THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

JULY 2, 2009 and DECEMBER 10, 2009

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS

VOLUME CCLXXVIII

PEGGY POLACEK

OFFICIAL REPORTER

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By Peggy Polacek, Reporter of the Supreme Court
and the Court of Appeals

For the benefit of the State of Nebraska

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JOHN F. WRIGHT, Associate Justice
WILLIAM M. CONNOLLY, Associate Justice
JOHN M. GERRARD, Associate Justice
KENNETH C. STEPHAN, Associate Justice
MICHAEL M. MCCORMACK, Associate Justice
LINDSEY MILLER-LERMAN, Associate Justice

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

EVERETT O. INBODY, Chief Judge
JOHN F. IRWIN, Associate Judge
RICHARD D. SIEVERS, Associate Judge
THEODORE L. CARLSON, Associate Judge
FRANKIE J. MOORE, Associate Judge
WILLIAM B. CASSEL, Associate Judge

PEGGY POLACEK . . . . . Reporter
LANET ASMUSSEN . . . . . Clerk
JANICE WALKER . . . . . State Court Administrator

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Clay, Fillmore, Gage, Jefferson, Johnson, Nemaha, Nuckolls, Pawnee, Richardson, Saline, and Thayer	Paul W. Korslund	Beatrice
		Daniel E. Bryan, Jr.	Auburn
		Vicky L. Johnson	Wilber
Second	Cass, Otoe, and Sarpy	Randall L. Rehmeier	Nebraska City
		William B. Zastera	Papillion
		David K. Arterburn	Papillion
		Max Kelch	Papillion
Third	Lancaster	Jeffre Cheuvront	Lincoln
		Paul D. Merritt, Jr.	Lincoln
		Karen B. Flowers	Lincoln
		Steven D. Burns	Lincoln
		John A. Colborn	Lincoln
		Jodi Nelson	Lincoln
		Robert R. Otte	Lincoln
Fourth	Douglas	J. Patrick Mullen	Omaha
		John D. Hartigan, Jr.	Omaha
		Joseph S. Troia	Omaha
		Gerald E. Moran	Omaha
		Gary B. Randall	Omaha
		Patricia A. Lamberty	Omaha
		J. Michael Coffey	Omaha
		W. Mark Ashford	Omaha
		Peter C. Bataillon	Omaha
		Gregory M. Schatz	Omaha
		J Russell Derr	Omaha
		James T. Gleason	Omaha
		Thomas A. Otepka	Omaha
		Marlon A. Polk	Omaha
		W. Russell Bowie III	Omaha
		Leigh Ann Retelsdorf	Omaha

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Robert R. Steinke	Columbus
		Alan G. Gless	Seward
		Michael J. Owens	Aurora
		Mary C. Gilbride	Wahoo
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Darvid D. Quist	Blair
		John E. Samson	Fremont
		William Binkard	Dakota City
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Robert B. Ensz	Wayne
		James G. Kube	Madison
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	Mark D. Kozisek	Ainsworth
		Karin L. Noakes	St. Paul
Ninth	Buffalo and Hall	John P. Icenogle	Kearney
		James D. Livingston	Grand Island
		Teresa K. Luther	Grand Island
		William T. Wright	Kearney
Tenth	Adams, Franklin, Harlan, Kearney, Phelps, and Webster	Stephen R. Illingworth	Hastings
		Terri S. Harder	Minden
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	John P. Murphy	North Platte
		Donald E. Rowlands	North Platte
		James E. Doyle IV	Lexington
		David Urbom	McCook
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Brian C. Silverman	Alliance
		Randall L. Lippstreu	Gering
		Leo Dobrovolny	Gering
		Derek C. Weimer	Sidney

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Curtis L. Maschman	Falls City
		J. Patrick McArdle	Wilber
		Steven B. Timm	Beatrice
Second	Cass, Otoe, and Sarpy	Robert C. Wester	Papillion
		John F. Steinheider	Nebraska City
		Todd J. Hutton	Papillion
		Jeffrey J. Funke	Papillion
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Mary L. Doyle	Lincoln
		Laurie Yardley	Lincoln
		Jean A. Lovell	Lincoln
		Susan I. Strong	Lincoln
Fourth	Douglas	Stephen M. Swartz	Omaha
		Lyn V. White	Omaha
		Thomas G. McQuade	Omaha
		Edna Atkins	Omaha
		Lawrence E. Barrett	Omaha
		Joseph P. Caniglia	Omaha
		Marcena M. Hendrix	Omaha
		Darryl R. Lowe	Omaha
		John E. Huber	Omaha
		Jeffrey Marcuzzo	Omaha
		Craig Q. McDermott	Omaha
		Susan Bazis	Omaha
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Gerald E. Rouse	Columbus
		Frank J. Skorupa	Columbus
		Patrick R. McDermott	David City
		Marvin V. Miller	Wahoo
		Linda S. Caster Senff	Aurora

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	C. Matthew Samuelson	Blair
		Kurt Rager	Dakota City
		Douglas L. Luebe	Hartington
		Kenneth Vampola	Fremont
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Richard W. Krepela	Madison
		Donna F. Taylor	Madison
		Ross A. Stoffer	Pierce
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	Alan L. Brodbeck	O'Neill
		Gary G. Washburn	Burwell
		James J. Orr	Valentine
Ninth	Buffalo and Hall	David A. Bush	Grand Island
		Philip M. Martin, Jr.	Grand Island
		Gerald R. Jorgensen, Jr.	Kearney
		Graten D. Beavers	Kearney
Tenth	Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Jack R. Ott	Hastings
		Robert A. Ide	Holdrege
		Michael Offner	Hastings
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Kent E. Florom	North Platte
		Kent D. Turnbull	North Platte
		Carlton E. Clark	Lexington
		Edward D. Steenburg	Ogallala
		Anne Paine	McCook
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Charles Plantz	Rushville
		G. Glenn Camerer	Gering
		James M. Worden	Gering
		Randin Roland	Sidney
		Russell W. Harford	Chadron

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

County	Judges	City
Douglas	Douglas F. Johnson	Omaha
	Elizabeth Crnkovich	Omaha
	Wadie Thomas	Omaha
	Christopher Kelly	Omaha
	Vernon Daniels	Omaha
Lancaster	Toni G. Thorson	Lincoln
	Linda S. Porter	Lincoln
	Roger J. Heideman	Lincoln
	Reggie L. Ryder	Lincoln
Sarpy	Lawrence D. Gendler	Papillion
	Robert B. O'Neal	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

Judges	City
Michael P. Cavel	Omaha
James R. Coe	Omaha
Laureen K. Van Norman	Lincoln
Ronald L. Brown	Lincoln
J. Michael Fitzgerald	Lincoln
Michael K. High	Lincoln
John R. Hoffert	Lincoln

ATTORNEYS
Admitted Since the Publication of Volume 277

TERRI LEE ALBERHASKY
JAMES RUSSELL BARTIMUS
MICHAEL DOUGLAS BEHRENS
JASON MICHAEL BERGEVIN
SCOTT BARRETT BLAHA
MICHAEL DAVID BLANCHARD
TYLER CHRISTIAN BLOCK
SARA JANE BOCKSTADTER
JORDAN ELIZABETH BOLER
LYNDSAY NICOLE BONWELL
MATTHEW CHRISTOPHER BOYLE
KELLI NEWTON BREER
STEVEN ANTHONY BREWSTER
CHRIS NICHOLAS BRINK
HELMUT EDUARDS BRUGMAN
COURTNEY RAECHELLE BULLINS
FRANCESKA DIANE CASSELL
KATHRYN JOYCE CHEATLE
JAMES PHILLIP CLEMENTS, JR.
ELIZABETH ANNE COLARIC
JACLYN FRANCES CORNELL
CAROLYN HEIDE CURRY
JEFFERY WARD DAVIS
JUSTIN BROOKS DEMERATH
ROBERTO JAVIER DIAZ
CARRIE SCHOOMAKER DOLTON
JOHN CONRAD EHRICH
KELLY MARIE EKELER
ELIZABETH ANN ELWELL
ELIZABETH DAWN FEREBEE
LYDIA JORDAN FIEDLER
ANDREW LEE FINKLE
JESSICA LEVINE FINKLE
JOHN GORDON FORSYTHE
NATHAN KIRK FOX
JONATHAN MICHAEL FRAZER
NICHOLAS EDWARD FREEMAN
RANDI ELLEN FROUG
KEVIN PATRICK GLEASON
BLAYNE GARTH GLISSMAN II
JAMES ALAN GODDARD
RICHARD CARL GRABOW
KRISTI J. GRIESS
KRISTINA SUE GUERRERO-SISNEROZ
ERIN AMANDA GUSTAFSON
DYLAN LAYNE HANDLEY
BRADLEY RYAN HANSEN
MELINDA MARIE HANSON
MARK ROBERT HAUTZINGER
TROY LYNN HAWK
JOHN PAUL HILLEBRANDT
MARCEDA MICHELLE HILL-STARKS
HARRY ALBERT HOCH III
AMANDA LYNN HOFFMAN
DAVID AARON HOUGHTON
JULIE CARVER HUNTER
RODNEY JOSEPH JANIS
BLAKE ELLIOT JOHNSON
SEAN PAUL KELLEY
WINIFRED FLORENCE KELLEY
CHRISTOPHER BEDELL KELLY
DANIEL JOEL KERR
CHRISTOPHER DAVID KING
MANDY JEAN KING

PHILIP KEENAN KLEINE
JASON MARK LAMMLI
TIMOTHY JOSEPH LANGDON
CHRISTOPHER JON LANGPAUL
MARIA T. LIGHTHALL
AUTUMN GRACE LONG
CHRISTIN PAULINE LOVEGROVE
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BENJAMIN EDWARD MOORE
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ANDRIA LIN MUELLER
TYLER JOHN MULLEN
LINDSAY PETERSON MURRAY
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MATTHEW D'ARGY NEHER
SHELLIE MARIE NELSON
VY SONG NGUYEN
REBECCA ANN NIEMANN
KIMBERLY ANNE NORRIS
ANTHONY LEE OSBORN
ELIZABETH ERIN OSTERMAN
DARREN JOSEPH PEKNY
JESSICA LIN VINCIK PISKORSKI
KYLEE MARIE POHL
SARAH ELIZABETH PREISINGER
MATTHEW BRENDAN REILLY
VALERIE SUE RETELSDORF
JUSTIN ANDREW ROBERTS
AMANDA SEIDEL ROCKERS
LOURDES A. RODRIGUEZ DE JONGH
DAWN MICHELLE ROTH
DANIELLE LAYNE SAVINGTON
JACOB WARREN SCHAFFER
KARLTON MARK SCHMIDT
SUSAN MARIE SCHNEIDER
MARNA MICHELLE MARIE SCHULTE
BLAKE JOEL SCHULZ
NICOLE SHALLA
JAMES AUGUST SHOEMAKER
ERIC JOHN SIMPSON
MICHELLE LYNN SITORIUS
LINDSAY RENEE SNYDER
AMANDA DALENE SPRACKLEN-HOGAN
DAVID NICHOLAS STEIER
BRENT CHARLES STEPHENSON
DUSTIN JOSEPH STILES
ANDREW ERIC STOCK
ADRIENNE EVE STRECKER
MARGARET MAUREEN SULLIVAN
ANNE J. SWANDA
HANG HUE TAT
JESUS ALFREDO TENA
DEREK ALLEN TERWEY
MARIA JO THIETJE
RICHARD SHANNON THOMAS
KERI LYNN TIMMERMAN
BRIAN JOSEPH TORPY
DEENA ANN TOWNLEY
WILLIAM JAMES TROSHYNSKI
CHRISTOPHER MARK TURNER
LUKE FRANCIS VAVRICEK
OCTAVIA VERONICA VRANCUTA
GREGORY JOHN WALKLIN
GERALD ROBERT WALTERS
NATHANIEL JAMES WARNOCK
JODIE LEIGH WESTFALL
SEAN DAVID WHITE
CHRISTOPHER PHILIP WICKHAM
LESLIE A. WILBOURN
ANGELA KATHRYN WILSON

MICHAEL JOSEPH WILSON
CLINTON PAUL WOERTH
JESSICA SUE WOLFF
DYANA NICOLE WOLKENHAUER
BRADLEY EDWARD WOLTERS

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LIST OF CASES DISPOSED OF BY FILED MEMORANDUM OPINION

No. S-08-658: **State v. Knight**. Affirmed. Gerrard, J.

No. S-08-819: **Brentzel v. Peterson**. Petition for further review dismissed as having been improvidently granted. Per Curiam.

No. S-08-937: **In re Interest of William G**. Order vacated. Gerrard, J.

No. S-09-151: **State v. Lam**. Affirmed. Gerrard, J.

No. S-09-184: **Fulkerson v. Bataillon**. Peremptory writ denied. Connolly, J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

Nos. S-07-517, S-07-960: **State ex rel. Counsel for Dis. v. Peters**. Motion sustained; respondent, William C. Peters, Jr., reinstated to the practice of law in the State of Nebraska.

No. S-07-718: **State ex rel. Counsel for Dis. v. Hubbard**. Respondent reinstated to the practice of law, subject to the conditions of reinstatement set forth in the court's judgment entered November 21, 2008.

No. S-08-485: **Great West Cas. Co. v. Vanderburg**. Stipulation allowed; appeal dismissed.

No. S-08-1231: **In re Interest of Hope L. et al**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-09-195: **State v. Bao**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. S-09-212: **Finova Capital Corp. v. Carl S. Baum Druggists, Inc**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-09-272: **State v. Hernandez**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. S-09-285: **Deckard v. Board of Parole**. By order of the court, appeal dismissed for failure to file briefs.

No. S-09-291: **State v. El-Tabech**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-09-329: **State v. Garza**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-09-374: **State v. Wilson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-09-398: **State v. Carter**. Motion of appellee for summary dismissal sustained. Appeal dismissed.

No. S-09-399: **In re Trust of Hansen**. Appeal dismissed for lack of a final, appealable order.

No. S-09-401: **State v. Carter**. Motion of appellee for summary dismissal sustained.

No. S-09-585: **State v. Pope**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-09-752: **State v. Phelps-Roper**. Appeal dismissed. See, § 2-107(A)(2); *Koch v. Aupperle*, 274 Neb. 52, 737 N.W.2d 869 (2007); *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005); *State v. Pruett*, 258 Neb. 797, 606 N.W.2d 781 (2000).

