insight that allows us to determine what weight the sentencing panel gave to this evidence relative to evidence supporting the other factors. But the majority concedes that the sentencing panel found each aggravating factor to be "'significant and substantial.'" Because of the emphases the State placed on the impermissible evidence and the sentencing panel's own statements, I do not believe we can assume the sentencing panel's reliance on both prongs of aggravator (1)(d) did not exert a decisive influence on its sentencing determination and was therefore harmless beyond a reasonable doubt. I would remand the cause for resentencing based on the evidence supporting the remaining aggravating circumstances and the mitigating circumstance.

Patricia Richardson, Special Administrator of the Estate of Corey Richardson, deceased, and Patricia Richardson, individually, appellees, v. Children's Hospital and Dr. Scott James, appellants.

787 N.W.2d 235

Filed July 30, 2010. No. S-09-915.

1. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
2. **Rules of Evidence: Expert Witnesses.** Neb. Rev. Stat. § 27-702 (Reissue 2008) allows the admission of expert testimony if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue; a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
3. **Trial: Evidence: Appeal and Error.** To preserve a claimed error in admission of evidence, a litigant must make a timely objection which specifies the ground of the objection to the offered evidence.
4. **Trial: Expert Witnesses.** An objection to the opinion of an expert based upon the lack of certainty in the opinion is an objection based upon relevance.
5. **Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

6. **Expert Witnesses.** "Magic words" indicating that an expert's opinion is based on a reasonable degree of medical certainty or probability are not necessary.
7. ____. An expert opinion is to be judged in view of the entirety of the expert's opinion and is not validated or invalidated solely on the basis of the presence or lack of the magic words "reasonable medical certainty."
8. ____. When faced with a proffer of expert scientific testimony, a trial judge must determine at the outset whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.
9. ____. A trial court should focus on the principles and methodology utilized by expert witnesses, and not on the conclusions that they generate.
10. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded.
11. **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.
12. **Judges: Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determining the relevance of evidence, and a trial court's decision regarding relevance will not be reversed absent an abuse of discretion.
13. **Trial: Evidence.** Evidence that is irrelevant is inadmissible.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Reversed and remanded for a new trial.

Patrick G. Vipond, William R. Settles, and Maria T. Lighthall, of Lamson, Dugan & Murray, L.L.P., for appellants.

R. Collin Mangrum, of Creighton University School of Law, and Terrence J. Salerno for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

Patricia Richardson (Richardson), individually and as special administrator of the estate of Corey Richardson (Corey), brought suit against Children's Hospital and Dr. Scott James (collectively appellants) in a medical malpractice claim. After trial, the jury found for Richardson and awarded her $900,000.

Appellants appeal from that decision. We reverse, and remand for a new trial.

BACKGROUND

This case is a consolidated action stemming from the medical treatment and death of Corey. Richardson brought the first action in her capacity as special administrator of Corey's estate, seeking damages for predeath pain and suffering. She brought the second action individually, as Corey's next of kin, pursuant to Nebraska's wrongful death statute.[1] The actions were consolidated for trial.

Richardson was Corey's foster mother and later adopted him. Corey had been removed from his biological parents' home at 8 weeks of age after his biological father shook him, causing a head injury. Corey was placed with Richardson in February 2003. Because of his head injuries, Corey was developmentally delayed, although he made a great deal of progress with Richardson. Corey was mostly blind and was fed through a gastric button, a tube that allowed nutrition to go directly into his stomach. Corey's pediatrician testified that although Corey was profoundly delayed, he was an otherwise healthy 3-year-old boy.

Richardson testified that Corey began retching on Monday, August 15, 2005, and that she thought he had "the flu." Corey would continue to retch when she fed him through the gastric button and would stop only if Richardson allowed the food to come back out through the decompression tube. The next day, Richardson made two calls to Corey's pediatrician. After the second call, the pediatrician directed Richardson to take Corey to Children's Hospital.

Richardson testified that she was concerned about Corey because he could not keep down Depakote, his antiseizure medication, or any other medications. Richardson testified that she believed Corey to be significantly dehydrated because he had less saliva production than usual and because he had fewer wet diapers than usual. On cross-examination, however, Richardson stated that she had informed the staff at

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[1] Neb. Rev. Stat. § 30-809 (Reissue 2008).

