W.2d 86 (2000).

³ *Benjamin M. v. Jeri S.*, *ante* p. 733, 950 N.W.2d 381 (2020).

⁴ See, *Tilson v. Tilson*, *ante* p. 275, 948 N.W.2d 768 (2020); *Whilde v. Whilde*, 298 Neb. 473, 904 N.W.2d 695 (2017); *State on behalf of Jakai C. v. Tiffany M.*, 292 Neb. 68, 871 N.W.2d 230 (2015); *Caniglia v. Caniglia*, 285 Neb. 930, 830 N.W.2d 207 (2013).

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IV. ANALYSIS

1. MODIFICATION OF IN LOCO PARENTIS
CUSTODY, VISITATION, AND SUPPORT

Most of our appellate decisions involving the modification of child custody, visitation, and support arise in the context of dissolution and paternity actions, where it is well established that provisions in a decree or order relating to custody, visitation, and support may be modified upon a showing of a material change in circumstances affecting the best interests of the child.⁵ The instant modification did not arise in a dissolution or a paternity action; instead, it arose in an action to establish custody, support, and visitation rights based on Windham's common-law status as one who stood in loco parentis to the minor children.

[4-7] In loco parentis is a common-law doctrine that gives standing to a nonparent to exercise the rights of a natural or adoptive parent when the evidence shows the nonparent's exercise of such rights is in the child's best interests.⁶ In order to stand in loco parentis, one must assume all obligations incident to the parental relationship.⁷ In loco parentis status is not equivalent to status as a parent, however, and it does not entitle a person to all the same rights that a legal parent would enjoy.⁸ Moreover, in loco parentis status does not, by itself, eclipse the superior nature of the parental preference accorded to biological or adoptive parentage.⁹

The parties' briefing generally assumes that once a judgment is entered establishing the custody, visitation, and support

⁵ See, e.g., *Tilson*, *supra* note 4; *State on behalf of Fernando L. v. Rogelio L.*, 299 Neb. 329, 907 N.W.2d 920 (2018).

⁶ See, *State on behalf of Tina K. v. Adam B.*, *ante* p. 1, 948 N.W.2d 182 (2020); *Windham v. Griffin*, 295 Neb. 279, 887 N.W.2d 710 (2016); *Latham v. Schwerdtfeger*, 282 Neb. 121, 802 N.W.2d 66 (2011), *disapproved on other grounds*, *Windham*, *supra* note 6.

⁷ *State on behalf of Tina K.*, *supra* note 6.

⁸ *Id.*

⁹ *Id.*

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rights and responsibilities of one who stands in loco parentis, any subsequent modification of that judgment will be governed by the same legal standards and principles that govern modification of similar provisions in a dissolution or paternity decree. With two important caveats, we agree.

In dissolution, separation, and paternity actions, issues regarding the custody, visitation, and support of minor children are governed largely by statute.¹⁰ There currently is no statutory scheme governing the rights and responsibilities of one who stands in loco parentis. But this court has consistently held that even absent statutory authorization, a district court has equitable jurisdiction to determine the rights and responsibilities of one who stands in loco parentis to a child, including custody, visitation, and support.¹¹ And once such rights and responsibilities have been established by a district court, we have recognized they can be modified.¹² But our cases make clear that when modifying the rights and responsibilities of one who stands in loco parentis, courts may also need to consider whether the in loco parentis relationship has changed¹³ and whether the parental preference doctrine applies.¹⁴

¹⁰ See, Neb. Rev. Stat. §§ 42-341 to 42-381 (Reissue 2016 & Cum. Supp. 2018) (dissolution); Neb. Rev. Stat. §§ 43-1401 to 43-1418 (Reissue 2016, Cum. Supp. 2018 & Supp. 2019) (paternity).

¹¹ See, *Windham*, *supra* note 6 (one who stands in loco parentis has right to seek custody and visitation, but parental preference doctrine still applies); *Latham*, *supra* note 6 (common-law doctrine of in loco parentis confers standing to seek custody and visitation when in best interests of child). See, also, *Charleen J. v. Blake O.*, 289 Neb. 454, 855 N.W.2d 587 (2014) (holding Nebraska common law recognizes action in equity for custody). Accord *Weinand v. Weinand*, 260 Neb. 146, 616 N.W.2d 1 (2000), *disapproved on other grounds*, *Windham*, *supra* note 6 (no basis to order ex-steparent to pay child support because he did not currently stand in loco parentis to minor child).

¹² See, *State on behalf of Tina K.*, *supra* note 6; *Whilde*, *supra* note 4.

¹³ *Whilde*, *supra* note 4.

¹⁴ *State on behalf of Tina K.*, *supra* note 6; *Windham*, *supra* note 6.

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In *Whilde v. Whilde*,¹⁵ we reviewed an order modifying the custody and visitation rights of one who stood in loco parentis to a minor child born during an unmarried same-sex relationship. In doing so, we recited the well-established modification standard from our dissolution and paternity cases, noting:

Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. . . . First, the party seeking modification must show a material change in circumstances, occurring after the entry of the previous custody order and affecting the best interests of the child. . . . Next, the party seeking modification must prove that changing the child's custody is in the child's best interests.¹⁶

The biological mother in *Whilde* claimed her former partner's in loco parentis status had ended. We recognized this argument when considering whether there had been a material change in circumstances, reasoning:

[A]n individual standing in loco parentis, which is temporary in nature, is not the functional equivalent of a lawful parent for all purposes or in all contexts. We believe that modification of custody is a context in which one who obtained rights as a result of in loco parentis status will be considered differently from one who is a lawful parent; therefore, whether one has maintained the sort of relationship with the child that gave rise to in loco parentis status is relevant to modification of custody and visitation rights, both in determining whether there has been a material change in circumstances and whether a modification of custodial and visitation rights is in the child's best interests.¹⁷

¹⁵ *Whilde*, *supra* note 4.

¹⁶ *Id.* at 487, 904 N.W.2d at 705 (citations omitted).

¹⁷ *Id.* at 488, 904 N.W.2d at 705.

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In *State on behalf of Tina K. v. Adam B.*,¹⁸ the biological mother of a minor child appealed from a modification order giving sole custody to a woman who stood in loco parentis to the child. The mother claimed her status as the natural parent entitled her to custody. We emphasized that because natural and adoptive parents have a fundamental right to make decisions concerning the care, custody, and control of their minor children which is constitutionally protected, custody disputes between a natural or adoptive parent and a nonparent are governed by the parental preference doctrine.¹⁹ That doctrine establishes a rebuttable presumption that the best interests of a minor child are served by placing custody of the child with his or her parent and, absent proof that a parent is unfit or has forfeited the right to custody, a parent may not ordinarily be deprived of the custody of a minor child.²⁰ In prior cases, we suggested it may be possible to overcome the parental preference doctrine by showing “the best interests of the child lie elsewhere,”²¹ but we described such circumstances as “exceptional.”²² In *State on behalf of Tina K.*, we explained that in order for such exceptional circumstances to negate the parental preference doctrine, there must be proof of serious physical or psychological harm to the child or a substantial likelihood of such harm.²³ We therefore reversed the order modifying custody and remanded the matter for reconsideration of the parental preference doctrine.

So while we generally agree with the parties that the legal standards governing modification of in loco parentis

¹⁸ *State on behalf of Tina K.*, *supra* note 6.

¹⁹ *Id.* See, also, *Windham*, *supra* note 6 (holding parental preference doctrine applies in custody dispute between natural or adoptive parent and one who stands in loco parentis).

²⁰ *State on behalf of Tina K.*, *supra* note 6.

²¹ *Windham*, *supra* note 6, 295 Neb. at 288, 887 N.W.2d at 717.

²² *Id.* at 290, 887 N.W.2d at 718.

²³ *State on behalf of Tina K.*, *supra* note 6.

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custody, visitation, and support are similar to the standards governing custody and support modifications in a dissolution or paternity action, the standards are not identical. *Whilde* demonstrates that consideration may also need to be given to whether the in loco parentis status has changed, and *State on behalf of Tina K.* teaches that when modifying custody rights as between a natural or adoptive parent and one who stands in loco parentis, the parental preference doctrine applies.

[8] We therefore hold that judgments establishing in loco parentis rights regarding the custody, visitation, and support of a minor child will ordinarily not be modified absent a material change in circumstances affecting the best interests of the child.²⁴ However, if raised by the parties, whether the in loco parentis relationship has changed is relevant to determining both whether there has been a material change in circumstances and whether modification is in the child's best interests.²⁵ Moreover, when modifying custody rights as between a natural or adoptive parent and one who stands in loco parentis, the parental preference doctrine applies.²⁶

On this record, the district court applied the correct legal standard to the requested modifications to custody, visitation, and support of one who stands in loco parentis. The parties did not dispute Windham's continued in loco parentis status, and Kroll did not assert the parental preference doctrine in seeking to modify the joint custody arrangement. To the contrary, the parties' mediated agreement to modify custody continued to describe Windham as a parent to the minor children, and the parties agreed that Windham should continue to have regular weekly parenting time with the children. Finding it was in the children's best interests, the court approved the mediated modification agreement giving Kroll, the natural parent, sole custody and adjusting Windham's regular parenting time.

²⁴ See, *id.*; *Whilde*, *supra* note 4.

²⁵ *Whilde*, *supra* note 4.

²⁶ See, *State on behalf of Tina K.*, *supra* note 6; *Windham*, *supra* note 6.

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On appeal, no party challenges the modifications to custody or parenting time and no party challenges Windham's in loco parentis status.

Instead, as noted earlier, Kroll assigns error only to the district court's modification of the provisions relating to the allocation of school tuition expenses and mandatory contributions to the children's college savings funds. The court modified these support-related provisions after finding that a material change in circumstances resulted from the parties' agreement to change from a joint custody arrangement to a sole custody arrangement. After reviewing this *de novo* on the record, we find no abuse of discretion.

[9] An abuse of discretion occurs when a trial court bases its decision upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.²⁷ Here, the district court reasoned that changing from a joint custody arrangement, where Kroll and Windham shared child-related expenses equally, to an arrangement where Kroll had sole legal and physical custody, was a material change in circumstances warranting modification of the support-related provisions concerning the minor children. There was also evidence that Windham's financial circumstances had changed since the 2012 judgment.

On this record, the district court did not abuse its discretion in finding that a material change in circumstances justified modifying support-related provisions concerning the minor children. To the extent Kroll's appellate briefing can be understood to argue there was insufficient evidence of a material change in circumstances, the argument is without merit.

But in fairness to Kroll, her appellate briefing does not focus on the material change in circumstances standard, because her primary contention on appeal is that a higher modification standard should have been applied. We consider that argument next, and reject it.

²⁷ *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015).