No. S-09-753: **State v. Phelps-Roper**. Appeal dismissed. See, § 2-107(A)(2); *Koch v. Aupperle*, 274 Neb. 52, 737 N.W.2d 869 (2007); *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005); *State v. Pruett*, 258 Neb. 797, 606 N.W.2d 781 (2000).

No. S-09-765: **State v. Thomas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-09-812: **Jackson v. Brotherhood's Relief & Comp. Fund**. Appeal dismissed. See § 2-107(A)(2). See, also, *Kilgore v. Nebraska Dept. of Health & Human Servs.*, 277 Neb. 456, 763 N.W.2d 77 (2009).

No. S-09-842: **Watts v. Sanitary & Imp. Dist. No. 59 of Sarpy Cty**. Motion of appellee for summary dismissal sustained. See, Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009); *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007). Accordingly, cases Nos. S-09-842 and S-09-843 no longer consolidated.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-08-130: **Bacon v. DBI/SALA**. Petition of appellant for further review denied on September 23, 2009.

No. A-08-130: **Bacon v. DBI/SALA**. Petition of appellee DBI/SALA for further review denied on September 23, 2009.

No. S-08-146: **Russell v. Kerry, Inc**. Petition of appellee for further review sustained on August 26, 2009.

No. A-08-266: **Capps v. Capps**. Petition of appellant for further review denied on July 1, 2009.

No. A-08-274: **Walter C. Diers Partnership v. State**, 17 Neb. App. 561 (2009). Petition of appellant for further review denied on July 15, 2009.

No. A-08-363: **Lowe v. Lancaster Cty. Sch. Dist. 0001**, 17 Neb. App. 419 (2009). Petition of appellee for further review denied on August 26, 2009.

No. A-08-455: **Villarreal v. Tran**. Petition of appellant for further review denied on July 1, 2009.

No. A-08-526: **Thompson v. Thompson**. Petition of appellant for further review denied on November 12, 2009.

No. S-08-628: **State v. Drahota**, 17 Neb. App. 678 (2009). Petition of appellant for further review sustained on September 30, 2009.

No. A-08-717: **Gallagher v. TSCI Med. Dept**. Petition of appellant for further review denied on August 26, 2009.

No. A-08-723: **State v. Fletcher**. Petition of appellant for further review denied on November 18, 2009.

No. A-08-779: **State v. McDaniel**, 17 Neb. App. 725 (2009). Petition of appellant for further review denied on August 26, 2009.

No. A-08-837: **State v. Glassco**. Petition of appellant for further review denied on October 21, 2009.

No. A-08-883: **Kruid v. Farm Bureau Mut. Ins. Co.**, 17 Neb. App. 687 (2009). Petition of appellee for further review denied on August 26, 2009.

No. A-08-886: **Stonington Ins. Co. v. Beimdiek Ins. Agency**. Petition of appellees for further review denied on September 9, 2009.

No. A-08-898: **Bazar v. Department of Motor Vehicles**, 17 Neb. App. 910 (2009). Petition of appellee for further review denied on November 12, 2009.

No. A-08-913: **Valley Cty. Sch. Dist. 88-0005 v. Ericson State Bank**. Petition of appellant for further review denied on August 26, 2009.

No. S-08-959: **State v. Simnick**, 17 Neb. App. 766 (2009). Petition of appellant for further review sustained on September 16, 2009.

No. S-08-962: **In re Interest of Chance J.**, 17 Neb. App. 645 (2009). Petition of appellee for further review sustained on August 26, 2009.

No. A-08-981: **In re Estate of Hue**. Petition of appellants for further review denied on July 15, 2009.

No. A-08-1000: **State v. Smith**. Petition of appellant for further review denied on July 8, 2009.

No. A-08-1008: **State v. Aguilar-Moreno**, 17 Neb. App. 623 (2009). Petition of appellant for further review denied on August 26, 2009.

No. A-08-1013: **State v. Smith**, 17 Neb. App. 633 (2009). Petition of appellant for further review denied on August 26, 2009.

No. A-08-1026: **Mace-Main v. City of Omaha**, 17 Neb. App. 857 (2009). Petition of appellant for further review denied on October 21, 2009.

No. A-08-1038: **Hronek v. Tri-State By-Products**. Petition of appellant for further review denied on October 28, 2009.

No. A-08-1044: **State v. Idles**. Petition of appellant for further review denied on July 24, 2009, as untimely filed.

No. A-08-1050: **State v. Calderon**. Petition of appellant for further review denied on August 26, 2009.

No. A-08-1060: **State v. Tylka**. Petition of appellant for further review denied on October 21, 2009.

No. A-08-1063: **Jones v. Platteview Apartments**. Petition of appellant for further review denied on August 26, 2009.

No. A-08-1070: **Stobbe v. Cortinas**. Petition of appellant for further review denied on August 26, 2009.

No. A-08-1083: **State v. Bartlett**. Petition of appellant for further review denied on September 30, 2009.

No. A-08-1094: **Romano v. Cannon**. Petition of appellee for further review denied on August 26, 2009.

No. A-08-1101: **Knight v. City of Fort Calhoun**. Petition of appellee for further review denied on October 21, 2009.

No. A-08-1116: **State v. Arellano**. Petition of appellant for further review denied on July 8, 2009.

No. A-08-1145: **In re Interest of Roman C**. Petition of appellant for further review denied on July 15, 2009.

No. A-08-1150: **In re Interest of Tayla R.**, 17 Neb. App. 595 (2009). Petition of appellant for further review denied on July 1, 2009.

No. A-08-1151: **In re Interest of Lea D.**, 17 Neb. App. 595 (2009). Petition of appellant for further review denied on July 1, 2009.

No. A-08-1206: **Chipman v. Chipman**. Petition of appellant for further review denied on September 16, 2009.

No. A-08-1217: **In re Interest of N.R. et al**. Petition of appellant for further review denied on August 26, 2009.

No. A-08-1217: **In re Interest of N.R. et al**. Petition of appellee N.R. for further review denied on August 26, 2009.

No. A-08-1223: **Rockhold v. KL and DC Corp**. Petition of appellant for further review denied on September 9, 2009.

No. A-08-1268: **Wilson v. Neth**, 18 Neb. App. 41 (2009). Petition of appellant for further review denied on November 18, 2009.

No. A-08-1272: **Mengedoht v. Blick**. Petition of appellant for further review denied on October 21, 2009.

No. A-08-1319: **State v. Doyle**. Petition of appellant for further review denied on August 26, 2009.

No. A-08-1320: **State v. Peeks**. Petition of appellant for further review denied on August 24, 2009, as untimely filed.

No. A-08-1324: **Capital One Bank v. Gember**. Petition of appellant for further review denied on August 26, 2009.

No. A-08-1326: **Durham v. City of Lincoln**. Petition of appellant for further review denied on November 18, 2009.

No. A-08-1332: **Lopez v. M.G. Waldbaum Co**. Petition of appellant for further review denied on September 9, 2009.

No. A-08-1337: **State v. Wilson**, 17 Neb. App. 846 (2009). Petition of appellant for further review denied on September 30, 2009.

No. A-09-007: **State v. Croft**. Petition of appellant for further review denied on August 26, 2009.

Nos. A-09-044, A-09-045: **State v. Wait**. Petitions of appellant for further review denied on August 26, 2009.

No. A-09-065: **State v. Porter**. Petition of appellant for further review denied on August 26, 2009.

No. A-09-069: **State v. Fuller**. Petition of appellant for further review denied on July 1, 2009.

No. A-09-070: **In re Interest of Leslie S. et al.**, 17 Neb. App. 828 (2009). Petition of appellant for further review denied on September 23, 2009.

No. A-09-074: **State v. Guerrero**. Petition of appellant for further review denied on November 12, 2009.

No. A-09-092: **State v. Martin**. Petition of appellant for further review denied on July 15, 2009.

No. A-09-105: **In re Interest of Louis S. et al.**, 17 Neb. App. 867 (2009). Petition of appellant for further review denied on October 28, 2009.

No. A-09-105: **In re Interest of Louis S. et al.**, 17 Neb. App. 867 (2009). Petition of appellee Carmela F. for further review denied on October 28, 2009.

No. A-09-108: **State v. Pope**. Petition of appellant pro se for further review denied on August 26, 2009.

No. A-09-126: **State v. Bayone**. Petition of appellant for further review denied on September 9, 2009.

No. A-09-146: **State v. Ducharme**. Petition of appellant for further review denied on August 26, 2009.

No. A-09-149: **State v. Braun**. Petition of appellant for further review denied on September 9, 2009.

No. A-09-201: **State v. Sherrod**. Petition of appellant for further review denied on September 16, 2009.

No. A-09-206: **State v. Chae**. Petition of appellant for further review denied on October 21, 2009.

No. A-09-207: **In re Interest of Renee R**. Petition of appellant for further review denied on September 16, 2009.

No. A-09-207: **In re Interest of Renee R**. Petition of appellee Thomas R. for further review denied on September 16, 2009.

No. A-09-208: **In re Interest of Joey R**. Petition of appellant for further review denied on September 16, 2009.

No. A-09-208: **In re Interest of Joey R**. Petition of appellee Thomas R. for further review denied on September 16, 2009.

No. A-09-221: **State v. Roberts**. Petition of appellant for further review denied on October 21, 2009.

No. A-09-224: **In re Change of Name of Chamberlain**. Petition of appellant for further review denied on July 8, 2009.

No. A-09-229: **State v. Moen**. Petition of appellant for further review denied on October 28, 2009.

No. A-09-233: **State v. Turpen**. Petition of appellant for further review denied on August 26, 2009.

No. A-09-234: **Nebraska Equal Opp. Comm. v. Widtfeldt**. Petition of appellant for further review denied on July 21, 2009, for lack of jurisdiction.

No. A-09-237: **Taylor v. Chapman**. Petition of appellant for further review denied on September 30, 2009.

No. A-09-250: **State v. Smith**. Petition of appellant for further review denied on October 9, 2009.

No. A-09-269: **State v. Dinh**. Petition of appellant for further review denied on August 26, 2009.

No. A-09-309: **In re Interest of Malaki H**. Petition of appellant for further review denied on November 18, 2009.

No. A-09-346: **In re Interest of Marianne B**. Petition of appellant for further review denied on November 18, 2009.

No. A-09-347: **In re Interest of Joseph F**. Petition of appellant for further review denied on November 18, 2009.

No. A-09-358: **Robinson v. Thomas**. Petition of appellant for further review denied on August 26, 2009.

No. A-09-362: **State v. Jaramillo**. Petition of appellant for further review denied on October 28, 2009.

No. A-09-391: **Kubr v. Kubr**. Petition of appellant for further review denied on September 9, 2009.

No. A-09-417: **State v. Alfredson**. Petition of appellant for further review denied on November 12, 2009.

No. A-09-449: **In re Interest of Joseph B**. Petition of appellant for further review denied on July 15, 2009.

No. A-09-465: **Harris v. Harris**. Petition of appellant for further review denied on September 23, 2009.

No. A-09-479: **State v. Kurtzhals**. Petition of appellant for further review denied on October 28, 2009.

No. A-09-492: **State v. Forbes**. Petition of appellant for further review denied on November 12, 2009.

No. A-09-506: **State v. McBride**. Petition of appellant for further review denied on November 12, 2009.

No. A-09-520: **Young v. Nebraska Insurance Commissioner**. Petition of appellant for further review denied on November 12, 2009.

Nos. A-09-524, A-09-525: **State v. Argo**. Petitions of appellant for further review denied on November 12, 2009.

No. A-09-538: **State v. Tyler**. Petition of appellant for further review denied on August 26, 2009.

No. A-09-554: **Miller v. Lehman**. Petition of appellant for further review denied on November 12, 2009.

No. A-09-602: **State v. Maser**. Petition of appellant for further review denied on October 21, 2009.

No. A-09-724: **State v. Gonzalez**. Petition of appellant for further review denied on November 16, 2009. Motion to proceed in forma pauperis improvidently granted; order of November 6, 2009, vacated.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

BRUCE EVERTSON AND PERRY VAN NEWKIRK, APPELLEES, V. THE CITY OF KIMBALL ET AL., APPELLANTS.

767 N.W.2d 751

Filed July 2, 2009. No. S-08-524.

1. **Justiciable Issues.** Justiciability issues that do not involve a factual dispute present a question of law.
2. **Statutes.** Statutory interpretation is a question of law.
3. **Appeal and Error.** An appellate court resolves questions of law independently of the determination reached by the court below.
4. **Mandamus: Words and Phrases.** Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right.
5. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict. An appellate court will not disturb those findings unless they are clearly erroneous.
6. **Mandamus.** Whether to grant a writ of mandamus is within the trial court's discretion.
7. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the litigation's outcome.
8. **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.
9. **Moot Question: Appeal and Error.** Under the public interest exception to the mootness doctrine, an appellate court may review an otherwise moot case if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.
10. ____: ____. When determining whether a case involves a matter of public interest, an appellate court considers (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for future guidance of public officials, and (3) the likelihood of future recurrence of the same or a similar problem.
11. **Mandamus: Proof.** A party seeking a writ of mandamus under Neb. Rev. Stat. § 84-712.03 (Reissue 2008) has the burden to satisfy three elements: (1) The requesting party is a citizen of the state or other person interested in the examination of the public records; (2) the document sought is a public record as defined

by Neb. Rev. Stat. § 84-712.01 (Reissue 2008); and (3) the requesting party has been denied access to the public record as guaranteed by Neb. Rev. Stat. § 84-712 (Reissue 2008).

12. ____: ____. If the requesting party satisfies its prima facie claim for release of public records, the public body opposing disclosure must show by clear and convincing evidence that Neb. Rev. Stat. § 84-712.05 or § 84-712.08 (Reissue 2008) exempts the records from disclosure.
13. **Records: Words and Phrases.** Neb. Rev. Stat. § 84-712.01 (Reissue 2008) does not require a citizen to show that a public body has actual possession of a requested record. This broad definition includes any documents or records that a public body is entitled to possess, regardless of whether the public body takes possession.
14. **Records: Proof.** Under Neb. Rev. Stat. § 84-712.01 (Reissue 2008), requested materials in a private party's possession are public records if the following requirements are met: (1) The public body, through a delegation of its authority to perform a government function, contracted with a private party to carry out a government function; (2) the private party prepared the records under the public body's delegation of authority; (3) the public body was entitled to possess the materials to monitor the private party's performance; and (4) the records are used to make a decision affecting public interest.
15. **Statutes: Records: Appeal and Error.** An appellate court must narrowly construe statutory exemptions shielding public records from disclosure.
16. **Records: Police Officers and Sheriffs: Intent.** Neb. Rev. Stat. § 84-712.05(5) (Reissue 2008) applies only to investigations or examinations for the purpose of performing adjudicatory or law enforcement functions.
17. **Records: Public Officers and Employees: Intent.** Neb. Rev. Stat. § 84-712.05(5) (Reissue 2008) applies to an investigation of a public body's employees only if the investigation focuses on specifically alleged illegal acts.
18. **Attorney Fees: Appeal and Error.** An appellate court will affirm a trial court's decision awarding or denying attorney fees absent an abuse of discretion.
19. ____: ____. A party may recover attorney fees and expenses in a civil action only when a statute permits recovery or when the Nebraska Supreme Court has recognized and accepted a uniform course of procedure for allowing attorney fees.