Children's Hospital that Corey had three wet diapers over a 24-hour period.

Richardson first took Corey to Children's Hospital at 9:30 p.m. on August 16, 2005, and remained there until Corey was discharged 3 hours later. While at Children's Hospital, Corey was examined, a blood culture was taken, and he was given an antinausea suppository. Richardson stated that she was unable to persuade Corey to take any fluids during that time. Because she believed Corey to be dehydrated, Richardson called the pediatrician the next morning, August 17, and was told to take Corey back to Children's Hospital.

Upon arrival at Children's Hospital on August 17, 2005, Richardson informed staff that she had been up through the night with Corey, that he had not taken any fluids, and that Corey's doctor had recommended intravenous (IV) fluids. Richardson testified that Dr. James examined Corey early during that visit, but that he did not conduct another examination before Corey was discharged. Richardson testified that Dr. James informed her that Corey had an elevated white blood cell count, which was an indication of an infection. An x ray was taken, as well as a urine sample, but no other signs of infection were found. Richardson testified that she asked Dr. James why he would not give Corey IV fluids and that Dr. James stated Corey did not need an IV.

Testimony at trial indicated that Corey had a body temperature of 95.7 degrees Fahrenheit during this second visit. Low body temperature can be indicative of dehydration. Appellants attempted to introduce past medical records regarding Corey's low body temperature, but the records were excluded as irrelevant. Appellants made an offer of proof that prior medical records would demonstrate that Corey had a difficult time regulating his body temperature, indicating that his low body temperature may not have been an indicator of dehydration.

Richardson also testified that she was uncomfortable with Corey's being discharged at that time and had wanted Corey to have IV fluids because she was concerned about dehydration. Corey was discharged shortly after 3 p.m. on August 17, 2005, and Richardson stated that she was again unable to persuade Corey to take any liquids after he was discharged.

Richardson's oldest daughter assisted Richardson in caring for Corey and Richardson's other children the night of August 17, 2005. Richardson slept while her oldest daughter took care of Corey. When Richardson woke around 5 a.m. on August 18, she realized that Corey was not breathing properly. An ambulance was called to transport Corey to Children's Hospital. Corey died that morning at the hospital. An autopsy later determined that Corey died of necrotizing hemorrhagic pancreatitis, an inflammation of the pancreas severe enough to cause bleeding and tissue death.

Richardson filed a wrongful death action against appellants in her own behalf and also on behalf of Corey's estate for his predeath pain and suffering. The two actions were consolidated and tried to a jury. Richardson alleged that appellants were negligent in not hydrating Corey with IV fluids and that their negligence was a direct and proximate cause of Corey's death.

Dr. Thomas McAuliff's video deposition was played for the jury during Richardson's case in chief. His testimony will be discussed in more detail below. Briefly, however, Dr. McAuliff testified it was his opinion that appellants had not met the standard of care for treating Corey on August 17, 2005, and that Corey should have been given IV fluids. Dr. McAuliff also testified that "the outcome would have been different" had Corey received IV fluids. Richardson rested her case in chief at this point.

Appellants' first witness was Dr. Steven Krug, a board-certified pediatrician and an expert in pediatric emergency medicine. Dr. Krug testified as to standard of care, and stated that there is no clear treatment for pancreatitis. Dr. Krug testified that the symptoms of pancreatitis in children of Corey's age are often variable and that it is difficult to diagnose. He also stated that hydration does not prevent pancreatitis and that hydration simply treats a symptom of the disease and produces variable results. Dr. Krug stated that a large percentage of patients with necrotizing hemorrhagic pancreatitis "don't make it." Dr. Krug gave his opinion that hydration would not have changed the outcome in Corey's case, but he also stated that a reasonable course to take would have been to admit

Corey to the hospital after his second visit and administer IV fluids.

Dr. James also testified and indicated that he had not been notified by Corey's pediatrician that Corey might need to be evaluated for dehydration or put on IV fluids. Dr. James stated that Corey's only abnormal test was the blood urea nitrogen. He also stated that other conditions, aside from dehydration, can cause an elevated blood urea nitrogen. Dr. James testified that around that same period of time, he had seen a number of children with a gastrointestinal virus that lasted between 2 and 5 days. Dr. James testified that oral hydration is the preferred method for mild to moderate dehydration. Dr. James also stated that he had planned for Corey to stay in the hospital longer, but that Richardson indicated she needed to leave to care for her other children.