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2. NO MERIT TO KROLL'S CLAIM THAT
PROVISIONS COULD NOT BE MODIFIED
ABSENT FRAUD OR GROSS INEQUITY

Kroll argues that because the provisions regarding allocation of tuition expenses and college savings contributions were voluntarily agreed to by the parties and incorporated into a consent judgment from which neither party appealed, those provisions can be modified only upon a showing of fraud or gross inequity.²⁸ We addressed and rejected a similar argument in *Reinsch v. Reinsch*.²⁹

In that case, a 1986 divorce decree incorporated a property settlement agreement in which the father agreed to pay \$200 in monthly child support until the child reached the age of 18. The mother later sought to modify the support and extend it to the age of 19. The district court granted the modification, finding the enactment of certain child support statutes was a material change in circumstances justifying modification of the duration of child support. The father appealed, arguing the trial court had applied the wrong standard to modify support. He claimed that since the parties had agreed to the duration of child support in their property settlement agreement, the duration could be modified only upon a showing of fraud or gross inequity. We soundly rejected this argument.

We acknowledged, but distinguished, a line of cases holding as follows:

[W]here a party to a divorce action voluntarily executes a property settlement agreement which is approved by the dissolution court and incorporated into a divorce decree from which no appeal is taken, provisions dealing with division of real and personal property, division of pension benefits, and division of stock will not

²⁸ See, generally, *Carlson*, *supra* note 1; *Strunk*, *supra* note 1.

²⁹ *Reinsch*, *supra* note 2.

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thereafter be vacated or modified in the absence of fraud or gross inequity.³⁰

We noted this higher modification standard was premised on § 42-366. That statute is intended to promote amicable settlement of disputes attendant to divorce and separation, and it permits parties to enter into a “written property settlement agreement containing provisions for the maintenance of either of them, the disposition of any property owned by either of them, and the support and custody of minor children.”³¹ *Reinsch* recognized that our cases applying § 42-366 had generally held that “if the terms of a property settlement agreement with respect to real and personal property and maintenance are not found unconscionable, the agreement is binding upon the dissolution court and the initial decree must carry such agreement into effect.”³²

But *Reinsch* expressly found this heightened modification standard was inapplicable to provisions in a property settlement agreement regarding the custody and support of minor children. We reasoned that under § 42-366(2), agreements regarding the custody and support of minor children are not binding on the dissolution court,³³ and we noted that despite agreements to the contrary, “child support orders are always subject to review and modification.”³⁴

³⁰ *Id.* at 568-69, 611 N.W.2d at 90, citing *Hoshor v. Hoshor*, 254 Neb. 743, 580 N.W.2d 516 (1998); *Pascale v. Pascale*, 229 Neb. 49, 424 N.W.2d 890 (1988); *Colson v. Colson*, 215 Neb. 452, 339 N.W.2d 280 (1983); and *Klabunde v. Klabunde*, 194 Neb. 681, 234 N.W.2d 837 (1975).

³¹ See § 42-366.

³² *Reinsch*, *supra* note 2, 259 Neb. at 568, 611 N.W.2d at 90, citing *Prochazka v. Prochazka*, 198 Neb. 525, 253 N.W.2d 407 (1977).

³³ § 42-366(2) (expressly excepting “terms providing for the support and custody of minor children” from rule that provisions of property settlement agreement shall be binding on court absent unconscionability).

³⁴ *Reinsch*, *supra* note 2, 259 Neb. at 568, 611 N.W.2d at 90. See, also, § 42-366(7) (“[e]xcept for terms concerning the custody or support of minor children, the decree may expressly preclude or limit modification of terms set forth in the decree”).

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[10] *Reinsch* makes clear that the higher fraud or gross inequity standard is inapplicable to actions involving modification of child support, even when such support was part of a voluntary property settlement agreement approved by the court and incorporated into the decree.³⁵

Kroll seeks to avoid the holding in *Reinsch* by arguing that the provisions regarding allocation of school tuition expenses and college savings contributions are “outside of traditional [c]hild support related expenses.”³⁶ She argues, without citation, that provisions “relating to tuition and college expenses”³⁷ are not properly characterized as child support. Our cases support the opposite conclusion.

In *Caniglia v. Caniglia*,³⁸ a dissolution decree required the father to be responsible for paying monthly child support and half of the “extracurricular activities, education . . . and other extraordinary expenses” of the minor child. When the father lost his job, he moved to modify both his monthly child support obligation and his obligation to pay half of the other child-related expenses. The mother contended only the award of monthly child support was modifiable, and we rejected her argument. In doing so, we noted that § 42-364.17 requires divorce and paternity decrees to incorporate provisions addressing responsibility for certain child-related expenses, including “‘medical, dental, and eye care, medical reimbursements, day care, extracurricular activity, education, and other extraordinary expenses of the child and calculation of child support obligations.’”³⁹ We specifically held that provisions in a dissolution decree related to child-related expenses listed in § 42-364.17 are modifiable when there has been a material change in circumstances, reasoning that such expenses “are

³⁵ *Reinsch*, *supra* note 2.

³⁶ Brief for appellant at 9.

³⁷ *Id.* at 10.

³⁸ *Caniglia v. Caniglia*, 285 Neb. 930, 932, 830 N.W.2d 207, 210 (2013).

³⁹ *Id.* at 933, 830 N.W.2d at 211.

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merely an incident of the parents' responsibility to support their child"⁴⁰ and are a "subset of child support."⁴¹ *Caniglia* found "no persuasive reason"⁴² for treating the modification of child-related expenses any differently than other provisions relating to children.

In *Lenz v. Lenz*,⁴³ the parties' minor child had profound hearing loss, and a provision in the dissolution decree required the father to pay "'all of the expenses for the minor child's special schooling.'" When the father failed to pay, the mother brought an action to modify and enforce the decree. We characterized the obligation to pay for special schooling as an expense "in the nature of child support," which could be modified prospectively, but not retrospectively.⁴⁴

In *Coffey v. Coffey*,⁴⁵ the dissolution decree referenced two bank accounts the parties had established for the minor children. It awarded the father control of one account and the mother control of the other. It directed the funds to be used primarily for the children's college education, but it allowed them to be used for extraordinary medical expenses or parochial high school tuition expenses if needed. The mother subsequently brought a complaint to modify custody, and the court changed the custody arrangement from joint custody to primary physical custody with the father. In doing so, it also modified child support and gave the father control of both accounts.

On appeal, the mother claimed the court erred in modifying control of these accounts because the issue of their ownership was not placed at issue by the parties' pleadings. The Nebraska Court of Appeals disagreed, reasoning:

⁴⁰ *Id.* at 931, 830 N.W.2d at 210.

⁴¹ *Id.* at 935, 830 N.W.2d at 212.

⁴² *Id.* at 936, 830 N.W.2d at 212.

⁴³ *Lenz v. Lenz*, 222 Neb. 85, 85, 382 N.W.2d 323, 324-25 (1986).

⁴⁴ *Id.* at 88, 382 N.W.2d at 326.

⁴⁵ *Coffey v. Coffey*, 11 Neb. App. 788, 661 N.W.2d 327 (2003).

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The control of these accounts, as provided for in the decree, was closely related to the joint custody arrangement and child support provisions therein, as opposed to being part of the distribution of real and personal property. By the parties' petitions to modify, the parties placed the custody and support of their children as issues before the trial court. Given that the trial court awarded custody of the children to [the father], we find no error in the portion of the order of modification granting [him] control of the children's accounts.⁴⁶

Coffey thus suggests that provisions in a decree regarding financial accounts intended to provide for the educational expense of minor children are properly characterized as support and are modifiable based upon a material change in circumstances.

[11] The reasoning in *Caniglia*, *Lenz*, and *Coffey* demonstrates that the provisions at issue here, which allocated school tuition expenses for the minor children and required contributions to the children's college savings accounts, pertain to the support of the minor children.⁴⁷ And when provisions pertain to the support of minor children, they are properly characterized as child support for purposes of the legal standard to be applied in a modification action. The fraud or gross inequity standard urged by Kroll was therefore inapplicable, and the district court correctly determined the support provisions were modifiable upon a showing of a material change in circumstances affecting the best interests of the children.⁴⁸

3. *CARLSON V. CARLSON*

INAPPLICABLE

Lastly, Kroll argues that our recent opinion in *Carlson v. Carlson*⁴⁹ required application of the fraud or gross inequity

⁴⁶ *Id.* at 815, 661 N.W.2d at 350-51.

⁴⁷ See, *Caniglia*, *supra* note 38; *Lenz*, *supra* note 43; *Coffey*, *supra* note 45.

⁴⁸ See, *State on behalf of Tina K.*, *supra* note 6; *Whilde*, *supra* note 4.

⁴⁹ *Carlson*, *supra* note 1.

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standard to the modification in this case. But as we explain, the rule announced in *Carlson* has no application to the modification of provisions regarding the support of minor children.

In *Carlson*, the parties entered into a property settlement agreement that divided marital property, established custody and support of the minor children, and required the father to pay monthly child support beyond the age of majority so long as the child was attending college. The property settlement agreement was approved by the court and incorporated into the decree. When the father later sought to modify the post-majority child support provision, it was a question of first impression whether such a provision could be modified and, if so, what standard to apply.

The father in *Carlson* urged that the provision to pay post-majority support should be characterized as “child support”⁵⁰ and therefore was subject to modification upon showing a material change in circumstances.⁵¹ We disagreed, reasoning that such a provision did not pertain at all to the support of minor children, but, rather, pertained to the support of adult children. We noted that absent agreement of the parties, a dissolution court in Nebraska cannot order payment of child support beyond the age of majority, but can enforce such provisions if contained in an approved property settlement agreement incorporated into a decree.⁵² Agreeing with the general consensus from other jurisdictions, *Carlson* ultimately held that a provision obligating a parent to pay post-majority child support could be modified, but not upon a showing of a material change in circumstances. Instead, *Carlson* held that when modifications to property settlement agreements do not pertain to the custody or support of minor children, they are governed either by the modification standard set out in the

⁵⁰ *Id.* at 542, 909 N.W.2d at 362.

⁵¹ See, e.g., *Tilson*, *supra* note 4.

⁵² *Carlson*, *supra* note 1. See, *Foster v. Foster*, 266 Neb. 32, 662 N.W.2d 191 (2003); *Zetterman v. Zetterman*, 245 Neb. 255, 512 N.W.2d 622 (1994).

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property settlement agreement or, if the agreement contains no such standard, by the general standard under Nebraska law for modifying provisions in a property settlement agreement.⁵³

We adhere to the rule announced in *Carlson* as it regards post-majority support, but find it has no application here. Unlike the post-majority support provisions in *Carlson*, the provisions allocating responsibility for primary and secondary school tuition and requiring contributions to college savings funds during the children's minority related exclusively to the support of minor children. As such, the district court applied the correct legal standard when it concluded the support provisions were modifiable upon finding a material change in circumstances.⁵⁴

V. CONCLUSION

For the foregoing reasons, the district court's modification order is affirmed.