Appeal from the District Court for Kimball County: KRISTINE R. CECAVA, Judge. Affirmed in part, and in part reversed and remanded with directions.

Randall L. Goyette and Andrea D. Snowden, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellants.

Donald J.B. Miller, of Matzke, Mattoon & Miller, L.L.C., L.L.O., for appellees.

William F. Austin, of Erickson & Sederstrom, P.C., for amicus curiae League of Nebraska Municipalities.

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

CONNOLLY, J.

I. SUMMARY

After receiving complaints alleging that police officers in Kimball, Nebraska, were engaged in racially profiling Hispanics, the mayor hired a private investigator to investigate. Later, the appellees, Kimball citizens Bruce Evertson and Perry Van Newkirk, brought a mandamus action to compel the City of Kimball, its mayor, and its city clerk (collectively the City) to disclose the investigative report. The City refused. It claimed that the report was verbal and that it had not paid for or requested a written report. It also claimed that it did not have to disclose any materials because the records fell within exemptions under the public records statutes.[1] The district court disagreed and ordered the City to disclose the records as redacted.

This appeal presents two questions:

1. Do a private investigator's written data and reports constitute public records under § 84-712.01 when the public body contractually delegated its investigative authority to the private investigators?

2. Are these requested materials, even if public records, exempt from disclosure under three separate provisions of § 84-712.05?

II. BACKGROUND

In July 2005, Gregory Robinson, the mayor of Kimball, attended a meeting with members of Forward Kimball Industries, a private economic development corporation. At the meeting, members complained that the City's police department was targeting the members' Hispanic or minority employees. Newkirk and Evertson were business partners; Evertson attended the meeting. Most of the complaints focused on Officer Sharon Lewis, and the members demanded that Robinson terminate Lewis' employment.

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[1] Neb. Rev. Stat. §§ 84-712 to 84-712.09 (Reissue 2008).

Because of the complaints made at the meeting, Robinson put Lewis on administrative leave and decided to investigate. The Nebraska State Patrol declined to conduct the investigation, and Robinson did not ask the sheriff's office because he wanted an independent investigator from outside the city. So Robinson hired Robert Miller, an attorney and investigator from Colorado. Miller then hired Bill Tidyman and Aaron Sanchez to help.

Robinson instructed the investigators to mainly investigate the specific allegations against Lewis and also to review the police department's treatment of minorities. In November 2005, Robinson and the city attorney met with the investigators. The team's verbal report confirmed some earlier allegations. The verbal report resulted in the City's terminating Lewis' employment. Robinson stated that he had not seen, nor did the investigation team give him, any notes or copies. And Robinson declined to order a final written report documenting the team's recommendations. He stated that the report would have cost $5,000 to $6,000 and that the investigation costs had already exceeded expectations. The City paid about $26,000 for the investigation.

The appellees knew from conversations with Sanchez that he was preparing a report for Tidyman. The appellees demanded a copy of the Tidyman report, in part, to defend themselves against Lewis' federal lawsuit. The suit alleged a conspiracy to terminate Lewis' employment, and the appellees believed that the report would show that no conspiracy existed. The City responded that no report meeting the appellees' description existed.

1. Appellees File a Mandamus Petition

In March 2006, the appellees sought a writ of mandamus ordering the City to disclose the Tidyman report. The City answered that it had only a verbal report and that it had not requested or paid for a written report. It also affirmatively alleged exemptions under § 84-712.05(4), (5), and (7) of the public records statutes.

Later, in response to a deposition subpoena, Tidyman elected to file with the court the sealed documents in his possession

and an accompanying affidavit. The court had ordered the investigators to seal any discovered reports and submit them to the court. It further ordered that the parties should not review them until the court decided whether to order disclosure.

At trial on the mandamus petition, the court stated that Tidyman's submitted documents contained his interview notes that he had typed for Miller but did not include a report that he would have provided to the City. Later, the appellees discovered that Sanchez had produced a final written report for Miller. His report summarized his findings based on 30 or more interviews and the City's arrest statistics. He agreed to mail his sealed report to the court for review.

2. Court Determines That Documents Are Public Records

In January 2008, the court issued an order directing the City to produce the Sanchez report. It found that Miller had hired Tidyman & Associates to conduct the investigation and that Tidyman & Associates had hired Sanchez to do the interviewing. The court further found that because of their investigation, the City terminated Lewis' employment. The court also found that the City had falsely asserted that no written report existed. The court noted that the documents were produced as part of the investigation. It stated that the City had paid for the investigative documents, received the information, and knew that the documents existed. It concluded that the documents were therefore public records and that none of the raised statutory exemptions applied.

3. Court Publicizes Sanchez Report in Its Order to Disclose and Gives Appellees Access to All Documents

The court ordered the City to produce Sanchez' written report. It also redacted names from the Sanchez report and attached it to its order. It also ordered that upon request, the appellees and their counsel could review in chambers other documents submitted by Tidyman and Sanchez, because Lewis had sued them in an action arising from the facts surrounding the investigation. Following this order, the court granted the appellees' motion for attorney fees.

III. ASSIGNMENTS OF ERROR

The City assigns that the district court erred in (1) determining that the documents the appellees sought were public records belonging to the City; (2) failing to determine that § 84-712.05(4), (5), and (7) exempted the documents from disclosure; and (3) awarding attorney fees and finding that $23,192.51 in attorney fees was a reasonable amount.

IV. STANDARD OF REVIEW

[1-3] Justiciability issues that do not involve a factual dispute present a question of law.[2] And statutory interpretation is a question of law.[3] We resolve questions of law independently of the determination reached by the court below.[4]

[4-6] Mandamus is a law action, and we have defined it as an extraordinary remedy, not a writ of right.[5] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict. We will not disturb those findings unless they are clearly erroneous.[6] Whether to grant a writ of mandamus is within the trial court's discretion.[7]

V. ANALYSIS

1. Mootness

The appellees contend that the court's order that disclosed the investigative materials renders the appeal moot because the court published the contents of the Sanchez report and granted them access to the other requested documents. They contend that the public interest exception to the mootness doctrine does not apply because the recurrence of this fact will likely not occur again. The City disagrees. It contends that we have an

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[2] See *In re Interest of Anaya*, 276 Neb. 825, 758 N.W.2d 10 (2008).

[3] *In re Estate of Chrisp*, 276 Neb. 966, 759 N.W.2d 87 (2009).

[4] See *Pennfield Oil Co. v. Winstrom*, 276 Neb. 123, 752 N.W.2d 588 (2008).

[5] See *State ex rel. Johnson v. Gale*, 273 Neb. 889, 734 N.W.2d 290 (2007).

[6] See, *Albert v. Heritage Admin. Servs.*, 277 Neb. 404, 763 N.W.2d 373 (2009); *Krolikowski v. Nesbitt*, 257 Neb. 421, 598 N.W.2d 45 (1999).

[7] See *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002).

opportunity to prevent further disclosure of these records and give guidance to public bodies faced with similar requests. They argue we should apply the public interest exception.

[7,8] A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the litigation's outcome.[8] Although mootness does not prevent appellate jurisdiction, it is a justiciability doctrine that can prevent courts from exercising jurisdiction.[9]

[9,10] But under the public interest exception, we may review an otherwise moot case if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.[10] And when determining whether a case involves a matter of public interest, we consider (1) the public or private nature of the question presented, (2) the desirability of an authoritative adjudication for future guidance of public officials, and (3) the likelihood of future recurrence of the same or a similar problem.[11]

This appeal presents valid reasons for applying the public interest exception. As these facts show, we can foresee a public body hiring a private investigator to conduct an internal investigation of its officials' or employees' activities to eliminate any appearance of impartiality. Giving guidance to courts and public bodies for future cases warrants our review of the issues. Thus, the case falls within the public interest exception.

2. Burdens of Proof

[11,12] A party seeking a writ of mandamus under § 84-712.03 has the burden to satisfy three elements: (1) The requesting party is a citizen of the state or other person interested in the examination of the public records; (2) the document sought is a public record as defined by § 84-712.01; and (3) the requesting party has been denied access to the public record as guaranteed

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[8] See *In re Interest of Taylor W.*, 276 Neb. 679, 757 N.W.2d 1 (2008).

[9] See *id.*

[10] *In re Interest of Anaya, supra* note 2.

[11] *Id.*

by § 84-712.[12] If the requesting party satisfies its prima facie claim for release of public records, the public body opposing disclosure must show by clear and convincing evidence that § 84-712.05 or § 84-712.08 exempts the records from disclosure.[13] Regarding the appellees' burden of proof as the requesting parties, the parties dispute only the second element.

3. What Constitutes a Public Record?

The City contends that the court erred in finding that the documents sought by the appellees were public records. It argues that the evidence showed that the documents did not belong to the City. It mainly relies on *Forsham v. Harris*,[14] a U.S. Supreme Court decision applying the federal Freedom of Information Act (FOIA).[15] Under *Forsham* and other Supreme Court interpretations of the federal act, an agency must create the records or exercise its right to obtain them before a requesting party can obtain an order for disclosure.

The appellees counter that they can distinguish *Forsham*. They contend that physical possession presents only one factor indicating ownership of records. They argue that requiring physical possession would permit governmental entities to easily avoid disclosing records by simply declining to take possession of them. So the initial question we address is whether Nebraska's statutes require physical possession of the requested materials.

(a) Nebraska's Definition of Public Records

Section 84-712.01(1) defines public records in Nebraska:

> [P]ublic records shall include all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or

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[12] See *State ex rel. Neb. Health Care Assn. v. Dept. of Health*, 255 Neb. 784, 587 N.W.2d 100 (1998).

[13] See *id.*

[14] *Forsham v. Harris*, 445 U.S. 169, 100 S. Ct. 977, 63 L. Ed. 2d 293 (1980).

[15] See 5 U.S.C. § 552 (2006).

> tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing. Data which is a public record in its original form shall remain a public record when maintained in computer files.

The reference to "data" in the last sentence shows that the Legislature intended public records to include a public body's component information, not just its completed reports or documents. In addition, § 84-712.01(3) requires that courts liberally construe the public records statutes for disclosure when a public body has expended its funds.

The City argues that the "of or belonging to" language in § 84-712.01 means a public body must have ownership of, as distinguished from a right to obtain, materials in the hands of a private entity. But the City's narrow reading of the statute would often allow a public body to shield records from public scrutiny. It could simply contract with a private party to perform one of its government functions without requiring production of any written materials.

[13] Section 84-712.01 does not require a citizen to show that a public body has actual possession of a requested record. Construing the "of or belonging to" language liberally, as we must, this broad definition includes any documents or records that a public body is entitled to possess—regardless of whether the public body takes possession. The public's right of access should not depend on where the requested records are physically located. Section 84-712.01(3) does not permit the City's nuanced dance around the public records statutes.

As noted, however, the City urges us to follow the U.S. Supreme Court's decision in *Forsham*. We have previously analogized decisions under the federal FOIA to construe Nebraska's public records statutes.[16] But a close look at *Forsham* provides little guidance. We believe a critical distinction exists between the judicial construction of the FOIA and § 84-712.01: The FOIA does not define the operative term, and Nebraska's definition of public records is less restrictive than the judicial

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[16] See *State ex rel. Neb. Health Care Assn., supra* note 12.

qualifiers that the Supreme Court has imposed for disclosure under the FOIA.

The FOIA defines "record" as "any information that would be an agency record."[17] It does not define "agency record." And a court can only "order the production of any agency records improperly withheld."[18] The U.S. Supreme Court has stated that the word "'withhold' . . . presupposes the actor's possession or control of the item withheld."[19] The Court has held that two requirements must be satisfied to show that requested materials qualify as agency records: (1) The agency must "'create or obtain'" the requested materials and (2) "the agency must be in control of the requested materials at the time the FOIA request is made. [Control means] that the materials have come into the agency's possession in the legitimate conduct of its official duties."[20]

In contrast to the U.S. Supreme Court's judicial "create or obtain" definition—with its attendant possession requirement—the Nebraska Legislature more broadly defined public records to include documents or records "of or belonging to" a public body. And remember, nothing in § 84-712.01 requires a public body to have actual possession of a requested record. Further, *Forsham* simply does not address disclosure when a public body contractually delegates a governmental function to a private party and decides not to take possession of the written records. To determine whether a Nebraska public body is entitled to records in a private party's possession for purposes of disclosure, we look to other state court decisions.

(b) Functional Equivalency Tests

In recent years, many state courts confronted the interplay of privatization of governmental duties and statutory requirements for access to public records. Some states have statutory

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[17] 5 U.S.C. § 552(f)(2).

[18] 5 U.S.C. § 552(a)(4)(B).

[19] *Kissinger v. Reporters Committee*, 445 U.S. 136, 151, 100 S. Ct. 960, 63 L. Ed. 2d 267 (1980).

[20] *Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-45, 109 S. Ct. 2841, 106 L. Ed. 2d 112 (1989).

provisions that preclude a public body from intentionally or unintentionally circumventing public records statutes by delegating public duties to private parties.[21] As the Iowa Supreme Court has noted, its statutory provision prevents government agencies from accomplishing indirectly what they are prohibited from doing directly—avoiding disclosure.[22]

Many courts have adopted functional equivalency tests for determining whether records in a private party's possession should be disclosed. Many of these tests provide stringent requirements before ordering disclosure. Some of these tests require a requesting party to show that the private party functions as a hybrid public/private entity: an entity created by, funded by, and regulated by the public body.[23] These tests appear appropriate when a private entity performs an ongoing government function. But requiring citizens to show that a private party functions as a hybrid government entity creates a loophole that would often allow public bodies to evade public records laws. As we know, public bodies often contract with independent contractors to provide government services.