Dr. Steven Werlin, a specialist in pediatric gastroenterology, also testified as an expert for appellants. Dr. Werlin has published more than 10 original articles and more than 20 book chapters on various aspects of pancreatitis diagnosis and treatment. Dr. Werlin testified regarding the treatment of pancreatitis and stated that while there is no specific treatment, in general, children are kept as healthy as possible to allow the pancreas time to repair itself. Dr. Werlin also stated that in his experience, hydration does not treat pancreatitis and many children with necrotizing hemorrhagic pancreatitis die.

Dr. Werlin stated that in patients with severe hemorrhagic pancreatitis, the disease generally moves quickly and that no intervention can save the patient. Dr. Werlin also testified that in his experience, children with pancreatitis may not appear very ill at the beginning of the disease, but that their condition often rapidly declines. Dr. Werlin could not say why some children with hemorrhagic pancreatitis died quickly and others recovered. Dr. Werlin gave his opinion that children like Corey who contract the disease typically do not survive. Dr. Werlin further stated that hydration would not have an effect on the progression of pancreatitis. On cross-examination, Dr. Werlin acknowledged that initiating hydration in children with pancreatitis is important because the outcome for even severe pancreatitis is variable. However, Dr. Werlin was not allowed

to give his ultimate opinion that Corey would have died even if he had been given IV fluids.

After appellants rested, Richardson offered video deposition testimony from Dr. Christine Odell as rebuttal testimony. Appellants objected, arguing that Dr. Odell's testimony was cumulative to Richardson's case in chief and, further, that her testimony was lacking in foundation. That objection was overruled, and Dr. Odell's video deposition was played for the jury. Dr. Odell testified regarding the applicable standard of care and also regarding the presence of bacteria in Corey's blood, something not raised in appellants' case in chief.

Appellants offered surrebuttal testimony from Dr. James and Dr. Edward Mlinek, Jr. The trial court denied the motion to give surrebuttal evidence, but allowed appellants to make offers of proof. Appellants stated Dr. James would testify that only one blood culture was taken and that the fact the blood culture was negative did not eliminate the possibility of sepsis, which is a bacterial infection in the blood. Dr. James also would have testified that the signs and symptoms of pancreatitis were not present and that he did not act unreasonably in not ordering more tests to check for pancreatitis. Dr. Mlinek would have testified that he had treated a number of children with Corey's symptoms who had gastritis and not pancreatitis. Dr. Mlinek would have further testified that children on Depakote commonly contracted gastritis and that pancreatitis, though associated with Depakote, was still a relatively rare diagnosis. Dr. Mlinek also would have testified as to Corey's level of dehydration.

At the close of the evidence, appellants moved for a directed verdict, arguing that Richardson's experts had not testified to a reasonable degree of medical certainty and that their testimonies lacked foundation. Appellants also objected to the language of instruction No. 18 as to Corey's pain and suffering, arguing that Richardson had not established pain and suffering. Instruction 18 states:

> If you return a verdict for the plaintiff, then you must determine the amount of money and the monetary value of the comfort and companionship that Corey . . . would have contributed to . . . Richardson had he lived.

> In making this determination you should consider the following:
>
> 1. The physical pain and suffering which Corey . . . endured as a result of the defendants' negligence.

Appellants also objected to Richardson's closing argument that the jurors should consider the amount of money they were being compensated for serving on the jury when calculating Richardson's loss of consortium. Richardson's counsel had stated, "[Y]ou guys are here at $35 a day for the inconvenience of rearranging your schedules for taking time out of your life to do something different. $35 a day for twenty-eight years is $357,000." Appellants argued that it was an impermissible per diem argument, and the trial court overruled the objection. The jury found for Richardson and awarded her $900,000 in damages. Appellants then moved for a new trial, which the trial court denied.