AFFIRMED.

⁵³ *Carlson*, *supra* note 1.

⁵⁴ See, *State on behalf of Tina K.*, *supra* note 6; *Whilde*, *supra* note 4.

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

STATE OF NEBRASKA, APPELLEE, V.

TIMOTHY J. CLAUSEN, APPELLANT.

951 N.W.2d 764

Filed December 11, 2020. No. S-20-109.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Trial: Evidence: Appeal and Error.** A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of an abuse of discretion.
3. **Trial: Evidence.** Balancing the probative value of evidence against the danger of unfair prejudice is within the discretion of the trial court.
4. **Appeal and Error.** Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.
5. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
6. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
7. **Effectiveness of Counsel: Appeal and Error.** Whether a claim of ineffective assistance of counsel may be determined on direct appeal is a question of law.
8. ____; _____. In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.

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9. **Self-Incrimination: Juries: Rules of Evidence.** Neb. Rev. Stat. § 27-513(2) (Reissue 2016) makes it clear that courts must avoid having witnesses claim privilege in the presence of the jury whenever practicable.
10. **Self-Incrimination.** A witness may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details.
11. **Criminal Law: Witnesses: Testimony.** When a defendant's witness testifies about a criminal action which is central to the defendant's guilt, but then refuses to answer the State's questions challenging the witness' assertion, the testimony may be stricken.
12. **Verdicts: Juries: Appeal and Error.** Harmless error review ultimately looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
13. **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.
14. ____: ____: _____. The admission or exclusion of evidence is a matter left largely to the sound discretion of the trial court, whose ruling will be upheld absent an abuse of discretion.
15. **Appeal and Error.** Plain error may be found on appeal when an error is unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
16. **Trial.** When there are outbursts of emotion in the courtroom, it is within the sound discretion of the trial court to deal with them in such a manner as to best preserve the judicial atmosphere and ensure a fair and impartial trial for the defendant.
17. **Witnesses: Testimony.** Striking the testimony of a witness is a drastic remedy, which is not to be lightly done.
18. **Courts.** Nebraska courts, through their inherent judicial power, have the authority to do all things reasonably necessary for the proper administration of justice.
19. **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

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- evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
20. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and, if taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
 21. ____: ____: _____. A jury instruction which misstates the issues and has a tendency to confuse the jury is erroneous.
 22. **Criminal Law: Rules of Evidence.** The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.
 23. **Constitutional Law: Criminal Law: Trial.** The right to present a defense is not unqualified and is subject to countervailing public interests such as preventing perjury and investigating criminal conduct.
 24. **Trial: Words and Phrases: Appeal and Error.** Structural errors are errors so affecting the framework within which the trial proceeds that they demand automatic reversal.
 25. ____: ____: _____. Structural errors are distinguished from trial errors, which generally occur during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether they were harmless beyond a reasonable doubt.
 26. **Sentences.** When imposing a sentence, a sentencing judge 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 amount of violence involved in the commission of the crime.
 27. _____. 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.
 28. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.
 29. ____: _____. To show that counsel's performance was deficient, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.

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30. ____: _____. To show prejudice in a claim of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
31. ____: _____. The two prongs of the ineffective assistance of counsel test—deficient performance and prejudice—may be addressed in either order.
32. **Constitutional Law: Criminal Law: Witnesses: Self-Incrimination: Depositions.** Where a witness becomes unavailable due to his assertion of Fifth Amendment privilege, such witness' prior deposition testimony is admissible as substantive evidence, given that the deposition had been taken in compliance with the law and in the course of the same criminal proceeding, and that the opposing party had adequate opportunity in the witness' deposition to examine the witness with similar, if not exact, interest and motive on matters relative to the case.
33. **Witnesses: Testimony: Self-Incrimination: Depositions.** If a witness refuses to answer questions that are so closely related to the subject of the case that the entire testimony of the witness should be stricken, opposing counsel has been deprived of an adequate opportunity to examine the witness during the deposition.

Appeal from the District Court for Lancaster County:
ANDREW R. JACOBSEN, Judge. Affirmed.

Christopher Eickholt, of Eickholt Law, L.L.C., for appellant.

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

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE,
and PAPIK, JJ.

CASSEL, J.

I. INTRODUCTION

Timothy J. Clausen appeals from sentences imposed pursuant to jury convictions related to a prison escape. Clausen primarily argues that rulings—striking his testimony for repeated misconduct and his witness' testimony for refusing cross-examination, and excluding other evidence—prevented him from presenting a duress defense. Because his own actions, his

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witness' choice, and the inadmissibility of his other evidence fundamentally crippled his defense, his claims lack merit. Finding no reversible error or abuse of discretion, we affirm.

II. BACKGROUND

For Clausen's role in a 2016 prison escape from the Lincoln Correctional Center in Lincoln, Nebraska, he was charged with three felonies: escape, theft by unlawful taking, and operating a motor vehicle to avoid arrest. Clausen and Armon Dixon escaped the facility by hiding in a prison laundry truck with the assistance of another inmate, Brandon Williams. After the escape, a law enforcement officer discovered the inmates in a Lincoln parking lot. Before the officer could apprehend them, the inmates stole a vehicle and fled. The officer recognized Clausen as the person driving the vehicle. Law enforcement pursued the stolen vehicle, but called off the pursuit after it was deemed unsafe. After the pursuit ended, two people witnessed Clausen crash the stolen vehicle into a parked vehicle, from which stolen vehicle the inmates ran on foot. In the following days, Clausen and Dixon were both arrested.

After Clausen was arrested, law enforcement officers interviewed him three times to ascertain how he and Dixon escaped. During each interview, the officers read Clausen his *Miranda* rights, which he waived. Clausen admitted to escaping the facility and described the events surrounding his escape. During these interviews, Clausen did not claim to have escaped under duress.

After being deemed competent to stand trial by two separate medical professionals, Clausen pled not guilty and proceeded to a jury trial. Clausen intended to argue that he had escaped only because of duress from Dixon and that it had been Dixon, not Clausen, who had taken and driven the stolen vehicle during their escape.

Before trial, the State moved to exclude the testimony of Clausen's two witnesses: Dixon and Bentley Buckner, Clausen's cellmate in prison. During a deposition, Dixon admitted

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to threatening and coercing Clausen during the planning and commission of the escape and to driving the escape vehicle. At trial, outside the presence of the jury, Dixon repeated his deposition testimony. However, because the State would not give him immunity for his testimony, Dixon invoked his Fifth Amendment privilege and refused to testify about a matter the court deemed sufficiently related to Clausen's defense—namely, how the men had obtained a cell phone and drugs they used during their escape. Consequently, the court sustained the State's motion to exclude Dixon from testifying, reasoning that Nebraska law discourages a court from allowing a witness to invoke his Fifth Amendment privilege in the presence of the jury. Clausen did not request the court to partially strike Dixon's testimony related to the subjects on which he invoked privilege and to allow him to continue to testify regarding other matters.

The State also moved to exclude Buckner from testifying that Clausen told Buckner that Dixon was threatening him, Buckner saw Dixon possess a knife while near Clausen over 2 months before their escape, and Buckner believed Clausen's escape was the result of duress based on Dixon's power and authority in the prison system. The court ultimately sustained the State's motion, determining that Buckner's testimony would be inadmissible because it was based on hearsay, was too remote in time to aid Clausen's duress defense, and was based on speculation about Clausen's state of mind.

At trial, Clausen took the stand in his own defense. He did not call any other witnesses. However, before Clausen took the stand, he had an outburst in front of the jury where he asked the court to "let the jury know . . . why my . . . witnesses was denied . . . and why . . . my witnesses . . . is not allowed to come into court . . . and testify. . . . Why can't Armon Dixon come testify . . . like I want him to[?]" After the jury was excused, the court warned Clausen that if he had another outburst while testifying, he would be waiving his right to testify and his testimony would be stricken. On cross-examination,

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Clausen again became upset that Dixon and Buckner were not allowed to testify. Despite the court's earlier warnings, he had another outburst.

During a recess, the court informed Clausen that because he had refused to subject himself to a complete cross-examination, he had forfeited his right to testify. After the recess, the court informed the jury that because of Clausen's conduct it was to disregard Clausen's testimony in its entirety and his testimony was stricken from the record. However, Clausen was allowed to remain in the courtroom for closing arguments. Despite defense counsel's objection, the court refused to give a no-inference instruction based on Clausen's right not to testify because, the court reasoned, Clausen did testify and his lack of testimony on the record was the result of his conduct rather than an invocation of his Fifth Amendment privilege.

The jury convicted Clausen of all three charges. Following an enhancement hearing, the court found Clausen to be a habitual criminal and sentenced him to a combined consecutive term of 80 to 140 years' imprisonment—40 to 60 years' imprisonment for escape, 20 to 40 years' imprisonment for theft by unlawful taking, and 20 to 40 years' imprisonment for operating a motor vehicle to avoid arrest. Although neither the oral pronouncement nor the written sentencing judgment contains any reference to credit for time served, we have not been directed to any facts in the record showing that any credit was due.

Although Clausen initially failed to file a direct appeal, his right to appeal was reinstated by postconviction relief. Clausen then filed a timely appeal, which we moved to our docket.¹

III. ASSIGNMENTS OF ERROR

Clausen assigns 14 errors in his appeal, which he consolidates into 6 overarching arguments. Clausen assigns, consolidated, that the district court erred by (1) excluding the

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

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testimonies of Dixon and Buckner; (2) striking Clausen's entire testimony and instructing the jury to disregard it; (3) failing to give a no-inference jury instruction; (4) depriving Clausen of his right to present a defense, thereby violating his constitutional rights and creating structural error; and (5) imposing excessive sentences.

Clausen also assigns that he received ineffective assistance of counsel because his trial counsel failed to (1) object to nonrelevant questioning of Dixon, (2) disclose Buckner as a witness in a timely manner, (3) offer out-of-court testimony of Dixon, (4) ensure Clausen received a proper mental evaluation, (5) subpoena the police officer who conducted a photographic lineup, (6) offer Clausen's complete interview with investigators, (7) object or seek corrective instructions regarding the State's improper opening statement commentary, (8) sufficiently cross-examine Williams, and (9) preserve Clausen's motions to suppress for appeal.

IV. STANDARD OF REVIEW

[1-3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.² A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of an abuse of discretion.³ Balancing the probative value of evidence against the danger of unfair prejudice is within the discretion of the trial court.⁴

[4] Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.⁵

² *State v. Devers*, 306 Neb. 429, 945 N.W.2d 470 (2020).