We agree with other courts that public records laws should not permit scrutiny of all a private party's records simply because it contracts with a government entity to provide services. But we prefer the Ohio Supreme Court's test, which applies to a broader range of circumstances. For a private entity's records to fall within Ohio's public records act, three requirements must be satisfied: (1) The private entity must prepare the records to carry out a public office's responsibilities; (2) the public office must be able to monitor the private entity's performance; and (3) the public office must have access to the records for this

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[21] See, *News and Sun-Sentinel v. Schwab, et al.*, 596 So. 2d 1029 (Fla. 1992); *Gannon v. Board of Regents*, 692 N.W.2d 31 (Iowa 2005).

[22] *KMEG Tele. v. Iowa State Bd. of Regents*, 440 N.W.2d 382 (Iowa 1989), *abrogated on other grounds, Gannon, supra* note 21.

[23] See, e.g., *Connecticut Humane Soc. v. FOIC*, 218 Conn. 757, 591 A.2d 395 (1991); *Marks v. McKenzie High School Fact-Finding Team*, 319 Or. 451, 878 P.2d 417 (1994); *Memphis Publishing v. Cherokee Children*, 87 S.W.3d 67 (Tenn. 2002).

purpose.[24] The court concluded, "[G]overnmental entities cannot conceal information concerning public duties by delegating these duties to a private entity."[25]

[14] We agree. Section 84-712.01(3) does not permit public bodies to conceal public records by delegating their duties to a private party. Accepting the City's argument would mock the spirit of open government. We conclude that the Ohio Supreme Court's test appears to be the most consistent with § 84-712.01's broad definition of public records, and we adapt it to determine whether a public body is entitled to documents in a private party's possession for purposes of disclosure. Specifically, under § 84-712.01, requested materials in a private party's possession are public records if the following requirements are met: (1) The public body, through a delegation of its authority to perform a government function, contracted with a private party to carry out the government function; (2) the private party prepared the records under the public body's delegation of authority; (3) the public body was entitled to possess the materials to monitor the private party's performance; and (4) the records are used to make a decision affecting public interest.

Here, the mayor delegated to Miller's team his authority to investigate allegations of wrongdoing by public officials and set the boundaries of the investigation. The investigators created the records under the City's delegated authority, and the information contained therein proved essential to the mayor's decision in terminating a public official. The City does not claim that the mayor did not have the right to obtain copies of the investigators' records to monitor their performance. And any claim to the contrary lacks credibility—the City having paid $26,000 for this information. The mayor admitted that he terminated Lewis' employment because of the information. Thus, the district court was not clearly wrong in finding that the records belonged to the City and that it relied on the information in the reports, even if it declined to take possession of the materials or pay for a final written report documenting

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[24] *State ex rel. v. Krings*, 93 Ohio St. 3d 654, 758 N.E.2d 1135 (2001).

[25] *Id.* at 659, 758 N.E.2d at 1140.

the team's recommendations. We conclude that the investigators' written reports and documents were public records under § 84-712.01.

4. Records Were Exempt From Disclosure

The City contends that the court erred in concluding that § 84-712.05(4), (5), and (7) did not exempt requested materials. We agree that the court erred in failing to conclude that § 84-712.05(5) exempted the investigatory records. Thus, we do not decide whether they were also exempt under § 84-712.05(4) or (7).

[15] As noted, the Legislature intended that courts liberally construe §§ 84-712 to 84-712.03 for disclosure whenever a public body expends public funds.[26] Because the Legislature has expressed a strong public policy for disclosure, we must narrowly construe statutory exemptions shielding public records from disclosure.[27]

Under § 84-712.05(5), public bodies have discretion to withhold the following materials:

> Records developed or received by law enforcement agencies and other public bodies charged with duties of investigation or examination of persons, institutions, or businesses, when the records constitute a part of the examination, investigation, intelligence information, citizen complaints or inquiries, informant identification, or strategic or tactical information used in law enforcement training, except that this subdivision shall not apply to records so developed or received relating to the presence

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[26] See § 84-712.01(3).

[27] See, e.g., *Department of Interior v. Klamath Water Users Protective Assn.*, 532 U.S. 1, 121 S. Ct. 1060, 149 L. Ed. 2d 87 (2001); *Young v. Rice*, 308 Ark. 593, 826 S.W.2d 252 (1992); *County of Santa Clara v. Superior Court*, 170 Cal. App. 4th 1301, 89 Cal. Rptr. 3d 374 (2009); *Herald Co v Bay City*, 463 Mich. 111, 614 N.W.2d 873 (2000); *Colby v. Gunson*, 224 Or. App. 666, 199 P.3d 350 (2008); *Trombley v. Bellows Falls Union H.S. Dist. No. 27*, 160 Vt. 101, 624 A.2d 857 (1993); *Brouillet v. Cowles Publishing Co.*, 114 Wash. 2d 788, 791 P.2d 526 (1990). Compare, *State ex rel. Upper Republican NRD v. District Judges*, 273 Neb. 148, 728 N.W.2d 275 (2007); *Grein v. Board of Education*, 216 Neb. 158, 343 N.W.2d 718 (1984).

> of and amount or concentration of alcohol or drugs in any body fluid of any person.

Here, the court ruled that the investigatory records exemption did not apply because (1) Robinson and Kimball are not "'law enforcement agencies'" or "'other public bodies charged with duties of investigation or examination'" and (2) the investigation was not a criminal justice or regulatory investigation. But the City contends that the records here are exempt under our two-part test for investigatory records set out in *State ex rel. Neb. Health Care Assn*.[28]

In *State ex rel. Neb. Health Care Assn.*, we modified a standard used by federal courts that determined whether an agency can withhold records under exemption 7 of the federal FOIA.[29] Under specified conditions, exemption 7 allows agencies to withhold "records or information compiled for law enforcement purposes." In determining whether a public body compiled records "for law enforcement purposes," some federal courts apply a two-part test. First, the agency's investigatory activities must relate to the enforcement of laws or the maintenance of national security. Second, the relationship between the investigation and one of the agency's law enforcement duties must sufficiently support at least a colorable claim of its rationality.[30]

We modified the two-part test in *State ex rel. Neb. Health Care Assn*. to also apply to a public body's investigatory records. There, we defined investigatory records:

> [A] public record is an investigatory record where (1) the activity giving rise to the document sought is related to the duty of investigation or examination with which the public body is charged and (2) the relationship between the investigation or examination and that public body's duty to investigate or examine supports a colorable claim of rationality.[31]

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[28] *State ex rel. Neb. Health Care Assn., supra* note 12.

[29] See 5 U.S.C. § 552(b)(7).

[30] See *State ex rel. Neb. Health Care Assn., supra* note 12.

[31] *Id.* at 792, 587 N.W.2d at 106.

The two-part test provides a deferential burden-of-proof rule for a public body performing an investigation or examination with which it is charged. But, as we recognized in *State ex rel. Neb. Health Care Assn.*, the investigatory exception does not apply to protect material compiled ancillary to an agency's routine administrative functions or oversight activities.[32] Federal courts have held that exemption 7 applies only when the investigation involves an agency's investigation of "non-agency personnel and of activities external to the agency's own operations"[33] and only when the agency aims its investigation with special intensity on a particular party.[34] Exemption 7 does not apply to material compiled during internal agency investigations in which an agency, acting as the employer, simply supervises its own employees. Exemption 7 does not cover this matter even if the investigation of internal activities reveals evidence that could later cause a law enforcement investigation.[35] If the exemption covered all monitoring of employees' activities, the exemption would swallow the disclosure rule.

As the District of Columbia Circuit Court of Appeals has explained, "Any internal auditing or monitoring conceivably could result in disciplinary action, in dismissal, or indeed in criminal charges against the employees."[36] But exempting all internal audits from disclosure would permit the exemption to defeat the purpose of the public records laws—"to provide public access to information concerning the Government's own activities."[37] The government must therefore show that the agency compiled the investigatory records for adjudicatory or enforcement purposes and not general agency monitoring of

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[32] See *id.*

[33] *Stern v. F.B.I.*, 737 F.2d 84, 89 (D.C. Cir. 1984). See, *Rosenfeld v. U.S. Dept. of Justice*, 57 F.3d 803 (9th Cir. 1995); *Pratt v. Webster*, 673 F.2d 408 (D.C. Cir. 1982).

[34] See *State ex rel. Neb. Health Care Assn., supra* note 12.

[35] *Stern, supra* note 33, citing *Rural Housing Alliance v. United States Dept. of Agr.*, 498 F.2d 73 (D.C. Cir. 1974). See, also, *Kimberlin v. Department of Justice*, 139 F.3d 944 (D.C. Cir. 1998).

[36] *Rural Housing Alliance, supra* note 35, 498 F.2d at 81.

[37] *Id.*

its programs and employees.[38] And "'[a]n agency's investigation of its own employees is for "law enforcement purposes" only if it focuses "directly on specifically alleged illegal acts, acts which could, if proved, result in civil or criminal sanctions."'"[39]

[16,17] We agree that an investigation of a public body's employee is "for law enforcement purposes" if the alleged acts could result in a civil or criminal sanction. Although § 84-712.05(5) does not refer to law enforcement purposes, it does refer to law enforcement agencies and public bodies charged with investigating or examining persons, institutions, or businesses. We interpret this language to mean investigations or examinations for performing adjudicatory or law enforcement functions. Otherwise, the exemption could exempt a broad spectrum of materials that included records related to official misconduct or general government activity. A broad interpretation of the exemption would be inconsistent with the Legislature's policy for disclosure. For the same reason, we also agree that § 84-712.05(5) should apply to an investigation of a public body's employees only if the investigation focuses on specifically alleged illegal acts.

Here, the complaints focused on racial profiling, an illegal act. Nebraska statutes prohibit racial profiling. Neb. Rev. Stat. § 20-502 (Reissue 2007) provides that no "law enforcement agency in this state shall engage in racial profiling." Yet, the Legislature has not enacted any criminal sanctions for this statute or authorized any state agency to investigate allegations of racial profiling.[40] Thus, the only means the City had to enforce the statute arose from Robinson's supervisory power to investigate the job performance of the City's law enforcement officials. Robinson, as the mayor, had statutory responsibility to ensure that the City complied with all governing laws and had the power to remove police officers.[41] Although Robinson's

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[38] *Patterson v. I.R.S.*, 56 F.3d 832 (7th Cir. 1995); *Stern, supra* note 33.

[39] *Patterson, supra* note 38, 56 F.3d at 837, quoting *Stern, supra* note 33.

[40] See Neb. Rev. Stat. §§ 20-501 to 20-506 (Reissue 2007).

[41] See Neb. Rev. Stat. §§ 17-107(1) and 17-110 (Reissue 2007).

investigation overlapped with his supervisory powers, the City was not monitoring its employees. The investigation concentrated on racial profiling and specifically zeroed in on allegations of racial profiling by Lewis. These allegations, if proved, would constitute a violation of law. We concede that the investigation could not have resulted in civil or criminal sanctions because the Legislature has not enacted enforcement provisions for racial profiling. But we conclude that the mayor's purpose in initiating the investigation was nonetheless for enforcement of the law. Because the statutes charged the mayor as the City's representative to ensure that the City complied with governing laws, we determine that the court erred in concluding that the investigatory records exemption under § 84-712.05(5) did not apply.

5. Attorney Fees Were Not Authorized

[18,19] Finally, the City contends that the court erred in awarding attorney fees. We will affirm a trial court's decision awarding or denying attorney fees absent an abuse of discretion.[42] A party may recover attorney fees and expenses in a civil action only when a statute permits recovery or when we have recognized and accepted a uniform course of procedure for allowing attorney fees.[43]

Section 84-712.07 specifically authorizes attorney fees only when the requesting party has substantially prevailed. Having determined that the court erred in failing to conclude that § 84-712.05(5) exempted the requested records, the appellees have not substantially prevailed. We conclude that the court erred in awarding the appellees an attorney fee under § 84-712.07.

VI. CONCLUSION

We determine that the district court did not err in determining that the requested materials were public records under § 84-712.01. But, we conclude that the court did err in failing

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[42] See *State ex rel. Stenberg v. Consumer's Choice Foods*, 276 Neb. 481, 755 N.W.2d 583 (2008).

[43] See *Simon v. City of Omaha*, 267 Neb. 718, 677 N.W.2d 129 (2004).

to rule that § 84-712.05(5) allowed the City to withhold the records from disclosure. Further, because an exemption applied, the requesting parties did not substantially prevail and the court erred in awarding attorney fees under § 84-712.07. We therefore affirm in part, and in part reverse and remand the cause with directions for the district court to enter an order consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

SHARI ERICKSON AND GEORGE ERICKSON, APPELLANTS, V. U-HAUL INTERNATIONAL, DOING BUSINESS AS U-HAUL COMPANY, A CORPORATE DEFENDANT, AND U-HAUL CENTER OF N.W. OMAHA, APPELLEES.

767 N.W.2d 765

Filed July 2, 2009. No. S-08-759.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.
3. **Jurisdiction: States.** When there are no factual disputes regarding state contacts, conflict-of-law issues present questions of law.
4. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
5. **Rules of Evidence: Appeal and Error.** 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.
6. **Trial: Evidence: Appeal and Error.** A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of abuse of discretion.
7. **Jurisdiction: States.** In answering any choice-of-law question, the court first asks whether there is any real conflict between the laws of the states.
8. ____: ____. In conflict-of-law analysis, an actual conflict exists when a legal issue is resolved differently under the law of two states.

9. **Jurisdiction: States: Torts.** In conflict-of-law analysis, the "most significant relationship" test is used to determine the applicable law for specific tort claim issues.
10. **Jurisdiction: States.** In choice-of-law analysis, the law of the site of the injury is usually applied to determine liability, except where another state has a more significant relationship on a particular issue.
11. **Damages: Marriage: Words and Phrases.** Damages for loss of consortium represent compensation for a spouse who has been deprived of rights to which he or she is entitled because of the marriage relationship, namely, the other spouse's affection, companionship, and assistance and particularly his or her conjugal society.
12. **Claims: Marriage.** Although loss of consortium is a personal legal claim which is separate and distinct from those claims belonging to the injured spouse, a loss of consortium claim derives from the harm suffered by the injured spouse.
13. ____: ____. In a loss of consortium claim, the rights of recovery by the uninjured spouse are based upon the injured spouse's right to recover for direct injuries. Not only must there be an injury to the injured spouse, but also there must be a compensable injury, that is, an injury for which the defendant is liable.
14. **Evidence: Words and Phrases.** Relevant evidence is that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed.