ASSIGNMENTS OF ERROR

Appellants assign that the district court erred in (1) admitting Richardson's expert evidence, because the testimony did not sufficiently establish causation and was insufficient to sustain a verdict; (2) preventing Dr. Werlin, an expert witness, from giving his ultimate opinions regarding causation; (3) excluding relevant evidence of Corey's past medical history; (4) allowing Dr. Odell's rebuttal testimony, because it raised issues not presented in, and was repetitive of, Richardson's case in chief; (5) not allowing appellants to present surrebuttal evidence; (6) instructing the jury that it could award damages for Corey's pain and suffering despite the absence of evidence to support this element of damages; (7) allowing Richardson to use an improper per diem argument for damages; and (8) overruling appellants' motion for a new trial.

STANDARD OF REVIEW

[1] A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.[2]

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[2] *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

ANALYSIS

Richardson's Expert Evidence Was Sufficient to Sustain Verdict

Appellants first argue that the trial court erred in admitting Richardson's expert evidence, because the testimony did not sufficiently establish causation and was insufficient to sustain a verdict. Appellants further allege that the expert testimony rose only to "loss of chance," which in Nebraska is not sufficient to establish causation. Richardson argues that appellants failed to preserve this issue on appeal, because appellants objected only on "'form and foundation,'" and not under Neb. Rev. Stat. § 27-702 (Reissue 2008).[3]

[2,3] Section 27-702 allows the admission of expert testimony "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue[;] a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." To preserve a claimed error in admission of evidence, a litigant must make a timely objection which specifies the ground of the objection to the offered evidence.[4]

Appellants made a motion in limine "[t]o prohibit and/or strike the testimony of Dr. McAuliff and Dr. Odell concerning causation" on the basis of § 27-702. Richardson, on the other hand, contends that a motion in limine is insufficient to preserve a § 27-702 objection on appeal.[5] However, the record demonstrates that appellants objected as to "form and foundation" during the trial deposition, made a motion in limine on § 27-702 grounds, and then objected at trial. We note that appellants objected to Dr. McAuliff's testimony on the grounds that he gave an opinion in his trial deposition which he did not give in his discovery deposition and that his opinion on causation was not given with a reasonable degree of medical certainty. We therefore conclude that appellants preserved the objection for appeal.

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[3] Brief for appellees at 11.

[4] *Allphin v. Ward*, 253 Neb. 302, 570 N.W.2d 360 (1997).

[5] See *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002).

[4-7] An objection to the opinion of an expert based upon the lack of certainty in the opinion is an objection based upon relevance.[6] Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[7] We have stated that "'[m]agic words' indicating that an expert's opinion is based on a reasonable degree of medical certainty or probability are not necessary."[8] An expert opinion is to be judged in view of the entirety of the expert's opinion and is not validated or invalidated solely on the basis of the presence or lack of the magic words "reasonable medical certainty."[9]

Dr. McAuliff stated that in his opinion, Corey was moderately dehydrated on August 17, 2005, and that if he had been rehydrated, "the outcome would have been different." Dr. McAuliff also testified that anything greater than 1.030 for the urinalysis specific gravity indicated significant dehydration and that Corey's levels were 1.034. Dr. McAuliff testified that he believed Dr. James deviated from the standard of care in several significant ways, but particularly by not hydrating Corey through IV fluids. Dr. McAuliff stated that he believed that with hydration, Corey could have recovered.

Appellants contend that because Richardson's experts' testimony was not given to a reasonable degree of medical certainty, it rose only to "loss of chance," which, as noted, in Nebraska, is insufficient to establish causation. We discuss "loss of chance" in *Rankin v. Stetson*.[10]

In *Rankin*, the plaintiff offered expert testimony that stated "it was more likely than not" that the plaintiff would have recovered from her spinal cord injury had surgery been performed within the first 72 hours.[11] We stated that an opinion

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[6] *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996).

[7] *Id.*

[8] *Id.* at 121, 541 N.W.2d at 643.

[9] *Id.*

[10] *Rankin v. Stetson*, 275 Neb. 775, 749 N.W.2d 460 (2008).

[11] *Id.* at 779, 749 N.W.2d at 464.

that a plaintiff would have had "a 'better prognosis' and a 'chance of avoiding permanent neurological injury'" did not establish the certainty of proof that was required.[12] However, because the doctor's opinion also stated that early surgical decompression of the spinal cord more likely than not would have led to an improved outcome, the evidence was sufficient to establish causation.[13]

Unlike in *Rankin*, where the language at issue indicated "a better prognosis" or "a chance," in this case, Dr. McAuliff stated that he believed that with hydration, Corey could have recovered. Such was a sufficient basis for Dr. McAuliff's opinion that Corey was dehydrated and that IV fluids would have made a difference in the ultimate outcome. We conclude these opinions were given with a sufficient degree of medical certainty and were sufficient to establish causation for purposes of Richardson's case in chief. Appellants' argument to the contrary is without merit.