³ *Id.*

⁴ *Id.*

⁵ *State v. Nadeem*, 284 Neb. 513, 822 N.W.2d 372 (2012).

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[5] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.⁶

[6] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.⁷

[7,8] Whether a claim of ineffective assistance of counsel may be determined on direct appeal is a question of law.⁸ In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.⁹

V. ANALYSIS

1. EXCLUSION OF DEFENSE

WITNESS TESTIMONY

Clausen first argues that the trial court erred in prohibiting Clausen from calling Dixon and Buckner as witnesses at trial. They were his key witnesses regarding duress. Clausen did not call any other witnesses to establish that defense.

Because judicial discretion was involved in these rulings, we review them for an abuse of discretion. We address each witness separately, because the court assigned different reasons for the respective rulings.

(a) Dixon

The State filed a motion in limine seeking to bar Dixon from testifying. In addressing the State's motion, the court held a hearing outside the jury's presence where the State questioned Dixon about his planned testimony.

⁶ *State v. Paez*, 302 Neb. 676, 925 N.W.2d 75 (2019).

⁷ *State v. Iddings*, 304 Neb. 759, 936 N.W.2d 747 (2020).

⁸ See *id.*

⁹ *State v. Vanness*, 300 Neb. 159, 912 N.W.2d 736 (2018).

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At the hearing, Dixon stated that he would be willing to “testify about what happened, and what went down . . . I ain’t got no problem with doing that.” However, Dixon invoked privilege when asked how he obtained the phone and drugs that contributed to the escape. The State argued that allowing Dixon to testify on behalf of Clausen and to invoke privilege on cross-examination would violate Neb. Rev. Stat. § 27-513(2) (Reissue 2016). Clausen countered that Dixon would only invoke privilege on collateral matters and that because he was critical to Clausen’s defense, Dixon should be allowed to testify.

The court ruled that Dixon would not be allowed to testify. The court explained that Dixon’s refusal to answer questions on cross-examination regarding events so closely related to the commission of the crime in this case would force the court to strike Dixon’s entire testimony, because allowing Dixon to testify only for his testimony to be stricken when he invoked privilege would violate § 27-513(2). Clausen argues the court erred in its ruling.

[9] Section 27-513(2) makes it clear that courts must avoid having witnesses claim privilege in the presence of the jury whenever practicable.¹⁰ The statutory subsection states: “In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.”¹¹ The purpose of that subsection is to prevent the jury from drawing an unfavorable inference from a witness’ assertion of a privilege.¹²

Section 27-513(2) does not bar a witness from ever invoking privilege in front of a jury.¹³ However, “ “[a]bsent extraordinary circumstances, trial courts should exercise their discretion to forbid parties from calling witnesses who, when called,

¹⁰ See *State v. Draper*, 289 Neb. 777, 857 N.W.2d 334 (2015).

¹¹ § 27-513(2).

¹² *Draper*, *supra* note 10.

¹³ See *id.*

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will only invoke a privilege.””¹⁴ Therefore, the trial court must determine whether the witness intends to refuse to testify and decide whether it would be prejudicial to the opposing party for the witness to be called in front of the jury.¹⁵ At the same time, the trial court may also consider whether the failure to call the witness, despite the refusal to testify, would unfairly prejudice the party calling the witness.¹⁶

[10] In making its prejudice determination, the trial court must also consider the extent to which a witness’ potential testimony would be excluded by the witness invoking privilege.¹⁷ It is well established that a witness may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details.¹⁸ The privilege is waived for the matters to which the witness testifies, and “the scope of the ‘waiver is determined by the scope of relevant cross-examination.’”¹⁹ Therefore, if the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection and not for that of other parties, and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure; where incriminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details.²⁰

Because a witness cannot use the protections of the Fifth Amendment to distort the facts by selecting a stopping place

¹⁴ *Id.* at 789, 857 N.W.2d at 344 (quoting *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006)).

¹⁵ See *Draper*, *supra* note 10.

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See *Mitchell v. United States*, 526 U.S. 314, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999).

¹⁹ *Id.*, 526 U.S. at 321 (quoting *Brown v. United States*, 356 U.S. 148, 78 S. Ct. 622, 2 L. Ed. 2d 589 (1958)).

²⁰ See *Rogers v. United States*, 340 U.S. 367, 71 S. Ct. 438, 95 L. Ed. 344 (1951).

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for his or her testimony, either the witness must invoke privilege at the outset of the questioning regarding an incriminating subject or the court will strike the distorted testimony.²¹ While this court has never addressed the extent to which a court that has a witness who has invoked privilege must strike his or her testimony, many courts embrace the approach taken in *United States v. Cardillo*.²² There, the court explained:

[Not] every refusal to answer by a witness, claiming his constitutional right against self-incrimination, requires the striking of his testimony or a part thereof. There would appear to be at least three categories to be considered. The first would be one in which the answer would have been so closely related to the commission of the crime that the entire testimony of the witness should be stricken. The second would be a situation in which the subject matter of the testimony was connected solely with one phase of the case in which even a partial striking might suffice. The third would involve collateral matters or cumulative testimony concerning credibility which would not require a direction to strike and which could be handled (in a jury case) by the judge's charge if questions as to the weight to be ascribed to such testimony arose. As to the first and second categories suggested, whether all or a part of the testimony should be stricken, must depend upon the discretion of the trial judge exercised in the light of the particular circumstances. Unsatisfactory as such a generality is for a trial judge who is required to give instantaneous rulings on close questions and who does not enjoy the luxury of reflective appellate deliberation, any set of specific dogmas would be even more unworkable.²³

²¹ See, e.g., *Mitchell*, *supra* note 18.

²² *United States v. Cardillo*, 316 F.2d 606 (2d Cir. 1963).

²³ *Id.* at 613.

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While the witness invoking privilege in *Cardillo* was testifying on behalf of the State, courts have applied *Cardillo* in the inverse when a witness is testifying on behalf of a defendant.²⁴ Important public policy protects even the prosecution's right to fair trials and the pursuit of truth, so that a similar principle should govern whether the recalcitrant witness was offered by the prosecution or by the defendant.²⁵ A witness may not say enough to exonerate the defendant without implicating himself, and the prosecutor is entitled to closely examine a witness to expose to the fact finder the witness' falsification.²⁶

[11] We adopt the *Cardillo* approach. When a defendant's witness testifies about a criminal action which is central to the defendant's guilt, but then refuses to answer the State's questions challenging the witness' assertion, the testimony may be stricken.²⁷ Therefore, a Nebraska court determining whether to exclude a witness pursuant to § 27-513 must consider the interrelatedness between the topic invoking the witness' Fifth Amendment protections and his or her cumulative testimony. If a court must strike the witness' entire testimony, then clearly the witness must be excluded pursuant to § 27-513.

Here, Dixon would have testified to the inner workings of the escape, which is central to this case. Dixon wished to testify about how he planned the entire escape and forced Clausen to escape with him. However, he refused to allow the State to cross-examine the validity of his assertion that he planned the escape.

During Dixon's deposition, Dixon admitted to selling drugs to raise money to purchase the phone that was used to coordinate the escape. He testified: "I sold a lot of drugs,

²⁴ See *U.S. v. Crews*, 856 F.3d 91 (D.C. Cir. 2017).

²⁵ *Lawson v. Murray*, 837 F.2d 653 (4th Cir. 1988).

²⁶ See *id.*

²⁷ See, *U.S. v. Davis*, 690 F.3d 912 (8th Cir. 2012), *cert. granted and judgment vacated on other grounds* 570 U.S. 913, 133 S. Ct. 2852, 186 L. Ed. 2d 903 (2013); *U.S. v. McKneely*, 69 F.3d 1067 (10th Cir. 1995).

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man. I had a lot of guards in my pocket. I had a lot of inmates that would do whatever I told them to do[.]” Once he purchased the phone, he “made some calls, set up some stuff” regarding the escape. Dixon refused to answer the State’s questions when asked for the names of the guards and inmates who smuggled in the phone and drugs. The State was entitled to ask these questions to discover other witnesses who could refute the validity of Dixon’s statements. During the hearing at trial, Dixon again refused to answer the State’s questions about the phone and drugs.

Dixon’s testimony falls into the first *Cardillo* category. Dixon’s selling drugs to purchase the phone and then using it to plan the escape were closely related to the commission of the crime at issue—the escape. While this court respects Dixon’s interest in not incriminating himself, Dixon’s decision to invoke privilege and refuse to answer how he obtained the phone and drugs frustrated the State’s cross-examination and denied him the opportunity to testify on Clausen’s behalf.

The court did not abuse its discretion in barring Dixon from testifying, because Dixon’s testimony did not warrant being only partially stricken. Dixon’s refusal to answer questions on cross-examination was not connected solely with one phase of the case. Dixon claimed to have planned the entire escape and forced Clausen to escape with him. Testimony regarding who planned the escape and took preparatory actions was key to Clausen’s duress defense, saturating all phases of this case. Dixon could not invoke privilege without subjecting his entire testimony to being stricken. Under these circumstances, we cannot say that the court’s decision to strike all of Dixon’s testimony was clearly untenable.

[12] Even if we assume that Dixon’s testimony would have been regarding a collateral matter, the court’s error would have been harmless.²⁸ Harmless error review ultimately looks to

²⁸ See *United States v. Lord*, 711 F.2d 887 (9th Cir. 1983). See, also, *U.S. v. Negrete-Gonzales*, 966 F.2d 1277 (9th Cir. 1992).

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the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.²⁹ The court's potential error was harmless, because Clausen could not prove a duress defense.

For a prisoner to utilize a duress defense based on threat of physical harm by another prisoner, the prisoner must report immediately to the proper authorities when he attains a position of safety from the threat.³⁰ In order for Clausen to have a duress defense, Clausen would have needed to turn himself back into custody after he separated from Dixon during the escape. Clausen instead remained in hiding until law enforcement discovered him in a house and arrested him, invalidating his duress defense. To the extent Dixon would have testified that he was the one driving the vehicle, the State offered evidence refuting this assertion.

(b) Buckner

The State sought to exclude Buckner's testimony because Clausen did not disclose Buckner as a witness in a timely manner. The court ruled instead to exclude Buckner because his testimony was (1) based on inadmissible hearsay, (2) too remote in time to be admissible evidence for Clausen's duress defense, and (3) based on speculation. Clausen assigns that the trial court erred in this order.

[13,14] An appellate court reviews the trial court's conclusions with regard to evidentiary foundation and witness qualification for an abuse of discretion.³¹ The admission or exclusion of evidence is a matter left largely to the sound

²⁹ *State v. Mann*, 302 Neb. 804, 925 N.W.2d 324 (2019).