P. Shawn McCann, of Sodoro, Daly & Sodoro, P.C., for appellants.

Ronald F. Krause, of Cassem, Tierney, Adams, Gotch & Douglas, and K. Lee Marshall and Stephen G. Strauss, of Bryan Cave, L.L.P., for appellees.

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

GERRARD, J.

This is the second time this case has come before us.[1] It remains a case about a moving day accident. Dale and Judith Carstens were moving from Walnut, Iowa, to Herman, Nebraska, and had enlisted the help of their daughter, Shari Erickson. To facilitate the move, Judith rented a U-Haul truck.

[1] See *Erickson v. U-Haul Internat.*, 274 Neb. 236, 738 N.W.2d 453 (2007).

While operating the truck, Dale accidentally pinned Shari's foot between the truck's ramp and a concrete step. As a result of the accident, Shari and her husband, George Erickson, sued U-Haul International, Inc.; U-Haul Center of N.W. Omaha (U-Haul Center); and Dale. The district court granted the defendants' motion for partial summary judgment as to the plaintiffs' statutory liability claims and directed a verdict against George's loss of consortium claim. The jury returned a verdict in favor of the defendants on the plaintiffs' remaining negligence claims.

The plaintiffs appeal, arguing that the court should not have entered judgment on their statutory liability and loss of consortium claims and that the court erred in excluding certain photographic evidence at trial. We affirm.

FACTS

Shari's mother, Judith, rented the truck from U-Haul Center, a Nebraska corporation, to move from Iowa to Nebraska. The truck, known as a 17-foot easy-loading mover, was titled in the name of "U Haul Co." Shari, a resident of Nebraska, agreed to help her parents move. While operating the truck in Iowa, Shari's father, Dale, attempted to back it up to a porch, but the loading ramp was a few inches short of the top step. Shari held the ramp up while Dale attempted to reverse the truck a few more inches. When the truck was engaged, however, it first jumped forward, throwing Shari off balance, and as Dale backed up the truck, it pinned Shari's foot between the concrete step and the truck's ramp. As a result of the injury, Shari had reconstructive surgery on her foot and was hospitalized for approximately 3 weeks.

Shari and George sued U-Haul International, U-Haul Center, and Dale for negligence. Dale has since died, and his estate is no longer a party. The Ericksons also brought claims against U-Haul International for vicarious liability and statutory negligence pursuant to Neb. Rev. Stat. § 25-21,239 (Reissue 2008) or, in the alternative, Iowa Code Ann. § 321.493 (West Cum. Supp. 2008). The district court had previously entered summary judgment in favor of U-Haul International and U-Haul Center, based, respectively, on a lack of tort duty and insufficient minimum contacts with the State of Nebraska. On

appeal, we reversed both findings and remanded the cause for trial.[2]

Before trial, U-Haul International filed a motion for partial summary judgment as to the statutory negligence cause of action. After a hearing, the district court granted U-Haul International's motion for partial summary judgment, concluding that U-Haul International was not statutorily negligent because it was not the owner of the truck. The district court did not resolve the issue of whether Nebraska or Iowa law applied, but determined that Erickson could not prevail under the relevant statutes of either state.

A jury trial was held to determine the negligence claims against U-Haul International and U-Haul Center. Judith testified that she did not see any legible warning decals on the truck instructing that the ramp should not be extended while the truck was in motion. The Ericksons also introduced a number of exhibits, including exhibits 30 and 31, which were photographs of a standard U-Haul truck bumper displaying a warning decal. The general manager of the U-Haul Center identified exhibit 30 as "the warning decal above the ramp" and exhibit 31 as a "little bit sharper view of Exhibit No. 30." He testified that both exhibits were photographs of a U-Haul truck, but not the truck in question. Instead, the truck pictured in exhibits 30 and 31 was a different truck, with a different ramp, than the truck which was involved in the accident.

U-Haul objected to the exhibits on foundation and relevance grounds. In response, the Ericksons' counsel argued that although the exhibits were "not probative of at the time of the accident how the particular truck was," the exhibits were "probative of the fact that U-Haul has ramps with defective stickers on them and labels that haven't been replaced." But the district court sustained the foundation and relevance objections.

The district court received into evidence, however, a color copy of the U-Haul ramp warning decal depicted in exhibits 30 and 31. The warning sticker below the latch to the truck's rear door states, "DANGER DO NOT extend or hold ramp while vehicle is in motion. Failure to follow this warning could result

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[2] See *id.*

in serious or fatal injury." (Emphasis in original.) The district court also received into evidence copies of photographs of the actual truck, including photographs of the truck's bumper with a warning decal affixed.

U-Haul Center's shop manager testified that the truck, at all times and including the day of the accident, had an empty vehicle weight of 8,140 pounds. In addition, the assistant corporate secretary of U-Haul International testified that with each rental of a truck, such as the truck here, an insurance policy is included, providing coverage for at least the minimum financial limits for the state where the vehicle is rented.

George did not attend trial and did not testify regarding any alleged loss of consortium. Shari, however, testified that the accident affected her intimacy and relationship with George. She testified that since the accident, her husband "probably has to do more chores" and he "takes it personally" if they sleep in separate bedrooms. At the close of the Ericksons' evidence, the district court sustained U-Haul International's motion for a directed verdict on the loss of consortium claim.

The jury returned a verdict in favor of U-Haul International and U-Haul Center, upon which the court entered judgment. The Ericksons appeal.

ASSIGNMENTS OF ERROR

The Ericksons assign, restated and renumbered, that the district court erred in (1) granting U-Haul International's motion for partial summary judgment dismissing the statutory liability claim against U-Haul International; (2) dismissing, on a directed verdict, George's loss of consortium claim; and (3) excluding photographic evidence of the warning label affixed to a U-Haul loading ramp.

STANDARD OF REVIEW

[1,2] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[3] In

[3] *Thone v. Regional West Med. Ctr.*, 275 Neb. 238, 745 N.W.2d 898 (2008).

reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.[4]

[3,4] When there are no factual disputes regarding state contacts, conflict-of-law issues present questions of law.[5] The meaning of a statute is also a question of law.[6] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[7]

[5,6] 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.[8] A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of abuse of discretion.[9]

ANALYSIS

Statutory Liability

In their first assignment of error, the Ericksons contend that the district court erred in granting partial summary judgment on their statutory liability claims. The Ericksons argue that pursuant to Nebraska's § 25-21,239, U-Haul International, as owner of the truck, is jointly and severally liable for damages to the Ericksons. Alternatively, the Ericksons argue, U-Haul International is vicariously liable for Dale's negligence pursuant to Iowa's § 321.493. The district court found that U-Haul

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[4] *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008).

[5] *Johnson v. United States Fidelity & Guar. Co.*, 269 Neb. 731, 696 N.W.2d 431 (2005).

[6] *Ahmann v. Correctional Ctr. Lincoln*, 276 Neb. 590, 755 N.W.2d 608 (2008).

[7] *Steffen v. Progressive Northern Ins. Co.*, 276 Neb. 378, 754 N.W.2d 730 (2008).

[8] *Japp v. Papio-Missouri River NRD*, 273 Neb. 779, 733 N.W.2d 551 (2007).

[9] See *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008).

International was not the owner of the truck and, therefore, was not statutorily negligent under either the Nebraska or Iowa statute.

[7,8] Before addressing U-Haul International's potential statutory liability, we should first determine which state's law governs: Nebraska or Iowa. In answering any choice-of-law question, the court first asks whether there is any real conflict between the laws of the states.[10] An actual conflict exists when a legal issue is resolved differently under the law of two states.[11] Nebraska's § 25-21,239 imposes statutory liability on owners of trucks in certain situations for damages caused by operation of the truck. Section 25-21,239 states:

> The owner of any truck . . . leased for a period of less than thirty days or leased for any period of time and used for commercial purposes, shall be jointly and severally liable with the lessee and the operator thereof for any injury to or the death of any person or persons, or damage to or the destruction of any property resulting from the operation thereof in this state . . . .

Iowa's § 321.493 also imposes statutory liability upon the owner of a leased vehicle in certain situations. Section 321.493 provides:

> 1. a. Subject to paragraph "b", in all cases where damage is done by any motor vehicle by reason of negligence of the driver, and driven with the consent of the owner, the owner of the motor vehicle shall be liable for such damage. For purposes of this subsection, "owner" means the person to whom the certificate of title for the vehicle has been issued or assigned . . . .
>
> b. The owner of a vehicle with a gross vehicle weight rating of seven thousand five hundred pounds or more who rents the vehicle for less than a year under an agreement which requires an insurance policy covering at least the minimum levels of financial responsibility prescribed by law, shall not be deemed to be the owner of the vehicle for the purpose of determining financial responsibility for

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[10] *Yoder v. Cotton*, 276 Neb. 954, 758 N.W.2d 630 (2008).

[11] *Heinze v. Heinze*, 274 Neb. 595, 742 N.W.2d 465 (2007).

> the operation of the vehicle or for the acts of the operator in connection with the vehicle's operation.

After reviewing the Nebraska and Iowa statutes, we conclude that an actual conflict exists. Although both Nebraska statute § 25-21,239 and Iowa statute § 321.493 impose statutory liability upon the owner of a leased vehicle for the negligent operation of the vehicle, liability is resolved differently under each law. Specifically, Iowa's § 321.493(1)(b) provides that the owner of a vehicle shall not be statutorily liable for the acts of one who rents the vehicle for a short term, when the vehicle has a gross weight rating of 7,500 pounds or more. Another notable difference between the two statutes is that the Nebraska statute, unlike the Iowa statute, provides that the owner of the truck shall be jointly and severally liable for damages resulting from the operation of the truck *only* within the State of Nebraska.

[9] Given that the potential statutory liability of U-Haul International would be resolved differently under the two statutes, we carry out a choice-of-law analysis. In choice-of-law determinations, we often seek guidance from the Restatement (Second) of Conflict of Laws.[12] Under the Restatement, the "most significant relationship" test is used to determine the applicable law for specific tort claim issues.[13] Section 145(2) of the Restatement provides the contacts that a court should consider when determining which state has the most significant relationship to the parties and the occurrence under general conflict-of-law principles. The contacts under § 145(2) are:

> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
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> (c) the domicil[e], residence, nationality, place of incorporation and place of business of the parties, and
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> (d) the place where the relationship, if any, between the parties is centered.[14]

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[12] See *Harper v. Silva*, 224 Neb. 645, 399 N.W.2d 826 (1987).

[13] See, *Heinze, supra* note 11; Restatement (Second) of Conflict of Laws §§ 145 and 174 (1971).

[14] Restatement, *supra* note 13, § 145(2) at 414.

[10] Under the Restatement, the law of the site of the injury is usually applied to determine liability, except where another state has a more significant relationship on a particular issue.[15] The Restatement notes that in certain circumstances, vicarious liability "may also be imposed by application of the local law of some state other than that of conduct and injury."[16] In particular, vicarious liability may be imposed under the local law of the state where the relationship between the one sought to be held liable and the tort-feasor is centered.[17] Application of the local law of that state to impose vicarious liability is particularly likely if that state has some relationship to the injured plaintiff.[18] In our case, as in illustration 6 of § 174 of the Restatement, Judith rented the truck in Nebraska from the U-Haul Center, a Nebraska corporation. Judith and Dale then drove to Iowa where they met Shari, a resident of Nebraska. While in Iowa, Dale accidentally caused injury to Shari. Although the injury occurred in Iowa, the facts that the Ericksons were residents of Nebraska and that the U-Haul rental agreement was signed in Nebraska provide this state with a significantly greater relationship to the parties. Thus, we conclude that Nebraska law governs the determination of liability in the present case.

The Ericksons contend that the district court erred in granting partial summary judgment because U-Haul International, as the owner of the truck, was liable. The Ericksons argue that the certificate of title, which shows the owner of the truck as "U Haul Co.," creates an issue of fact as to whether U-Haul International was the owner of the truck. Whether U-Haul International was the owner of the truck, however, is irrelevant.

Under § 25-21,239, U-Haul International is not liable, because § 25-21,239 only creates liability for injuries or damage "resulting from the operation thereof in this state." It is

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[15] *Heinze, supra* note 11.

[16] Restatement, *supra* note 13, § 174 comment *c*. at 520.

[17] *Id.*

[18] *Id*.

undisputed that Shari's injury occurred while Dale operated the truck in Iowa. Shari's injury did not result from the operation of the truck within Nebraska, and therefore, § 25-21,239 does not apply.

We further note that even though Nebraska law is clearly applicable here, under these circumstances, U-Haul International would not be liable under Iowa law either. Based on § 321.493, an owner of a vehicle is not statutorily liable for the acts of one who rents the vehicle for less than 1 year, when the vehicle has a "gross vehicle weight rating of seven thousand five hundred pounds or more." Therefore, even if the Iowa statute applied and U-Haul International was the owner of the truck, it would not be statutorily liable under § 321.493, because the truck weighed more than 7,500 pounds and it was rented for less than a year under an agreement which required an insurance policy covering the minimum level of financial responsibility.

Considering the evidence in a light most favorable to the Ericksons, we conclude that regardless of the ownership of the truck, U-Haul International is not statutorily liable under Nebraska's § 25-21,239. Accordingly, we conclude, albeit for different reasons, that the district court did not err in granting partial summary judgment to U-Haul International.

Loss of Consortium Claim

[11-13] In their second assignment of error, the Ericksons argue that the district court erred when it dismissed, on a directed verdict, George's loss of consortium claim. Damages for loss of consortium represent compensation for a spouse who has been deprived of rights to which he or she is entitled because of the marriage relationship, namely, the other spouse's affection, companionship, and assistance and particularly his or her conjugal society.[19] Although loss of consortium is a personal legal claim which is separate and distinct from those claims belonging to the injured spouse,[20] a loss of consortium

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[19] *Simms v. Vicorp Restaurants*, 272 Neb. 744, 725 N.W.2d 406 (2006).

[20] See *id.*

claim derives from the harm suffered by the injured spouse.[21] The rights of recovery by the uninjured spouse are based upon the injured spouse's right to recover for direct injuries.[22] Not only must there be an injury to the injured spouse, but also there must be a compensable injury, that is, an injury for which the defendant is liable.[23]

In this case, George's recovery for a loss of consortium claim is dependent upon the success of Shari's underlying tort claim. Because George's right to recover for loss of consortium is derivative of his wife's claim, and she did not recover, he likewise cannot recover.