Trial Court Abused Its Discretion by Not Allowing Dr. Werlin to Give His Ultimate Opinion on Causation

Appellants' second assignment of error is that the trial court erroneously excluded Dr. Werlin's expert opinion on the ultimate causation of Corey's death. Richardson objected to Dr. Werlin's testimony on the basis of "foundation" and "702." The trial court sustained the objections, but gave no further explanation. Dr. Werlin was allowed to testify that in his expert opinion, hydration does not treat pancreatitis and that Corey's pancreatitis was particularly bad. However, Dr. Werlin was not permitted to testify that giving Corey IV fluids would not have prevented his death. Following the sustaining of Richardson's objection by the district court, appellants were permitted to make an offer of proof regarding Dr. Werlin's testimony.

[8,9] When faced with a proffer of expert scientific testimony, a trial judge must determine at the outset whether the

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[12] *Id.* at 787, 749 N.W.2d at 469.

[13] *Id.*

expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.[14] The trial court should focus on "the principles and methodology utilized by expert witnesses, and not on the conclusions that they generate."[15]

One of the key questions in this case was standard of care and whether appellants' actions, or lack thereof, contributed to Corey's death. Dr. Werlin was board certified in both pediatrics and pediatric gastroenterology. Although Dr. Werlin did state that it was impossible to know why some children died of pancreatitis and others did not, he also stated that it was possible to retrospectively predict survivability.

Richardson alleged that appellants' decision not to give Corey IV fluids directly contributed to his death. Dr. Werlin, as an expert witness in the diagnosis and treatment of pancreatitis, would have testified that hydration would not have had an impact on the outcome of Corey's case. Dr. Werlin's ultimate opinion on causation was scientific knowledge that would have helped the trier of fact understand or determine a fact at issue. We therefore find that the trial court abused its discretion in not allowing Dr. Werlin to testify.

[10] To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded.[16] We find that appellants were unfairly prejudiced because their expert was not allowed to give his opinion on causation. We further find that this was reversible error on the part of the trial court and, accordingly, remand this cause to the district court for a new trial.

Trial Court Abused Its Discretion in Excluding Relevant Evidence Regarding Corey's Past Medical History

Appellants next argue that the trial court erroneously excluded evidence of Corey's past medical history. Although

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[14] *Rankin, supra* note 10.

[15] *Schafersman, supra* note 2, 262 Neb. at 234, 631 N.W.2d at 878.

[16] *Kirchner v. Wilson*, 262 Neb. 607, 634 N.W.2d 760 (2001).

the foregoing determination resolves this appeal, we address the exclusion of Corey's past medical records because it is an issue that is likely to recur.

Appellants argue that while Drs. McAuliff and Odell cited Corey's low body temperature on August 17, 2005, as evidence of dehydration, prior medical records indicated that Corey's body temperature fluctuated widely due to his compromised neurological condition. Richardson objected to the prior medical records on the basis of relevancy, and the trial court sustained that objection.

[11-13] 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.[17] The exercise of judicial discretion is implicit in determining the relevance of evidence, and a trial court's decision regarding relevance will not be reversed absent an abuse of discretion.[18] To be admissible, evidence must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[19] Evidence that is irrelevant is inadmissible.[20]

Richardson argues that the trial court did not abuse its discretion in excluding Corey's past medical records, because appellants did not make a discovery disclosure that any expert intended to rely on medical records to form an opinion. Richardson also argues that the medical records were excludable as hearsay, that appellants' experts never offered a medical opinion that Corey was not dehydrated, and that Richardson's experts could have been cross-examined regarding their opinions based on the medical records. We disagree.

First, it is clear from the record that Richardson and her experts first raised the issue of Corey's body temperature as a

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[17] *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).

[18] *Id.*

[19] Neb. Rev. Stat. § 27-401 (Reissue 2008).