³⁰ *State v. Reed*, 205 Neb. 45, 286 N.W.2d 111 (1979).

³¹ *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002).

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discretion of the trial court, whose ruling will be upheld absent an abuse of discretion.³²

Buckner would have testified that Clausen told him that Dixon was threatening him and saying that he would kill his loved ones if Clausen did not help him escape. This testimony is hearsay because it is a statement made out of court by Clausen offered to prove that Dixon was in fact threatening Clausen.³³ Buckner's hearsay testimony was inadmissible.

Additionally, Buckner would have testified that he saw Dixon threaten Clausen with a knife more than 2 months before the escape. A prisoner claiming he escaped under fear of impending death or serious bodily injury at the hands of another prisoner must prove that the injury was immediately impending.³⁴ Buckner's testimony would have been inadmissible because the witnessed threat was too remote from the time of escape.

Finally, Buckner's belief that Clausen escaped as the result of duress based on Dixon's power and authority in the prison system is speculation.³⁵ Therefore, Buckner's testimony was inadmissible at trial. We see no abuse of discretion in the court's exclusion of Buckner's testimony.

2. EXCLUSION OF CLAUSEN'S TESTIMONY

Clausen next argues that the court erred in striking his entire testimony and instructing the jury to disregard it. Clausen did not object to the court's actions at trial, failing to preserve this issue for appeal.³⁶ However, Clausen argues that the court committed plain error by not finding Clausen in contempt before sanctioning Clausen for his actions at trial and that

³² *State v. Irish*, 223 Neb. 578, 391 N.W.2d 137 (1986).

³³ See Neb. Rev. Stat. § 27-801(3) (Reissue 2016).

³⁴ See *Reed*, *supra* note 30.

³⁵ See, generally, Neb. Rev. Stat. § 27-701 (Reissue 2016).

³⁶ See *State v. McSwine*, 292 Neb. 565, 873 N.W.2d 405 (2016).

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the court should have imposed an alternative penalty instead of a complete strike of his testimony.

[15] Under most circumstances, we require a party to object to a perceived error by a trial court in order to preserve that issue for appeal.³⁷ Conversely, plain error may be found on appeal when an error is unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.³⁸

The U.S. Supreme Court in *Illinois v. Allen*³⁹ articulated three principles regarding courtroom decorum. It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings.⁴⁰ The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated.⁴¹ Trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case.⁴²

[16-18] The principles articulated in *Allen* are consistent with Nebraska law. When there are outbursts of emotion in the courtroom, it is within the sound discretion of the trial court to deal with them in such a manner as to best preserve the judicial atmosphere and ensure a fair and impartial trial for the defendant.⁴³ Striking the testimony of a witness is a drastic remedy, which is not to be lightly done.⁴⁴ However,

³⁷ See *id.*

³⁸ *Id.*

³⁹ *Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *State v. Scott*, 200 Neb. 265, 263 N.W.2d 659 (1978).

⁴⁴ *Davis*, *supra* note 27; *Murray*, *supra* note 25.

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Nebraska courts, through their inherent judicial power, have the authority to do all things reasonably necessary for the proper administration of justice.⁴⁵

Here, we see no plain error. The court warned Clausen that it would strike his testimony and instruct the jury to disregard it if he had another outburst. Clausen's disruptive outburst was a flagrant disregard of the court's repeated warnings and was an attempt to taint the mind of the jury. The court acted within its power to ensure a fair and impartial trial.

3. JURY INSTRUCTION

Clausen assigns that the trial court erred in not giving a no-inference jury instruction. Although not precise, a fair reading of the record shows the court understood Clausen to be requesting a pattern jury instruction. It states: "The defendant has an absolute right not to testify. The fact that the defendant did not testify must not be considered by you as an admission of guilt and must not influence your verdict in any way."⁴⁶ The district court refused the instruction, explaining that Clausen "did testify and that his own conduct eviscerated that testimony." Unlike the previous assignment of error, Clausen objected to the court's ruling, preserving this issue for appeal.

[19-21] 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.⁴⁷ All the jury instructions must be read together, and, if taken as a whole, they correctly state the law, are not misleading, and adequately

⁴⁵ *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010), *disapproved on other grounds*, *Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012).

⁴⁶ NJI2d Crim. 9.4. See *Kreikemeier*, *supra* note 45.

⁴⁷ *State v. Abejide*, 293 Neb. 687, 879 N.W.2d 684 (2016).

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cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.⁴⁸ A jury instruction which misstates the issues and has a tendency to confuse the jury is erroneous.⁴⁹

Here, we find that the jury was properly instructed. Clausen testified in front of the jury, and his testimony was stricken only because of his conduct. Under these circumstances, the pattern instruction would have incorrectly stated the events at trial and misled the jury. We agree with the trial court and find no error.

4. RIGHT TO PRESENT DEFENSE

Clausen argues that the court “stripped away” his entire defense because it barred Clausen from calling his two witnesses—Dixon and Buckner—and also struck his own testimony from the record.⁵⁰ Clausen claims the court’s actions denied him his right to present a complete defense as guaranteed by the U.S. Constitution and *Rock v. Arkansas*,⁵¹ violating his 14th Amendment due process rights and his 6th Amendment Confrontation Clause rights—which he characterized as structural error requiring automatic reversal. These claims will each be addressed in turn.

(a) Due Process and
Confrontation Clause

[22,23] 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.⁵² However, the accused does not have an unfettered

⁴⁸ See *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011).

⁴⁹ *Id.*

⁵⁰ Brief for appellant at 43.

⁵¹ *Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987).

⁵² *State v. Said*, 306 Neb. 314, 945 N.W.2d 152 (2020).

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right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.⁵³ The right to present a defense is not unqualified and is subject to countervailing public interests such as preventing perjury and investigating criminal conduct.⁵⁴

Clausen was entitled to present a complete defense to counter the State's charges against him. However, Clausen did not have an unfettered right to offer inadmissible testimony or disregard the court's instruction. Clausen's inability to present witnesses that could provide admissible testimony pursuant to the Nebraska Evidence Rules and his disruptive outbursts, not the court, "stripped away" his defense. Clausen's due process and confrontation rights were not violated.

(b) Structural Error

[24,25] Structural errors are errors so affecting the framework within which the trial proceeds that they demand automatic reversal.⁵⁵ They are distinguished from trial errors, which generally occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt.""⁵⁶

The U.S. Supreme Court limited structural errors to a few very specific categories—total deprivation of counsel, trial before a judge who is not impartial, unlawful exclusion of members of the defendant's race from a grand jury, denial of the right to self-representation at trial, and denial of the right to a public trial.⁵⁷ The fact that the error in a case was

⁵³ *Id.*

⁵⁴ *State v. Oldson*, 293 Neb. 718, 884 N.W.2d 10 (2016).

⁵⁵ *State v. Abram*, 284 Neb. 55, 815 N.W.2d 897 (2012).

⁵⁶ *Id.* at 64, 815 N.W.2d at 905 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)).

⁵⁷ *Abram*, *supra* note 55. See *Fulminante*, *supra* note 56.

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a constitutional error does not in itself mean that it was structural error.⁵⁸

The assigned errors Clausen asserts fall in the category of trial errors rather than structural errors. The trial court's determination to exclude Clausen's witnesses and strike his testimony occurred during the presentation of the case to the jury. His claims do not fall within the limited set of aforementioned structural errors established by the U.S. Supreme Court. Clausen's trial does not warrant an automatic reversal.

5. EXCESSIVE SENTENCES

Clausen also argues that the court abused its discretion by imposing excessive sentences. Clausen claims the court made no meaningful factual findings to justify the sentence or any substantive factors relating to his prior criminal history. Clausen does not address the court's finding that he was a habitual criminal.

[26,27] As stated above, we review a sentence imposed within statutory limits for an abuse of discretion.⁵⁹ When imposing a sentence, a sentencing judge 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 amount of violence involved in the commission of the crime.⁶⁰ 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.⁶¹

⁵⁸ See *Abram*, *supra* note 55.

⁵⁹ See *State v. Lierman*, 305 Neb. 289, 940 N.W.2d 529 (2020).

⁶⁰ *Id.*

⁶¹ *Id.*

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We have reviewed Clausen’s sentences and conclude that they were not excessive. The court determined Clausen was a habitual criminal and sentenced him on all three convictions pursuant to the habitual criminal statutory guidelines.⁶² The court did not abuse its discretion.

6. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, Clausen presents a plethora of ineffective assistance of counsel claims for this court to consider. Clausen’s counsel on direct appeal is different from his trial counsel. We conclude that the record is sufficient to address all of the assignments of error regarding ineffectiveness and that all lack merit.

[28-31] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,⁶³ the defendant must show that his or her counsel’s performance was deficient and that this deficient performance actually prejudiced the defendant’s defense.⁶⁴ To show that counsel’s performance was deficient, a defendant must show that counsel’s performance did not equal that of a lawyer with ordinary training and skill in criminal law.⁶⁵ 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.⁶⁶ The two prongs of the ineffective assistance of counsel test—deficient performance and prejudice—may be addressed in either order.⁶⁷

(a) Questioning of Dixon

Clausen claims that his trial counsel did not object on relevancy when the State questioned Dixon regarding the escape

⁶² See Neb. Rev. Stat. § 29-2221 (Reissue 2016).

⁶³ *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

⁶⁴ *State v. Parnell*, 305 Neb. 932, 943 N.W.2d 678 (2020).

⁶⁵ *State v. Anderson*, 305 Neb. 978, 943 N.W.2d 690 (2020).

⁶⁶ *Id.*

⁶⁷ See *State v. Privett*, 303 Neb. 404, 929 N.W.2d 505 (2019).

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preparation at a hearing. The State asked Dixon for the names of the individuals who provided him with the phone and drugs that aided in the escape. However, Clausen misstates the record. Clausen's trial counsel repeatedly objected to the relevancy, and the court overruled the objections. Trial counsel was not ineffective on this issue.

(b) Untimely Disclosure
of Buckner

Clausen moves on to claim his trial counsel was ineffective by failing to disclose Buckner as a witness in a timely manner. However, because the court did not err in excluding Buckner's testimony on separate evidentiary grounds, Clausen did not suffer any prejudice from this untimely witness disclosure. This claim lacks merit.