Exhibits 30 and 31

In the final assignment of error, the Ericksons contend that the trial court abused its discretion when it excluded exhibits 30 and 31, photographs of a U-Haul truck ramp with an illegible warning decal on it. The district court excluded them as irrelevant.

[14] Evidence which is not relevant is not admissible.[24] Relevant evidence is that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[25] Here, the issue before the district court was whether U-Haul International breached a duty of care to Shari by leasing a truck with inadequate warnings or failing to provide instructions regarding the use and operation of the loading ramp. Exhibits 30 and 31 depict the condition of a warning decal on a truck not involved in the accident and are not of consequence to the legal determination in this case. Such evidence is not probative as to whether U-Haul International breached a duty of care to Shari. Moreover, the district court received into evidence a color copy of the U-Haul ramp warning decal depicted in exhibits 30 and 31 and copies

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[21] See *Johnston v. State*, 219 Neb. 457, 364 N.W.2d 1 (1985).

[22] See *id.*

[23] See *id.*

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

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

of photographs of the actual truck, including photographs of the truck's bumper with a warning decal affixed. There was no abuse of discretion by the district court in excluding exhibits 30 and 31 at trial.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court in all respects.

AFFIRMED.

JOHN AHMANN AND NEBRASKA ASSOCIATION OF PUBLIC EMPLOYEES AFSCME LOCAL 61, APPELLEES, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES AND THE STATE OF NEBRASKA, APPELLANTS.

767 N.W.2d 104

Filed July 2, 2009. No. S-08-888.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments: Evidence: Words and Phrases: Appeal and Error.** An appellate court will not substitute its factual findings for those of the district court where competent evidence supports those findings. Competent evidence means evidence that tends to establish the fact in issue.
4. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
5. **Administrative Law: Courts: Appeal and Error.** In a district court's de novo review of the decision of an administrative agency, the level of discipline imposed by the agency is subject to the district court's power to affirm, reverse, or modify the decision of the agency or to remand the case for further proceedings. The district court is not required to give any deference to the findings of the agency hearing officer or the department director.
6. **Termination of Employment: Words and Phrases.** "Just cause" for dismissal is that which a reasonable employer, acting in good faith, would regard as good and

> sufficient reason for terminating the services of an employee, as distinguished from an arbitrary whim or caprice.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed.

Jon Bruning, Attorney General, and Ryan C. Gilbride for appellants.

Dalton W. Tietjen, of Tietjen, Simon & Boyle, for appellees.

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

MCCORMACK, J.

NATURE OF CASE

The Nebraska Department of Correctional Services (DCS) and the State of Nebraska appeal from the district court's order concluding that DCS terminated John Ahmann's employment without just cause, in violation of their labor agreement. DCS had made the decision to terminate Ahmann's employment after a random drug test showed the presence of marijuana in his system. Because of Ahmann's "spotless" employment record, the fact that his drug use was off duty, and his expressed willingness to stop using marijuana, the court determined that termination of employment violated the labor agreement, providing that DCS "shall not discipline an employee without just cause, recognizing and employing progressive discipline."

FACTS

Ahmann was hired by DCS in November 2002 as a receptionist. By August 2004, he was promoted to Secretary II to the deputy warden. In that position, Ahmann was responsible for filing incident reports; filing inmate grievances; maintaining those files; entering data into databases; preparing monthly reports, correspondence, and memorandums; taking meeting minutes; and other general secretarial duties.

Ahmann was a member of the Nebraska Association of Public Employees Local 61 of the American Federation of State, County and Municipal Employees (NAPE). Section 10.1

of the labor agreement between NAPE and the State governs discipline of NAPE employees:

> Discipline will be based upon just cause and will in no case be effective until the employee has received written notice of the allegations describing in detail the issue involved, the date the alleged violation took place, [and] the specific section or sections of the contract or work rules involved . . . . The Employer shall not discipline an employee without just cause, recognizing and employing progressive discipline. When imposing progressive discipline, the nature and severity of the infraction shall be considered along with the history of discipline and performance contained in the employee's personnel file.

Prior to Ahmann's termination of employment, job performance evaluations showed that Ahmann consistently exceeded the performance level expected of him. He never received an evaluation that was less than satisfactory and had never been disciplined or counseled for any misconduct. Ahmann's work performance was described as "complete and accurate." In June 2004, Ahmann was selected as employee of the month because of his dependability, efficiency, positive working relationship with the staff, and willingness to take on extra work whenever the department was short staffed.

In May 2006, Ahmann was subjected to a random urinalysis and tested positive for marijuana. The testing was part of the "Employee Drug Testing Program," policy directive 04-005. The introductory section to the directive states that DCS "has zero tolerance for illicit drug use/abuse" and that to preserve security and protect the personal safety of employees, volunteers, inmates, and the general public, employees were not permitted "to perform their duties or enter departmental facilities or offices while under the influence of alcohol, illegal drugs and/or controlled substances."

The directive states that when test results are positive, DCS has the following courses of action to consider: (1) supplemental training, (2) supervisory counseling, (3) employee assistance program referral or treatment referral to a licensed substance abuse professional, (4) performance improvement plan, or (5) disciplinary action. The Directive explains that DCS will take

disciplinary action only "for just cause, while considering any mitigating information." It further states:

> However, employees who test positive for drugs may be disciplined for any illegal actions they engage in, including possessing, manufacturing and trafficking in illegal drugs. Employees who test positive for illegal drugs may also be disciplined for failing to fully cooperate with an employer investigation, into the positive drug test, and the circumstances surrounding their drug use.

On June 1, 2006, Ahmann was suspended without pay pending an investigation into the positive urinalysis. That same date, Ahmann submitted a letter to DCS "[i]n an effort to resolve [the] issue as quickly as possible . . . ." Ahmann admitted that he had, "on occasion," used marijuana. But Ahmann explained that he had never used marijuana either before or during his work hours and had never possessed marijuana on DCS property.

Ahmann stated that he understood marijuana was against the law, but that he had "made a conscious choice to accept the civil penalty involved if [he] were to be ticketed." Possession of less than an ounce of marijuana is, for the first offense, neither a felony nor a misdemeanor—it is an infraction, punishable by a $300 fine.[1] Ahmann pointed out that failing to wear a seatbelt was also against the law, similarly punishable by a fine.[2] Ahmann denied using any other drugs.

Ahmann stated he did not believe that his "quite minimal" use of marijuana "had any negative effect on [his] performance, quality, efficiency or accuracy" at his job or that it had ever "risked the safety, security and good working order of the institution." He understood the test results could not "simply be overlooked," but hoped any disciplinary action would be the equivalent of the civil penalty he would have been subject to

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[1] See, Neb. Rev. Stat. §§ 28-416(13)(a) and 29-431 (Reissue 2008); *Miller v. Peterson*, 208 Neb. 658, 305 N.W.2d 364 (1981), *disapproved on other grounds, Jacobson v. Higgins*, 243 Neb. 485, 500 N.W.2d 558 (1993).

[2] See Neb. Rev. Stat. §§ 60-6,267 (Cum. Supp. 2008) and 60-6,268 (Reissue 2004).

had he been charged with possession. Ahmann emphasized that he wished to return to work as quickly as possible.

On June 5, 2006, Ahmann was notified he was being charged with violating article 10.2, subsections (a), (d), and (m), of the labor agreement. As relevant, article 10.2 states that appropriate disciplinary action, subject to just cause, may be taken for the following: (a) "[v]iolation of, or failure to comply, with the Labor Contract, State constitution or statute; an executive order; regulations, policies or procedures of the employing agency; or legally promulgated published rules"; (d) "[u]nlawful manufacture, distribution, dispensation, possession or use of a controlled substance or alcoholic beverage in the workplace or reporting for duty under the influence of alcohol and/or unlawful drugs"; or (m) "[a]cts or conduct which adversely affects the employee's performance and/or the employing agency's performance or function."

DCS also attached to the letter a copy of its "Drug Free Work Place Policy." The policy concerns drug abuse and use "at the work place," for which disciplinary action may be imposed. The policy also states that the possession or use of illicit drugs "in the community at large" is "in the direct conflict with the Mission of this Department." Furthermore, referring specifically to the "Code of Ethics and Conduct," the drug-free workplace policy warned employees to be aware of other regulations and policies concerning the possession and use of illicit drugs outside the workplace.

The Code of Ethics and Conduct provides, under the heading of "Personal Accountability," that "[a]n employee is expected to maintain and promote professionalism towards inmates, coworkers and the public" and that such promotion includes "exemplifying the Department's mission." More specifically, the code states that any employee who is arrested or issued a citation for a violation of the law, other than a minor traffic violation, will be subject to investigation. Further, "[a]ny alleged illegal activity on the part of the employee will be considered to have an impact on his or her ability to perform as a correctional employee and may result in immediate suspension from the job pending the outcome of any litigation." Under the more specific category of "Drug Abuse," the Code of Ethics

and Conduct specifically prohibits the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance "in [DCS'] work place" and subjects to discipline "[a]ny employee violating this policy."

A predisciplinary meeting between Ahmann and the warden, Diane Sabatka-Rine, took place on June 9, 2006. At the meeting, Ahmann questioned whether he was in fact in violation of the specific rules cited against him. He further explained that he did not think what he did was "wrong." Nevertheless, Ahmann explained that he had decided to stop using marijuana, because that would be in his best interests, and was willing to submit to followup urinalyses. He stated he did not foresee needing any assistance in quitting, pointing out that he had been able to quit in the past. Ahmann explained that he had known when the drug-free workplace policy was issued that he was taking the chance of getting caught with a positive urinalysis. Still, he did not think he actually violated the drug-free workplace policy, as written. Ahmann "apologize[d] for any inconvenience without admitting guilt."

Sabatka-Rine issued a letter terminating Ahmann's employment on June 30, 2006, citing violations of article 10.2(a) and (m) of the NAPE labor agreement. Ahmann filed a grievance with the DCS director, who issued a written decision agreeing with Sabatka-Rine's decision to terminate Ahmann's employment. In accordance with the employee grievance procedure, Ahmann appealed to the State Personnel Board (the Board).

On February 28, 2007, a hearing was held before a hearing officer appointed by the Board. The witnesses testifying at the hearing were Ahmann, Sabatka-Rine, and Keith Ernst, the human resources manager for DCS.

Ahmann again stated that he was never under the influence of marijuana while on the job. He further stated that although he "[o]ccasionally" came into contact with prison inmates, he had never accepted marijuana from an inmate or an inmate's family.

Ahmann admitted that he knew off-duty marijuana use "might" subject him to discipline. Ahmann testified he was aware of the drug-free workplace policy. But Ahmann stated that it was his understanding that even if some form of

discipline was appropriate under that policy, he did not expect it to be severe. Ahmann noted that in the policy, "discipline" was last on the list of possible DCS responses to a positive urinalysis. Ahmann thought that given his employment history, he would not be subject to discipline for a first offense. Furthermore, being aware of the progressive discipline policy, Ahmann did not believe that discharge would be appropriate for a single positive urinalysis. Ahmann explained that he knew of instances where employees actually showed up for work under the influence of alcohol and were only put on disciplinary probation.

Ahmann admitted it was his personal view that marijuana was less harmful than alcohol and that it should be legalized. Ahmann reiterated, however, that he was willing to discontinue his use of the drug in the interest of maintaining his employment. Ahmann tried to explain that it had been his intention to be honest and that he "took it like a man." But he felt that the decision to terminate his employment had been made because he was not sufficiently contrite.

Ernst testified that there was no evidence that Ahmann's off-duty marijuana use affected Ahmann's job performance. Ernst instead opined that the off-duty drug use affected DCS' ability to carry out its "mission." Sabatka-Rine elaborated that the mission of DCS related to the safety and security of the facility and that it was hypothetically possible that an employee using marijuana could be buying from someone related to an inmate or who later becomes an inmate.

Ernst and Sabatka-Rine agreed that a positive urinalysis did not automatically result in termination of employment. The disciplinary abstract showed that discipline for a positive urinalysis for marijuana had been imposed on five DCS employees between 2004 and 2006. Three incidents resulted in a disciplinary suspension, and not termination of employment. Termination of employment was imposed for Ahmann and two other employees. Sabatka-Rine explained that one of those two employees discharged had previously tested positive, but had been given a 20-day suspension after he claimed the test was the result of one bad decision at a party. After a second random test was positive for marijuana and it was apparent

that the employee had lied, Sabatka-Rine made the decision to discharge. The other employee discharged for a positive urinalysis had stood mute to his charges and had given "no indication that he was going to stop his behavior and comply with [DCS] policy."

Sabatka-Rine testified that Ahmann's wrongdoing stemmed from the positive urinalysis and not any other specific act. She determined that discharge was the proper discipline because Ahmann failed to admit guilt, expressed no regret, and minimized the severity of his infraction. Sabatka-Rine stated further that Ahmann had apparently displayed this behavior over a long period of time and had chosen to continue it despite knowing it was in violation of DCS policy. Sabatka-Rine stated that Ahmann did not leave her with any indication he would comply with DCS policy in the future.

The hearing officer concluded that Ahmann violated article 10.2(a) of the collective bargaining agreement, but that DCS had failed to prove Ahmann violated article 10.2(m). The hearing officer explained: "While it is obvious that [DCS] is and should be concerned about its employees using marijuana or other drugs, concern is not sufficient proof that an employee's use of marijuana while off-duty adversely affects the employee's work performance or [DCS'] performance or function." The hearing officer noted that, in fact, Ahmann was a dependable employee with "'above satisfactory'" performance.

The hearing officer recommended that the grievance be sustained in part and that Ahmann be reinstated but suspended for 20 days. The hearing officer concluded that DCS acted arbitrarily when it decided termination of employment was the appropriate discipline, because it did not prove that Ahmann's conduct was so egregious that progressive discipline should be ignored. Furthermore, the hearing officer found it had been established by the record that DCS had, in previous incidents, most frequently opted for a disciplinary suspension when its employees tested positive for marijuana. While DCS claimed Ahmann's attitude raised a question of whether he could be trusted to actually quit using marijuana, the hearing officer explained that this was an insufficient cause for termination

of employment, because DCS had the authority to monitor Ahmann with drug testing.