[20] Neb. Rev. Stat. § 27-402 (Reissue 2008).

sign of dehydration and that appellants attempted to introduce Corey's medical records to provide another explanation for Corey's low body temperature. Thus, we conclude that appellants attempted to introduce past medical records as substantive evidence of Corey's inability to regulate his body temperature as part of his neurological issues and not for the reasons argued by Richardson.

We also note that Richardson objected to past medical records based only on relevancy. Because Richardson was arguing that Corey's low internal temperature was a sign of severe dehydration and required IV fluids, Corey's past medical records were relevant to demonstrate his inability to maintain his body temperature. We therefore find that exclusion of Corey's past medical records constituted an abuse of discretion and was also reversible error.

Plaintiff's Per Diem Argument Was Not Improper

We next turn to whether Richardson's counsel made an improper per diem argument with respect to damages. Again, we address this issue because it is likely to recur. During closing arguments, counsel stated:

> Now, the Judge read you the instruction that said you have to consider the shortest life expectancy because, obviously, [Richardson's life] expectancy is twenty-eight years. If she would have died, Corey would have had to be taken care of and live with somebody else. So you can consider only that period of time for the loss here. And one measure that — that I can come up with and you guys are here at $35 a day for the inconvenience of rearranging your schedules for taking time out of your life to do something different. $35 a day for twenty-eight years is $357,000.

We note that the conduct of final argument is within the sound discretion of the trial court, and absent abuse of that discretion, the trial court's ruling regarding final argument will not be disturbed.[21] We previously addressed per diem

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[21] *Sundeen v. Lehenbauer*, 229 Neb. 727, 428 N.W.2d 629 (1988).

arguments in *Baylor v. Tyrrell*.[22] In *Baylor*, the plaintiff's attorney used a mathematical formula to suggest a sum for pain and suffering. We declined to find any error in the argument at that time. And more recently, the Court of Appeals addressed per diem arguments in *Dowd v. Conroy*.[23] The Court of Appeals noted in that case that there is no rule in Nebraska forbidding per diem arguments, or the suggestion of mathematical equations, during closing argument.[24] We find there was nothing improper in a per diem argument in this case. And we keep in mind that the amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.[25] Therefore, appellants' fourth assignment of error is without merit.

Appellants' Remaining Assignments of Error

We need not reach appellants' remaining assignments of error, which are rendered moot by our decision to reverse, and remand for a new trial.

CONCLUSION

Richardson's expert witness, Dr. McAuliff, gave his opinion with a reasonable degree of medical certainty, and therefore appellants' first assignment of error is without merit. We also find that the per diem argument in this case was not inappropriate. However, the trial court did abuse its discretion by preventing appellants' expert, Dr. Werlin, from giving his ultimate opinion on causation and by excluding relevant evidence from Corey's past medical records. We further find that these abuses

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[22] *Baylor v. Tyrrell*, 177 Neb. 812, 131 N.W.2d 393 (1964), *disapproved on other grounds, Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994).

[23] *Dowd v. Conroy*, 1 Neb. App. 230, 491 N.W.2d 375 (1992).

[24] *Id.*

[25] *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 748 N.W.2d 626 (2008).

of discretion constitute reversible error. Therefore, we reverse, and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

IN RE INTEREST OF JORGE O., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. JORGE O., APPELLEE,
AND NEBRASKA DEPARTMENT OF HEALTH AND
HUMAN SERVICES, APPELLANT.

IN RE INTEREST OF DENG M., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. DENG M., APPELLEE,
AND NEBRASKA DEPARTMENT OF HEALTH AND
HUMAN SERVICES, APPELLANT.

786 N.W.2d 343

Filed July 30, 2010. Nos. S-09-966, S-09-983.

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.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Juvenile Courts: Jurisdiction: Statutes.** As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute.
4. **Administrative Law.** Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.

Appeals from the Separate Juvenile Court of Lancaster County: REGGIE L. RYDER, Judge. Affirmed in part, and in part vacated.

Eric M. Stott, Special Assistant Attorney General, for appellant.

Dennis R. Keefe, Lancaster County Public Defender, for appellees Jorge O. and Deng M.

Valerie R. McHargue and Yohance L. Christie, Deputy Lancaster County Public Defenders, for appellee Jorge O.