(c) Dixon's Deposition

[32] Clausen also claims that his trial counsel was ineffective by failing to introduce Dixon's deposition at trial, because he was an unavailable witness. Where a witness becomes unavailable due to his assertion of Fifth Amendment privilege, such witness' prior deposition testimony is admissible as substantive evidence, given that the deposition had been taken in compliance with the law and in the course of the same criminal proceeding, and that the opposing party had adequate opportunity in the witness' deposition to examine the witness with similar, if not exact, interest and motive on matters relative to the case.⁶⁸ But a witness' refusal to answer questions during cross-examination of a deposition may deprive the opposing counsel of an adequate opportunity to examine the witness during the deposition.⁶⁹

⁶⁸ See *State v. Allen*, 252 Neb. 187, 560 N.W.2d 829 (1997), *disapproved on other grounds*, *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999). See, also, Neb. Rev. Stat. § 27-804(2)(a) (Reissue 2016).

⁶⁹ See, e.g., *State v. Privat*, 251 Neb. 233, 556 N.W.2d 29 (1996); *Burke v. Harman*, 6 Neb. App. 309, 574 N.W.2d 156 (1998).

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[33] To determine whether opposing counsel has been deprived of the opportunity to examine a witness during cross-examination, Nebraska courts apply the *Cardillo* approach discussed earlier.⁷⁰ If a witness refuses to answer questions that are so closely related to the subject of the case that the entire testimony of the witness should be stricken, opposing counsel has been deprived of an adequate opportunity to examine the witness during the deposition.⁷¹ The incomplete deposition cannot be admitted as substantive evidence at trial.⁷²

Dixon deprived the State of an adequate opportunity to cross-examine him. At his deposition, Dixon refused to answer questions regarding how he obtained the phone and drugs that aided in the escape. The State's questioning was closely related to the commission of the escape. Dixon's entire testimony would have been stricken in accordance with *Cardillo* if Clausen would have submitted Dixon's deposition at trial, and therefore, the record shows that Clausen was not prejudiced by trial counsel's conduct.

Even if Dixon's deposition should have been allowed into evidence, the record shows that Clausen was not prejudiced by trial counsel's conduct. As discussed earlier, Clausen could not prove a duress defense because he failed to surrender himself to authorities.

(d) Mental Evaluation
of Clausen

Clausen next claims that his trial counsel was ineffective because trial counsel did not ensure that Clausen received a proper mental evaluation to determine whether he was competent to stand trial. By request of his trial counsel, Clausen received two evaluations from separate medical professionals—a forensic psychiatrist and a licensed psychologist. Both professionals concluded Clausen was feigning his mental

⁷⁰ See, e.g., *Cardillo*, *supra* note 22; *Harman*, *supra* note 69.

⁷¹ See, *Cardillo*, *supra* note 22; *Harman*, *supra* note 69.

⁷² See *id.*

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issues. Clausen argues that these evaluations were cursory and that he was never properly assessed.

This court concludes that the performance of Clausen's trial counsel was not deficient. Trial counsel identified the potential competency issue and requested an evaluation. After the court deemed Clausen competent to stand trial, trial counsel reaffirmed his commitment to his client by requesting another mental examination.

Because both professionals independently reached the same conclusion, trial counsel exercised the judgment of a lawyer with ordinary training and skill in criminal law in not requesting further mental evaluations. Even if this court were to find that trial counsel's performance was deficient, there is not a reasonable probability that an additional evaluation would have resulted in Clausen's being found incompetent to stand trial. Clausen's trial counsel was not ineffective on this issue.

(e) Failure to Subpoena
Police Officer

Clausen also claims that trial counsel was ineffective because he failed to subpoena or compel the police officers who conducted a photographic lineup. Clausen argues his trial counsel's actions resulted in the overruling of his motion to suppress evidence of the photographic lineup. In reality, the court sustained his motion at a hearing and no evidence of the photographic lineup was admitted into evidence. This claim has no merit.

(f) Failure to Offer
Complete Interview

Clausen next claims his trial counsel should have presented the jury with Clausen's entire recorded interviews with law enforcement after his arrest, arguing that it gave the jury an inaccurate view of Clausen's role in the escape. The recordings contained information highly prejudicial to Clausen such as the offense Clausen was imprisoned for, his participation in various crimes, and his overall criminal history. The State

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presented a redacted version to ensure the jury did not hear this highly prejudicial information. The record establishes that Clausen suffered no prejudice by the exclusion of this highly prejudicial information.

(g) Opening Statement

Clausen moves on to claim that his trial counsel was ineffective by failing to object to or ask the district court to take any corrective action for the State's improper commentary in opening statements. The State mentioned in its opening statement that Clausen was found "in a bathroom with a firearm" when he was arrested. The parties agree that this statement was improper because it was in violation of a pretrial order by the court.

In *State v. Iromuanya*,⁷³ we addressed a similar situation where the State made improper comments during opening statements. We reasoned that the State's commentary was not prejudicial because (1) the trial court had orally instructed jurors before the trial that attorneys' statements and arguments were not evidence, (2) the statements represented short moments in a long trial during which many other witnesses testified about the critical issues in the case, and (3) the trial court's written instructions informed the jurors that they must not decide the case based on sympathy or prejudice.⁷⁴

We find *Iromuanya* instructive in this case. Here, the court reminded the jury that "opening statements by counsel are not evidence"; multiple witnesses testified during a long trial about critical issues of the case, which did not include the possession of a firearm; and the jury instructions reiterated that statements and arguments by counsel were not evidence. The State never offered evidence that Clausen possessed a firearm at the time of his arrest. In light of these circumstances, the record shows that Clausen suffered no prejudice.

⁷³ *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011).

⁷⁴ See *id.* See, also, *State v. Stelly*, 304 Neb. 33, 932 N.W.2d 857 (2019) (discussing *Iromuanya*, *supra* note 73).

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(h) Cross-Examination of Williams

Clausen continues his ineffective assistance of counsel assignment by arguing that his trial counsel was ineffective in his cross-examination of Williams. Clausen claims that his counsel failed to impeach Williams' credibility by (1) establishing Williams was a felon under Neb. Rev. Stat. § 27-609 (Reissue 2016), (2) highlighting Williams' motivation for testifying under his plea agreement, and (3) questioning Williams about a suicide attempt he made immediately after Clausen and Dixon escaped from prison.

Clausen misstates the record—his trial counsel did, in fact, impeach Williams for being a felon. Section 27-609(1) allows a party to admit evidence of a conviction resulting in an imprisonment in excess of 1 year for purposes of attacking the credibility of a witness. The statute goes on to state that “[e]vidence of a conviction . . . is not admissible if a period of more than ten years has elapsed since the date of such conviction or of the release of the witness from confinement, whichever is the later date.”⁷⁵ After the conviction is established, “the inquiry must end there, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof.”⁷⁶

Trial counsel asked Williams: “I know that you are in the penitentiary but tell me, have you had any felony convictions in the last ten years?” Williams ultimately responded: “No. Just what I have now.” Trial counsel utilized § 27-609 and attacked Williams' credibility for being a felon. Trial counsel's performance was not deficient.

Next, Williams testified in his direct examination that he was charged with two counts of escape because he helped Clausen and Dixon escape. Williams explained that in exchange for his testimony, the State dropped one of those counts. Trial

⁷⁵ § 27-609.

⁷⁶ *State v. Castillo-Zamora*, 289 Neb. 382, 388, 855 N.W.2d 14, 22 (2014) (quoting *State v. Johnson*, 226 Neb. 618, 413 N.W.2d 897 (1987)).

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counsel need not ask redundant questions on information already established on direct examination. The jury was aware of Williams' motivation to testify in this case, and therefore, Clausen suffered no prejudice.

Lastly, Clausen's trial counsel did not provide ineffective assistance of counsel by not questioning Williams regarding his suicide attempt after Clausen and Dixon escaped from prison, because that evidence was inadmissible. Parties can only ask witnesses relevant questions that "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence."⁷⁷ Williams' suicide attempt had no bearing on whether it was more probable or less probable that Clausen escaped from prison, stole a vehicle, and operated the vehicle to escape arrest. Because this line of questioning would have been inadmissible, the record establishes that Clausen was not prejudiced.

(i) Preservation of
Motions to Suppress

Clausen claims that his trial counsel was ineffective because his counsel failed to preserve his motions to suppress by objecting at trial to the introduction of the photographic lineup. However, as discussed earlier, Clausen misstates the record. Clausen's motion to suppress evidence of the photographic lineup was sustained, and no evidence of a photographic lineup was presented at trial. This claim has no merit.

Furthermore, Clausen also claims that his trial counsel was ineffective because his counsel failed to preserve his motions to suppress by objecting at trial to the introduction of Clausen's statements made to investigators after he was arrested. Clausen filed motions to suppress his statements made during his postarrest interview because investigators did not read him his *Miranda* rights until around 15 minutes into

⁷⁷ Neb. Rev. Stat. § 27-401 (Reissue 2016). See, also, *Devers*, *supra* note 2.

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a series of interviews. The court overruled Clausen's motion to suppress evidence of the statements made to investigators and allowed redacted portions of the interview to be played at trial.

The record shows that Clausen was not prejudiced by his counsel's failure to preserve his motion to suppress by objecting at trial. Law enforcement interviewed Clausen three times. In the first interview, State Patrol investigators did not read Clausen his *Miranda* rights for the first 15 minutes of the interview. However, the investigators did not elicit any incriminating information from Clausen until after investigators read him his *Miranda* rights. The pre-*Miranda* discussion focused on Clausen's previous criminal history, his time in solitary confinement, and the potential effect of Clausen's cooperating with the investigation. At the start of the final two interviews, investigators read Clausen his *Miranda* rights and he signed a *Miranda* rights waiver form before the interview began. As Clausen's *Miranda* rights were not violated, no prejudice resulted from his trial counsel's inaction.

(j) Failure to Request No-Inference
Jury Instruction

Finally, Clausen argues, but fails to assign, that trial counsel was ineffective for not requesting a no-inference jury instruction. Although we decline to reach the merits of this claim because it was not assigned as error, the record shows that Clausen suffered no prejudice. As we discussed earlier, the court did not err in refusing the pattern jury instruction.⁷⁸

VI. CONCLUSION

Clausen fails to show that the trial court erred or abused its discretion in its rulings. The court correctly excluded Dixon's and Buckner's inadmissible testimonies. Clausen's failure to follow the court's instructions at trial led to his testimony being stricken and disregarded by the jury, thereby forfeiting

⁷⁸ See *State v. Smith*, 292 Neb. 434, 873 N.W.2d 169 (2016).

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his right to a no-inference jury instruction. None of the errors that Clausen assigned qualified as structural errors, nor was he deprived of his right to present a defense. Clausen's sentences were not excessive. Finally, his claims of ineffective assistance of trial counsel lack merit. We affirm the judgment of the district court.

AFFIRMED.

FREUDENBERG, J., not participating.

MILLER-LERMAN, J., concurring.