The Board voted to accept the hearing officer's findings of fact and the conclusion that Ahmann had violated article 10.2(a), but not article 10.2(m). But the Board rejected the hearing officer's conclusion that there was no just cause for termination of Ahmann's employment. Instead, the Board concluded that termination of employment was justified in light of the seriousness of the offense and Ahmann's attitude toward the same.

Ahmann appealed under the Administrative Procedure Act[3] to the district court. After a de novo review on the record, the district court reversed the Board's decision to terminate Ahmann's employment. The court concluded that while there was just cause to *discipline* Ahmann, there was not just cause for immediate *termination* of his employment. The court noted that there was no evidence Ahmann's use of marijuana "ever affected his performance on the job or in any way jeopardized the safety and security of the institution." The court concluded that "attitudes and beliefs that are contrary to those of DCS do not in and of themselves demonstrate risk of harm such that termination of employment is necessary." The court explained that this was especially true in this case, because Ahmann stated he was willing to cooperate and discontinue using marijuana. The court also considered that Ahmann had an otherwise "spotless" employment record. The court concluded that termination of employment as a sanction exceeded the nature and severity of the infraction for which it was imposed.

The court remanded the case for further proceedings to determine the appropriate sanction short of termination of employment. DCS appeals.

ASSIGNMENTS OF ERROR

DCS asserts that the district court erred (1) in finding no evidence that the positive test for marijuana use posed a risk of harm to the safety and security of the institution and (2) in finding that the imposition of termination of employment as a

[3] See Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008).

sanction exceeded the nature and severity of the infraction for which it was imposed.

STANDARD OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.[4] 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.[5]

[3] An appellate court will not substitute its factual findings for those of the district court where competent evidence supports those findings.[6] "Competent evidence" means evidence that tends to establish the fact in issue.[7]

[4] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.[8]

ANALYSIS

[5] In a district court's de novo review of the decision of an administrative agency, the level of discipline imposed by the agency is subject to the district court's power to affirm, reverse, or modify the decision of the agency or to remand the case for further proceedings.[9] The district court is not required to give any deference to the findings of the agency hearing officer or the department director.[10] In this case, the district

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[4] *Holmes v. State*, 275 Neb. 211, 745 N.W.2d 578 (2008); *Rainbolt v. State*, 250 Neb. 567, 550 N.W.2d 341 (1996).

[5] *Id.*

[6] *Rainbolt v. State, supra* note 4.

[7] *Hammann v. City of Omaha*, 227 Neb. 285, 417 N.W.2d 323 (1987).

[8] *Stejskal v. Department of Admin. Servs.*, 266 Neb. 346, 665 N.W.2d 576 (2003).

[9] *Rainbolt v. State, supra* note 4. See, also, § 84-917(5).

[10] *Trackwell v. Nebraska Dept. of Admin. Servs.*, 8 Neb. App. 233, 591 N.W.2d 95 (1999).

court determined that the immediate termination of Ahmann's employment violated the labor agreement. We hold that this decision conforms to the law and was neither arbitrary, capricious, nor unreasonable.

[6] The labor agreement requires that DCS have "just cause" for its discipline of an employee and that it recognize and employ "progressive discipline." "Just cause" for dismissal is that which a reasonable employer, acting in good faith, would regard as good and sufficient reason for terminating the services of an employee, as distinguished from an arbitrary whim or caprice.[11] Progressive discipline is not specifically defined by the agreement, but the common meaning of "progressive" is to develop "gradually," "in stages," or "step by step."[12] Both parties agree that a progressive discipline policy does not require that the employer always impose some measure short of termination of employment for a first offense.[13] However, in accordance with the terms of the labor agreement, before making the decision to terminate employment, DCS must consider "the nature and severity of the infraction . . . along with the history of discipline and performance contained in the employee's personnel file."

Considering the nature and severity of the infraction in this case, along with Ahmann's history of discipline and performance, the district court was correct to conclude that a reasonable employer, acting in good faith, would not regard the infraction as good and sufficient reason for immediate termination of Ahmann's employment. Ahmann did knowingly violate article 10.2(a) of the labor agreement, which subjects employees to discipline for violating a state statute. His positive urinalysis was sufficient, under the agreement, to show that Ahmann was in possession of marijuana, an infraction under state law.[14]

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[11] See *Stejskal v. Department of Admin. Servs., supra* note 8.

[12] Concise Oxford American Dictionary 707 (2006).

[13] See *Nebraska Dept. of Health & Human Servs. v. Williams*, 16 Neb. App. 777, 752 N.W.2d 163 (2008).

[14] See § 28-416(13)(a).

But the court was also correct to conclude that Ahmann had not violated the other subsections under which DCS had originally sought discharge. Article 10.2(d) concerned drug use "in the workplace" and was not ultimately cited as a ground for discharge. Article 10.2(m) concerned acts adversely affecting performance or function. It was neither arbitrary, capricious, nor unreasonable for the district court to find that Ahmann's use of marijuana did not affect his job performance or in any way jeopardize the safety and security of DCS.

Clearly, DCS' treatment of other employees who tested positive for marijuana shows that DCS does not consider off-duty drug use to be a per se justification for immediate discharge. In fact, the employee drug testing program specifically contemplates numerous courses of action short of discharge when test results are positive. The district court found that the decision to discharge Ahmann was based in large part on his attitude, and the court did not err in concluding that it was unreasonable for DCS to discharge Ahmann for that reason. Much of Ahmann's "attitude" stemmed from his correct assertion that he was not strictly violating all the provisions cited by DCS against him. Ahmann also failed to admit that what he had done was "wrong." But Ahmann expressed a desire and willingness to comply fully with DCS policy in the future and to cease all use of marijuana. As the district court noted, DCS has the means to monitor whether this actually occurs. To the extent that attitude is a factor in whether there is just cause for immediate discharge, the district court was not wrong to conclude that Ahmann's attitude did not significantly change the fundamental analysis that the nature and severity of Ahmann's infraction, when considered in conjunction with his positive work history, do not warrant ignoring progressive discipline.

CONCLUSION

For the foregoing reasons, we conclude that the district court did not err in remanding Ahmann's case to the Board for further proceedings to determine what sanction, short of discharge, would be appropriate.

AFFIRMED.

WRIGHT, J., participating on briefs.

SHARON H. ALLEN, APPELLANT, V. IMMANUEL MEDICAL CENTER, APPELLEE.

767 N.W.2d 502

Filed July 2, 2009. No. S-08-996.

1. **Statutes.** Statutory interpretation is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
3. **Courts: Workers' Compensation: Jurisdiction.** The jurisdiction of the compensation court over issues ancillary to a workers' compensation claim is not exclusive and thus does not prevent a district court from exercising its jurisdiction over such matters.
4. **Workers' Compensation: Judgments.** The dormancy provisions of Neb. Rev. Stat. § 25-1515 (Reissue 2008) apply to an award of the Workers' Compensation Court which is filed in a district court pursuant to Neb. Rev. Stat. § 48-188 (Cum. Supp. 2008).
5. **Workers' Compensation: Judgments: Time.** The date on which a workers' compensation award is filed in a district court pursuant to Neb. Rev. Stat. § 48-188 (Cum. Supp. 2008) is the date of judgment for purposes of computing when the judgment becomes dormant under Neb. Rev. Stat. § 25-1515 (Reissue 2008).

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

Jerold V. Fennell and Michael J. Dyer, of Dyer Law, P.C., L.L.O., for appellant.

Patrick R. Guinan, of Erickson Sederstrom, P.C., for appellee.

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

STEPHAN, J.

The issue presented by this appeal is whether an award of the Workers' Compensation Court providing for periodic disability payments which is filed in a district court pursuant to Neb. Rev. Stat. § 48-188 (Cum. Supp. 2008) may become dormant. We conclude that it may and that the date on which the award becomes dormant is computed from the date it is filed in district court.

BACKGROUND

Sharon H. Allen injured her back in 1985 during the course and scope of her employment with Immanuel Medical Center (IMC). The Nebraska Workers' Compensation Court entered an award in Allen's favor, and it was modified on rehearing on November 5, 1987. The award on rehearing provided in relevant part that Allen would recover indemnity benefits of $200 per week for temporary total disability from July 15, 1985, to October 1, 1987, and "thereafter and in addition thereto the sum of $200.00 per week for so long in the future" as she remained totally disabled. The award further provided that "[i]f [Allen's] total disability ceases, she shall be entitled to the statutory amounts of compensation for any residual permanent partial disability . . . ."

On December 10, 1987, Allen filed a certified copy of the compensation award on rehearing with the clerk of the district court for Douglas County. On June 26, 2008, Allen refiled the award in the district court and subsequently commenced garnishment proceedings against a bank, claiming that the bank held funds belonging to IMC and that IMC owed her $203,000 on the workers' compensation judgment.

IMC contested the garnishment by filing a motion to dismiss. In its motion, IMC raised nine defenses: (1) The judgment was dormant and could not be revived; (2) Allen's claim was barred by estoppel, laches, acquiescence, inexcusable neglect, and unclean hands; (3) Allen's claim was barred by waiver and estoppel; (4) Allen's claim was barred by accord and satisfaction; (5) the compensation award was a conditional judgment and thus wholly void; (6) IMC had complied with all the terms of the compensation award; (7) Allen's claim was barred by the statute of limitations; (8) Allen's claim was barred by res judicata and collateral estoppel; and (9) Allen's claim violated IMC's due process rights.

An evidentiary hearing was held on the motion. The record establishes that IMC paid Allen disability benefits pursuant to the award, with the final payment being made on April 25, 1991. On May 24, 1988, Allen was given a permanent disability rating by her physician. She returned to full-time employment in February 1989 and continued to work full time until

she retired in December 2006. It is undisputed that IMC has never filed an application in the Workers' Compensation Court to modify the terms of the original compensation award.[1] Allen made no attempt to execute on the award until commencement of the garnishment proceedings in July 2008.

The district court dismissed the garnishment action, reasoning that the award became dormant pursuant to Neb. Rev. Stat. § 25-1515 (Reissue 2008) in April 1996, 5 years after the date Allen last received a benefit payment, and that because 10 years had passed, it could no longer be revived.[2] The order did not address any of the other defenses asserted in the motion to dismiss.

Allen perfected this timely appeal, and we granted her petition to bypass the Court of Appeals.

ASSIGNMENT OF ERROR

Allen assigns, restated and consolidated, that the district court erred as a matter of law when it held that the compensation award became dormant pursuant to § 25-1515.

STANDARD OF REVIEW

[1,2] Statutory interpretation is a question of law.[3] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.[4]

ANALYSIS

The issue presented in this case involves the interplay between certain provisions of the Nebraska Workers' Compensation Act and statutory provisions pertaining to the enforcement of district court judgments. Although the case spans a time period of more than 20 years, the relevant statutory provisions have remained the same or substantially

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[1] See Neb. Rev. Stat. § 48-141 (Reissue 2004).

[2] See Neb. Rev. Stat. § 25-1420 (Reissue 2008).

[3] *In re Estate of Chrisp*, 276 Neb. 966, 759 N.W.2d 87 (2009); *In re Interest of Devin W. et al.*, 270 Neb. 640, 707 N.W.2d 758 (2005).

[4] *Gavin v. Rogers Tech. Servs.*, 276 Neb. 437, 755 N.W.2d 47 (2008); *New Tek Mfg. v. Beehner*, 275 Neb. 951, 751 N.W.2d 135 (2008).

similar. Accordingly, we will refer to the current versions of the applicable statutes.

Our starting point is § 48-188, the provision in the Nebraska Workers' Compensation Act which permits a party to file and enforce a compensation award in the district court. Section 48-188 provides in relevant part:

> Any order, award, or judgment by the Nebraska Workers' Compensation Court . . . may, as soon as the same becomes conclusive upon the parties at interest, be filed with the district court . . . . Upon filing, such order, award, or judgment shall have the same force and effect as a judgment of such district court . . . and all proceedings in relation thereto shall thereafter be the same as though the order, award, or judgment had been rendered in a suit duly heard and determined by such district court . . . .

Judgments of a district court may be enforced through the procedures set forth in chapter 25, article 15, of the Nebraska Revised Statutes. Section 25-1515 provides:

> If execution is not sued out within five years after the date of entry of any judgment that now is or may hereafter be rendered in any court of record in this state, or if five years have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment, and all taxable costs in the action in which such judgment was obtained, shall become dormant and shall cease to operate as a lien on the estate of the judgment debtor.

A dormant judgment may be revived, but only if the action to revive is "commenced within ten years after such judgment became dormant."[5]

Allen argues that a periodically payable workers' compensation award can never become dormant. Her argument rests primarily on § 48-141 and Neb. Rev. Stat. § 48-161 (Reissue 2004), two provisions of the Nebraska Workers' Compensation Act. Essentially, she argues that § 48-161 vests the Workers'

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[5] § 25-1420.

Compensation Court with exclusive jurisdiction over any compensation claim and that under § 48-141, a compensation award payable periodically continues indefinitely unless modified by the Workers' Compensation Court. She argues that because § 25-1515 is not a listed exclusion in § 48-161 from the exclusive jurisdiction of the compensation court, the Legislature has made it clear that compensation judgments payable periodically are to continue indefinitely and are not subject to the dormancy requirements of § 25-1515.

Allen's argument relies on a misinterpretation of § 48-161 and fails to consider the effect of § 48-188. The first sentence of § 48-161 confers exclusive jurisdiction on the Workers' Compensation Court by providing: "All disputed claims for workers' compensation shall be submitted to the Nebraska Workers' Compensation Court for a finding, award, order, or judgment." Here, the compensation court exercised its exclusive jurisdiction to determine Allen's entitlement to benefits when it issued the 1987 award on rehearing. The action presently before us, however, is a proceeding to enforce that compensation award, and thus, it would fall within the second sentence of § 48-161; that sentence gives the compensation court jurisdiction "to decide any issue ancillary to the resolution of an employee's right to workers' compensation benefits," with certain exceptions not applicable here.