This was an imperfect trial. The testimonies of three defense witnesses were stricken in their entirety. These witnesses were the defendant Clausen, the coperpetrator Dixon, and an additional witness who would have supported Clausen's theory of duress. Flawed though it was, I cannot say the trial suffered structural error warranting reversal. Accordingly, notwithstanding my remarks regarding the constitutional dimension of exclusion of testimony generally and that of Dixon in particular, I concur.

Jurisprudential Clarification.

It has been observed that "[s]triking the testimony of a witness is a drastic remedy. It is not to be lightly done. . . . Striking all of the testimony of the witness may be the only appropriate remedy when refusal to answer the questions of the cross-examiner frustrates the purpose of the process." *Lawson v. Murray*, 837 F.2d 653, 656 (4th Cir. 1988). In the instant case, Clausen's remarks did in fact frustrate the process and striking his testimony in its entirety made sense. However, not every refusal to cooperate on cross-examination warrants striking a witness' testimony.

In *United States v. Cardillo*, 316 F.2d 606 (2d Cir. 1963), the Second Circuit recognized this measured approach, and I am in agreement with the majority opinion which adopts the three category framework of the *Cardillo* opinion. *Cardillo* stated:

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[Not] every refusal to answer by a witness, claiming his constitutional right against self-incrimination, requires the striking of his testimony or a part thereof. There would appear to be at least three categories to be considered. The first would be one in which the answer would have been so closely related to the commission of the crime that the entire testimony of the witness should be stricken. The second would be a situation in which the subject matter of the testimony was connected solely with one phase of the case in which even a partial striking might suffice. The third would involve collateral matters or cumulative testimony concerning credibility which would not require a direction to strike and which could be handled (in a jury case) by the judge's charge if questions as to the weight to be ascribed to such testimony arose. As to the first and second categories suggested, whether all or a part of the testimony should be stricken, must depend upon the discretion of the trial judge exercised in the light of the particular circumstances.

316 F.2d at 613.

The witness who invoked the Fifth Amendment on cross-examination in *Cardillo* was a government witness, so the *Cardillo* framework needs to be applied with some caution where the witness who invokes the Fifth Amendment privilege on cross-examination, as in the instant case, has been called by the defendant. This is so, because different rights are at stake. An opinion from a case where a defense witness invoked the Fifth Amendment on cross-examination in which Chief Judge Garland and then-Judge Kavanaugh joined, makes this point, wherein it stated: "The potential prejudice to the government from preventing its cross examination of [a defense witness], unlike the prejudice to the defendants in *Cardillo* [seeking to cross-examine a government witness], has no constitutional dimension." *U.S. v. Crews*, 856 F.3d 91, 99 (D.C. Cir. 2017).

Elsewhere, it has been observed:

Cardillo and cases like it do not address the tension inherent, when the witness is defendant's, between the

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prosecution's need to cross-examine and the defendant's right to call witnesses on her own behalf. The right to present witnesses "has long been recognized as essential to due process." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973). The compulsory process clause of the Sixth Amendment also supports the same right. *Taylor v. Illinois*, 484 U.S. 400, 409, 108 S.Ct. 646, 652, 98 L.Ed.2d 798 (1988).

Denham v. Deeds, 954 F.2d 1501, 1503-04 (9th Cir. 1992). A trial court must safeguard to the extent possible a criminal defendant's right to present his or her story. *Id.*

It has been stated: "The key question is whether the defendant's right to present witnesses can be protected without frustrating the government's interest in effective cross-examination." *U.S. v. Negrete-Gonzales*, 966 F.2d 1277, 1280 (9th Cir. 1992). Based on constitutional imperatives and the authority of *Crews* and similar jurisprudence, to the extent the opinion of the court in this case suggests that the State's or government's right to examine a defense witness who has invoked the Fifth Amendment on cross-examination is the constitutional equivalent of the right at stake of the criminal defendant, I respectfully disagree.

Striking All or Partial Testimony of Dixon.

The thrust of the majority opinion is that Dixon's refusal to identify who supplied the drugs and from whom he obtained the phone to set up the crimes as charged was testimony in the first *Cardillo* category, i.e., "so closely related to the commission of the crime that the entire testimony of the witness should be stricken." *United States v. Cardillo*, 316 F.2d 606, 613 (2d Cir. 1963). I respectfully disagree; instead, I believe the "subject matter of the testimony was connected solely with one phase of the case" involving steps in the preparation for the crimes which warranted a "partial strik[e]." *Id.*

The crimes charged were escape, theft of a vehicle by unlawful taking, and operating a vehicle to avoid arrest. At his deposition, Dixon stated he put a knife to Clausen's neck

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in the bathroom and told him he was going to help with the escape, whether he wanted to or not, and threatened the lives of Clausen and his family. Contrary to the opinion of the court, I believe Dixon offered details of how he planned the escape and the State's interest in prosecuting Clausen was not frustrated by Dixon's unwillingness to name names. When asked from whom he got the phone to set up the crimes, Dixon said he would not answer. Dixon said he paid for the phone. When asked how he paid for the phone, he said he had "a lot of guards in my pocket" from whom he obtained drugs with which to obtain the phone.

During his deposition and his appearance before the district court, Dixon described how he and Clausen escaped in a laundry truck, cut open the roof, and then stole a pickup, which Dixon drove during the pursuit by police. These details and admissions would have favored the State. And Dixon's testimony, if it had been permitted, could have given Clausen some advantage in his attempt to raise doubt with the jury as to his guilt as to certain of the counts. In my view, exclusion of the entirety of Dixon's proposed testimony, because of his refusal to name names in connection with the preparatory phase, diminished the integrity of the trial.

I am aware of cases where a witness denied that the defendant was the source of drugs, but on cross-examination refused to name the source, and the appellate court concluded the witness' testimony was properly stricken. E.g., *U.S. v. McKneely*, 69 F.3d 1067 (10th Cir. 1995). However, in *McKneely*, "the identity of the source was central to the issue of defendant's guilt or innocence." 69 F.3d at 1076. The instant case is more similar to *U.S. v. Negrete-Gonzales*, *supra*, where the appellate court concluded it was improper to strike the testimony of a witness who refused to identify her source of cocaine on cross-examination where neither defendant was charged with supplying cocaine. The instant case is not a drug case, and the identities of the source of the drugs and phone were not central. Accordingly, in my view, Dixon's refusal to name

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the source of the drugs and phone did not warrant striking the entirety of his testimony.

Having concluded that the refusal of defense witness Dixon to answer certain questions on cross-examination falls into the second *Cardillo* category, it is necessary for me to determine if partial striking was feasible. In *U.S. v. Crews*, 856 F.3d 91, 101 (D.C. Cir. 2017), the appellate court was unable to ascertain whether the witness had asserted her Fifth Amendment privilege “only with respect to certain, limited questions,” and therefore, the trial court could not be faulted for excluding all her testimony. Here, however, Dixon was available to provide an abundance of information, not all of it favorable to Clausen, and his refusal was clearly limited to the identity of the sources of the drugs and phone. And although the district court suggested that Dixon’s refusal only to identify sources might be characterized as an assertion of his Fifth Amendment privilege, that suggestion is curious where he had already resolved his case arising from the escape. In my view, given the record, striking all of Dixon’s testimony on the basis that he asserted the Fifth Amendment was “drastic.” *Lawson v. Murray*, 837 F.2d 653, 656 (4th Cir. 1988).

It has been observed that “[e]ven when the witness refuses to answer questions relevant to matters at issue, striking only portions of the testimony may be the more reasonable remedy” *Id.* In this case, in my view, a partial striking of Dixon’s testimony would have been the better course; however, I recognize that the district court was not asked to do so. Under similar circumstances, in *Crews*, the appellate court assumed that “the district court had viable alternatives, but [the defendant] did not suggest any at trial. The court did not plainly err by failing to consider them *sua sponte*.” 856 F.3d at 100-01. Similarly, on the record before us, not having been presented with the alternative of partially striking Dixon’s proposed testimony, I cannot find that the district court plainly erred when it chose to strike Dixon’s testimony in its entirety.

For the foregoing reasons, I concur.

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Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

TROY M. FUELBERTH AND JULIE K. FUELBERTH, HUSBAND
AND WIFE, APPELLANTS, v. HEARTLAND HEATING &
AIR CONDITIONING, INC., A NEBRASKA
CORPORATION, APPELLEE.

951 N.W.2d 758

Filed December 11, 2020. No. S-20-178.

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. ____: _____. An appellate court reviews the district court's grant of summary judgment de novo, viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor.
3. **Limitations of Actions: Breach of Warranty: Contractors and Subcontractors.** Where the basis of a claim is improper workmanship resulting in defective construction, the Neb. Rev. Stat. § 25-223 (Reissue 2016) statute of limitations runs from the date of substantial completion of the project, not the date of any specific act which resulted in the defect.
4. **Limitations of Actions.** A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain suit.
5. **Actions: Breach of Contract: Limitations of Actions.** If a contract is divisible, breaches of its severable parts give rise to separate causes of action, and the statute of limitations will generally begin to run at the time of each breach. If, however, a contract is indivisible, an action can be maintained on it only when a breach occurs or the contract is in some way terminated, and the statute of limitations will begin to run from that time only.

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6. **Contracts.** A contract which in its nature and purpose is susceptible of division and apportionment is divisible and severable.

Appeal from the District Court for Cedar County: JAMES G. KUBE and BRYAN C. MEISMER, Judges. Reversed and remanded for further proceedings.

Allison Rockey Mason and David E. Copple, of Copple, Rockey & Schlecht, P.C., L.L.O., for appellants.

Todd B. Vetter and Luke P. Henderson, of Fitzgerald, Vetter, Temple, Bartell & Henderson, for appellee.

HEAVICAN, C.J., MILLER-LEMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

PAPIK, J.

Troy M. Fuelberth (Fuelberth) and Julie K. Fuelberth hired Heartland Heating & Air Conditioning, Inc. (Heartland), to design, construct, and install an interior in-floor geothermal system and an exterior icemelt system for a shop building on their farm. The Fuelberths later sued Heartland, alleging that Heartland's work was defective. The Fuelberths now appeal from the district court's entry of summary judgment in favor of Heartland on statute of limitations grounds. Because we find that Heartland was not entitled to summary judgment, we reverse, and remand for further proceedings.

BACKGROUND

Parties' Dispute.

In 2009, the Fuelberths decided to build a shop building on their farm. Fuelberth hired a general contractor to construct the shop building, and he arranged for other contractors to perform various tasks related to the building. Fuelberth selected Heartland to design, construct, and install heating and air conditioning systems. Fuelberth's primary contact at Heartland was Mike Wiederin, a shareholder, officer, and employee of Heartland.

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Fuelberth initially contacted Wiederin in 2010. Fuelberth expressed interest in having an interior in-floor geothermal system that would heat and cool the building and an exterior icemelt system that would melt ice off the driveway. After some discussions, Heartland provided Fuelberth with a written estimate for the project.

Heartland, through Wiederin, agreed to design, construct, and install the interior system and the exterior system. The agreement was oral. Heartland thereafter designed, constructed, and installed both systems.

On November 14, 2016, the Fuelberths sued Heartland. In the complaint, they alleged that on or about November 15, 2012, the exterior system failed and that in the summer of 2016, they discovered that the interior system had also failed. The Fuelberths alleged that the failures had occurred as a result of Heartland's defective work. According to the Fuelberths, they faced significant repair and replacement costs as a result of the systems' failures. In their complaint, the Fuelberths alleged two theories of recovery: negligence and breach of an implied warranty of workmanlike performance.

Summary Judgment.

After the parties engaged in some discovery, Heartland moved for summary judgment. At a hearing on the motion, Heartland argued that it was entitled to summary judgment on statute of limitations grounds.

In support of its summary judgment motion, Heartland offered Wiederin's deposition in which he testified that both the interior system and the exterior system were completely installed by January 2012. Heartland also offered Fuelberth's deposition. In his deposition, Fuelberth acknowledged that the interior system was "[p]artially" working by January 2012, but he contended that it was not working properly. Fuelberth also testified that the exterior system was not operational until November 2012 when Wiederin came to the property to pour glycol into the system and take other steps to make it

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operational. Fuelberth testified that Wiederin performed this work sometime between November 1 and 12, 2012.

The district court entered summary judgment in favor of Heartland. The district court concluded that the Fuelberths' claims were subject to the 4-year statute of limitations set forth in Neb. Rev. Stat. § 25-223 (Reissue 2016) and that, under that statute, the limitations period begins to run upon substantial completion of the project. The district court then analyzed whether there were genuine issues of material fact as to when substantial completion occurred. It did so by considering the interior system and the exterior system separately.

As to the interior system, the district court determined there was no dispute that it was substantially complete by January 2012. Because the Fuelberths' complaint was not filed until November 14, 2016, the district court found that Heartland was entitled to summary judgment on the Fuelberths' claims concerning the interior system.

The district court also found that Heartland was entitled to summary judgment on the Fuelberths' claims concerning the exterior system. Here, the district court, relying on Fuelberth's deposition testimony, concluded that there was no dispute that the exterior system was substantially complete by no later than November 12, 2012. The district court then reasoned that because the Fuelberths filed their complaint more than 4 years after November 12, 2012, their claims as to the exterior system were also barred by the statute of limitations.

The Fuelberths timely appealed.

ASSIGNMENT OF ERROR

The Fuelberths assign three errors on appeal, but they can be effectively restated as one: The district court erred by granting Heartland summary judgment on statute of limitations grounds.

STANDARD OF REVIEW

[1] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence

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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. *Russell v. Franklin County*, 306 Neb. 546, 946 N.W.2d 648 (2020).

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

ANALYSIS

Arguments on Appeal.

The sole issue in this appeal is whether Heartland was entitled to summary judgment on statute of limitations grounds. The parties agree that § 25-223 sets forth the statute of limitations governing the Fuelberths’ claims. See *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992) (holding that § 25-223 applies to claims concerning negligent construction of improvement on real estate brought against contractors or builders, whether based on negligence or breach of warranty). Section 25-223 provides, in part, as follows:

Any action to recover damages based on any alleged breach of warranty on improvements to real property or based on any alleged deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property shall be commenced within four years after any alleged act or omission constituting such breach of warranty or deficiency. If such cause of action is not discovered and could not be reasonably discovered within such four-year period, . . . then the cause of action may be commenced within two years from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier.

[3] In *Adams v. Manchester Park*, 291 Neb. 978, 983, 871 N.W.2d 215, 218-19 (2015), we stated that “where the basis of the claim is improper workmanship resulting in defective

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construction, the § 25-223 statute of limitations runs from the date of substantial completion of the project, not the date of any specific act which resulted in the defect.” Heartland argued in the district court and continues to argue here that the interior system was substantially completed no later than January 31, 2012, and the exterior system was substantially completed no later than November 12, 2012. The district court agreed with Heartland that there was no genuine issue of fact that the respective systems were substantially complete by these dates and granted Heartland summary judgment on this basis.

The Fuelberths argue on appeal that there were genuine issues of material fact as to when substantial completion occurred. While they make separate arguments with respect to both the interior system and the exterior system, they also assert that the systems functioned together and that one system could not be considered substantially complete if the other was not also substantially complete. We begin our analysis with the question of whether the Fuelberths’ claims accrued at separate times or whether they accrued on the same substantial completion date.

One Statute of Limitations Period or Two?

As noted, we have held that where the basis of a claim is improper workmanship resulting in defective construction, the statute of limitations period under § 25-223 begins to run from the date of substantial completion of the project. In this case, that raises the question of whether the installation of the interior system and the exterior system was one project such that the statute of limitations would begin to run when the entire project was substantially complete or two separate projects such that the statute of limitations on a claim related to improper workmanship in one system would begin to run when that system was substantially complete.

[4] A statute of limitations begins to run as soon as the claim accrues. See *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W.2d 376 (2007). A cause of action accrues and

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the statute of limitations begins to run when the aggrieved party has the right to institute and maintain suit. *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 720 N.W.2d 886 (2006). Accordingly, if the Fuelberths had the right to sue Heartland for defective construction as soon as one system was substantially complete, the statute of limitations on the cause of action related to that system would begin to run before the statute of limitations began to run on a cause of action related to the other system. Alternatively, if the Fuelberths could not institute a suit until the agreed-to work as a whole was substantially complete, a single statute of limitations would begin to run on claims related to defective construction of any part of the project at that point.

[5] Whether the Fuelberths could institute and maintain suit as soon as one system was substantially complete or were required to wait until the substantial completion of the work as a whole depends on whether the agreement between Heartland and the Fuelberths was divisible or indivisible. If a contract is divisible, “breaches of its severable parts give rise to separate causes of action, [and] the statute of limitations will generally begin to run at the time of each breach.” 15 Richard A. Lord, *A Treatise on the Law of Contracts* by Samuel Williston § 45.20 at 403-04 (4th ed. 2014). If, however, a contract is indivisible, “an action can be maintained on it only when a breach occurs or the contract is in some way terminated, and the statute of limitations will begin to run from that time only.” *Id.* at 405.

[6] We have previously treated the question of whether a contract was divisible or indivisible as one of fact. See *Honstein Trucking v. Sandhills Beef, Inc.*, 209 Neb. 422, 308 N.W.2d 331 (1981). In an early case, we observed that generally where a contract has several undertakings each supported by distinct consideration, it is divisible. See *Burwell & Ord Irrigation & Power Co. v. Wilson*, 57 Neb. 396, 77 N.W. 762 (1899). More recently, we have indicated that whether a contract is divisible or indivisible is a question of intentions

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apparent in the instrument. See *Gaspar v. Flott*, 209 Neb. 260, 307 N.W.2d 500 (1981). In an unambiguous contract, it is to be determined from the language, the subject matter, and the construction placed upon it by the parties in light of the surrounding circumstances. *Id.* “A contract which in its nature and purpose is susceptible of division and apportionment is divisible and severable.” *Reichert v. Mulder*, 121 Neb. 11, 14, 235 N.W. 680, 682 (1931). See, also, *Gaspar, supra*.

In this case, there are genuine issues of fact as to whether the agreement between Heartland and the Fuelberths was divisible or indivisible. The subject matter of the agreement was the design and installation of both an interior system and an exterior system, but there was evidence that the parties intended to enter an agreement in which the Fuelberths would pay one sum for all the work Heartland agreed to perform, as opposed to several undertakings supported by distinct consideration. In August 2010, Heartland gave a written estimate of the scope of work to be completed. That written estimate described the project as an installation of floor heating in a shop in various numbered “zones.” Those zones included a number of locations in the interior of the shop and another labeled “(7) ICE MELT.” The description went on to state that the bid included labor and various specified parts and equipment and totaled \$78,000. There is no indication in the written estimate that the Fuelberths had agreed to pay a certain price for the exterior system and another price for the interior system. Further, Fuelberth testified in his deposition that in negotiating the agreement with Heartland, “we didn’t change components much, it was like [a] package deal[,] we’re going to do this, this is what it’s going to cost.”

If the parties’ agreement was, in fact, indivisible, the Fuelberths’ cause of action did not accrue until the entire project was substantially complete. In order to assess Heartland’s entitlement to summary judgment, then, we must consider whether there were genuine issues of material fact as to when the project as a whole was substantially complete.

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Substantial Completion.

We find that a reasonable fact finder could conclude that the project as a whole was not substantially complete until November 12, 2012. Fuelberth testified at his deposition that the exterior system was not operational until sometime between November 1 and 12, 2012, when Wiederin came to the Fuelberths' property to pour glycol into the system and take other steps necessary to ready it for operation.

If the Fuelberths' claims accrued on November 12, 2012, their complaint was timely filed. Although the district court was correct that the Fuelberths filed their complaint more than 4 years after November 12, 2012, it does not inevitably follow that the complaint filed on November 14, 2016, was untimely. A Nebraska statute, Neb. Rev. Stat. § 25-2221 (Reissue 2016), provides a general rule for computing time. We have previously applied this rule in determining whether an action was timely filed under a civil statute of limitations. See *George P. Rose Sodding & Grading Co. v. Dennis*, 195 Neb. 221, 237 N.W.2d 418 (1976). Section 25-2221 provides, in relevant part, as follows:

Except as may be otherwise more specifically provided, the period of time within which an act is to be done in any action or proceeding shall be computed by excluding the day of the act, event, or default after which the designated period of time begins to run. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a day during which the offices of courts of record may be legally closed as provided in this section, in which event the period shall run until the end of the next day on which the office will be open.

Under § 25-2221, if the Fuelberths' cause of action accrued on November 12, 2012, the statute of limitations started to run on the following day, November 13, 2012. The last day of the 4-year period as measured from that day would be November 12, 2016. However, November 12, 2016, was a Saturday. Under § 25-2221, then, the period of limitations would run

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until the following Monday, November 14, 2016. That is the day on which the Fuelberths filed their complaint.

Disposition.

Because a reasonable finder of fact could have concluded that Heartland and the Fuelberths entered into an indivisible contract to design, construct, and install both the interior system and the exterior system and that the entire project was not substantially complete until November 12, 2012, the district court erred by entering summary judgment in favor of Heartland on statute of limitations grounds.

CONCLUSION

For reasons we have explained, the district court erred by granting summary judgment in favor of Heartland. We thus reverse the district court's grant of summary judgment and remand the cause to the district court for further proceedings.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

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