[3,4] Contrary to Allen's argument, the Workers' Compensation Court's jurisdiction to decide ancillary issues is not exclusive. We held in *Schweitzer v. American Nat. Red Cross*[6] that the jurisdiction of the compensation court over issues ancillary to a workers' compensation claim is not exclusive and thus does not prevent a district court from exercising its jurisdiction over such matters. Allen's argument that § 48-161 fails to list § 25-1515 as an "exclusion" to the exclusive jurisdiction of § 48-161 is thus without merit. In addition, § 48-188 clearly provides that a compensation court award can be filed in the district court and that when it is, it has "the same force and effect as a judgment of such district court" and "all

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[6] *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999).

proceedings in relation thereto" shall be the same as if it were a district court judgment. When the compensation statutes are read as a whole, it is clear that even though § 48-141 gives the compensation court indefinite jurisdiction to modify a periodically payable compensation award, if such an award is filed in district court pursuant to § 48-188, it is subject to all statutes that would affect its enforcement as a district court judgment, including § 25-1515. We thus conclude that the dormancy provisions of § 25-1515 apply to an award of the Workers' Compensation Court which is filed in a district court pursuant to § 48-188.

The next step in our analysis is to determine the commencement date of the 5-year period designated in § 25-1515. The district court held that this period began to run in April 1991, when the last payment was made to Allen pursuant to the award. We find no statutory basis for calculating the dormancy period from the date of the last payment, and the parties appear to agree that the district court was incorrect. IMC argues that the 5-year period began to run on November 5, 1987, when the award was entered by the compensation court. Allen argues that if the district court filing subjects the award to dormancy, the 5-year period should run from the date each separate periodic payment is due. Alternatively, she argues that only the amount of periodic payments due on the date of filing should be affected.

IMC's argument that computation of the dormancy period should begin on the date the award was entered by the compensation court is based in part upon our opinion in *Koterzina v. Copple Chevrolet*.[7] In that case, we held that prejudgment interest on a workers' compensation award filed in district court is payable from the date that the award was entered by the compensation court. The majority reasoned that § 48-188 has a "nunc pro tunc" effect requiring the award to be treated as if it had been entered by the district court on the date it was entered by the compensation court. The dissent interpreted the statute differently, disputing the nunc pro tunc effect relied upon by the majority. The dissent concluded that "[i]t is only

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[7] *Koterzina v. Copple Chevrolet*, 249 Neb. 158, 542 N.W.2d 696 (1996).

upon filing of the workers' compensation award in the district court that interest commences."[8]

[5] The plain language of § 48-188 gives a workers' compensation award the legal effect of a district court judgment "[u]pon filing" in the district court. Until that point, the award is governed solely by the Nebraska Workers' Compensation Act, which contains no provisions for execution or dormancy. It is only "[u]pon filing" of the award in district court that "all proceedings in relation thereto shall thereafter be the same" as though the award had been originally entered by the district court.[9] We read § 48-188 to subject a compensation award to the provisions of the execution and dormancy statutes only after it is filed in the district court. We therefore disapprove *Koterzina* and hold that the date on which a workers' compensation award is filed in a district court pursuant to § 48-188 is the date of judgment for purposes of computing when the judgment becomes dormant under § 25-1515. We note that this holding is consistent with the rule that because a foreign judgment becomes the functional equivalent of a Nebraska judgment on the date it is registered in Nebraska pursuant to the Uniform Enforcement of Foreign Judgments Act, the dormancy period runs from the date of registration.[10]

We are not persuaded by Allen's argument that if the filing of an award in the district court subjects the award to dormancy, then the dormancy period should run from the date each payment is due. The argument is based upon Kansas and Georgia cases which have adopted such a rule in jurisdictions where, unlike Nebraska, periodic awards in family law cases are subject to dormancy statutes in the same manner as other judgments.[11] The Georgia Court of Appeals has extended this

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[8] *Id.* at 168, 542 N.W.2d at 703 (Wright, J., dissenting; Connolly, J., joins).

[9] § 48-188.

[10] *St. Joseph Dev. Corp. v. Sequenzia*, 7 Neb. App. 759, 585 N.W.2d 511 (1998), *overruled on other grounds, Breeden v. Nebraska Methodist Hosp.*, 257 Neb. 371, 598 N.W.2d 441 (1999).

[11] See, *Bryant v. Bryant*, 232 Ga. 160, 205 S.E.2d 223 (1974); *Wichita Fed. Sav. & Loan Ass'n v. North Rock Rd. Ltd. Partnership*, 13 Kan. App. 2d 678, 779 P.2d 442 (1989). But see *Miller v. Miller*, 153 Neb. 890, 46 N.W.2d 618 (1951).

reasoning to periodic obligations under workers' compensation awards.[12] But we find no language in either § 48-188 or the Nebraska execution statutes which would permit us to fashion such a rule. Section 48-188 refers to the filing of a single judgment or award which, upon filing in the district court, "shall have the same force and effect as *a judgment*" of the district court. (Emphasis supplied.) Section 25-1515 begins the dormancy clock on "the date of entry of any judgment." This statutory language does not permit the judicial crafting of a rule which would treat a single workers' compensation award filed in district court as multiple judgments which become dormant on different dates. For similar reasons, we reject Allen's argument that only the amount of periodic payments due at the time of filing would be affected by § 25-1515.

For these reasons, we conclude that under § 25-1515, Allen's award became dormant in December 1992, 5 years after it was first filed in the district court in December 1987. Because the judgment was not revived within 10 years after it became dormant, it could not thereafter be revived[13] and the refiling of the award in 2008 was a nullity. Although our reasoning differs somewhat from that of the district court, we agree that the judgment had become dormant prior to the commencement of the garnishment proceedings, and those proceedings were therefore properly dismissed.

CONCLUSION

For the reasons discussed, we affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., participating on briefs.

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[12] See *Taylor v. Peachbelt Properties, Inc.*, 293 Ga. App. 335, 667 S.E.2d 117 (2008).

[13] See § 25-1420.

Arleen M. Weber, appellant and cross-appellee, v. Gas 'N Shop, Inc., and Employers Mutual Companies, appellees and cross-appellants.

767 N.W.2d 746

Filed July 2, 2009. No. S-08-1105.

1. **Statutes.** Statutory interpretation is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
3. **Judgments: Final Orders: Words and Phrases.** A conditional judgment is an order purporting to be a final judgment which is dependent upon the occurrence of uncertain future events. Such a judgment is wholly void because it does not perform in praesenti and leaves to speculation and conjecture what its final effect may be.
4. **Workers' Compensation: Courts: Judgments: Limitations of Actions.** The date on which a workers' compensation award is filed in a district court pursuant to Neb. Rev. Stat. § 48-188 (Cum. Supp. 2008) is the date of the judgment for purposes of computing when the judgment becomes dormant under Neb. Rev. Stat. § 25-1515 (Reissue 2008).
5. **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.
6. ____. An appellee's argument that a lower court's decision should be upheld on grounds specifically rejected below constitutes a request for affirmative relief, and the appellee must cross-appeal in order for that argument to be considered.

Appeal from the District Court for Douglas County: Marlon A. Polk, Judge. Reversed and remanded for further proceedings.

Jerold V. Fennell and Michael J. Dyer, of Dyer Law, P.C., L.L.O., for appellant.

Jeffrey J. Blumel and Tyler P. McLeod, of Abrahams, Kaslow & Cassman, L.L.P., for appellees.

Heavican, C.J., Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

Stephan, J.

This appeal presents legal issues decided in *Allen v. Immanuel Med. Ctr.*[1] Applying the principles of that case, we conclude

[1] *Allen v. Immanuel Med. Ctr., ante* p. 41, 767 N.W.2d 502 (2009).

that the workers' compensation award which is the subject of this appeal was not dormant when garnishment proceedings were commenced. We therefore reverse, and remand for further proceedings.

BACKGROUND

Arleen M. Weber filed a workers' compensation action alleging that she sustained a compensable injury to her right knee while employed by Gas 'N Shop in March 1991. On September 22, 1993, the Workers' Compensation Court entered an award which was affirmed by a review panel on February 25, 1994. Weber was awarded benefits of $255 per week for temporary total disability from September 1, 1992, through September 1, 1993, "and thereafter and in addition thereto a like sum per week for so long in the future as [she] remains temporarily totally disabled." The award further provided that "[w]hen [Weber] reaches maximum medical improvement, she shall be entitled to the statutory amounts for any residual disability."

Weber filed the compensation award with the district court for Douglas County on May 16, 2008. On June 10, she commenced a garnishment proceeding against UMB Bank, alleging it held funds belonging to Employers Mutual Companies (EMC), which was the workers' compensation insurer for Gas 'N Shop at the time of Weber's injury. In the garnishment proceeding, Weber claimed that $184,875 was due on the compensation award.

EMC and Gas 'N Shop filed a motion to dismiss the garnishment proceeding. In their motion, they asserted seven defenses: (1) The compensation award was a conditional judgment and wholly void; (2) the compensation award was dormant; (3) EMC and Gas 'N Shop had complied with all the terms of the award; (4) Weber's claim was barred by the statute of limitations; (5) Weber's claim was barred by res judicata and issue preclusion; (6) Weber's claim was barred by estoppel, laches, acquiescence, inexcusable neglect, and unclean hands; and (7) Weber's claim violated the rights of EMC and Gas 'N Shop to due process.

An evidentiary hearing was held on the motion to dismiss. The evidence received at the hearing established that EMC

received a letter from Weber's treating physician dated March 9, 1994, in which the physician indicated that Weber had reached maximum medical improvement as of his last examination on January 18, 1994. The physician gave Weber a 10-percent permanent disability rating to her right lower extremity. Upon receipt of this information, EMC sent Weber's attorney a draft in the amount of $18,396.47, representing 72⅐ weeks of temporary total disability benefits from September 1, 1992, through January 18, 1994. EMC also sent Weber's attorney a draft in the amount of $2,550, representing 10 weeks of permanent partial disability benefits for the period of January 19 through March 29, 1994. In its transmittal letter, EMC indicated that it would continue to pay permanent partial disability benefits at the rate of $255 per week for an additional 11½ weeks, based upon the 10-percent disability rating.

EMC subsequently received a second report from Weber's treating physician, dated March 31, 1995, indicating that he had seen Weber again for continued problems with her knee, but that she had reached maximum medical improvement. The physician revised Weber's disability rating to 20 percent. Upon receipt of this report, EMC sent another letter to Weber's attorney setting forth the additional benefits it would pay to Weber. In total, EMC paid Weber $18,396.47 in temporary total disability benefits for the period of September 1, 1992, through January 18, 1994; $5,500.61 in permanent partial disability benefits for the period of January 19 through June 18, 1994; $5,100 in temporary total disability benefits for the period of July 15 through December 1, 1994; and $5,464.40 in permanent partial disability benefits for the period of December 2, 1994, through April 30, 1995. EMC also paid various medical and hospital expenses incurred by Weber between 1993 and 2008.

From the time of the final payment of disability benefits to Weber in April 1995 until January 2008, neither Weber nor her attorney contacted EMC to dispute the amount of benefits paid pursuant to the award. In January 2008, Weber's attorney advised EMC that Weber was claiming additional disability benefits, penalties, interest, and attorney fees, pursuant to the 1993 award.

The district court granted EMC's motion to dismiss the garnishment proceeding. The court reasoned that the workers' compensation award became dormant pursuant to Neb. Rev. Stat. § 25-1515 (Reissue 2008) in April 2000, 5 years after the last payment to Weber was made, and that it had not been revived by the Workers' Compensation Court. The court did not address any of the other defenses asserted in the motion to dismiss.

Weber perfected this timely appeal, and we granted her petition to bypass the Court of Appeals.

ASSIGNMENTS OF ERROR

Weber assigns, restated and consolidated, that the district court erred as a matter of law when it held that the compensation award became dormant pursuant to § 25-1515 and when it held that revival of the compensation award must occur in the Workers' Compensation Court.

EMC and Gas 'N Shop cross-appeal, assigning that the trial court erred in failing to find that the compensation award was a conditional judgment and thus was wholly void and unenforceable. EMC and Gas 'N Shop also argue that we can affirm the district court's dismissal of the garnishment proceeding based on any of the defenses they raised to the district court.

STANDARD OF REVIEW

[1,2] Statutory interpretation is a question of law.[2] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.[3]

ANALYSIS

Award Was Not Void

[3] In their cross-appeal, EMC and Gas 'N Shop argue that the compensation award was void ab initio as a conditional judgment. A conditional judgment is an order purporting to

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[2] *In re Estate of Chrisp*, 276 Neb. 966, 759 N.W.2d 87 (2009); *In re Interest of Devin W. et al.*, 270 Neb. 640, 707 N.W.2d 758 (2005).

[3] *Gavin v. Rogers Tech. Servs.*, 276 Neb. 437, 755 N.W.2d 47 (2008); *New Tek Mfg. v. Beehner*, 275 Neb. 951, 751 N.W.2d 135 (2008).

be a final judgment which is dependent upon the occurrence of uncertain future events.[4] Such a judgment is wholly void because it does not perform in praesenti and leaves to speculation and conjecture what its final effect may be.[5] Weber's workers' compensation award performed in praesenti because it required immediate payment of temporary total disability benefits in the amount of $255 per week. The award was not void as a conditional judgment or order.

EMC and Gas 'N Shop also argue in their cross-appeal that the award is not sufficiently definite so as to be enforceable through garnishment. In *Lenz v. Lenz*,[6] we held that a judgment for money must specify with definiteness and certainty the amount for which it is rendered and that where external proof and another hearing are necessary to establish the existence or extent of a party's liability to permit execution, the judgment is not enforceable. The judgment in *Lenz* required a spouse to pay the costs of his hearing-impaired child's special schooling and was not more definite as to the amounts. Here, however, the award is quite different. It clearly awards temporary total disability benefits of $255 per week, followed by statutory benefits for any residual disability after Weber reached maximum medical improvement. We conclude that the award is sufficiently definite and certain to be enforceable.

Award Was Not Dormant

[4] The district court concluded that the award became dormant in April 2000, 5 years after the last payment of benefits. We held in *Allen v. Immanuel Med. Ctr.*[7] that the date on which a workers' compensation award is filed in a district court pursuant to Neb. Rev. Stat. § 48-188 (Cum. Supp. 2008) is the date of the judgment for purposes of computing when the judgment becomes dormant under § 25-1515. Here, the workers'

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[4] See, *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006); *Garcia v. Platte Valley Constr. Co.*, 15 Neb. App. 357, 727 N.W.2d 698 (2007).

[5] *Id.*

[6] *Lenz v. Lenz*, 222 Neb. 85, 382 N.W.2d 323 (1986).

[7] *Allen v. Immanuel Med. Ctr., supra* note 1.

compensation award was filed in the district court on May 16, 2008, and it was not dormant when the garnishment proceeding was commenced less than a month later.

Other Defenses

As noted, EMC and Gas 'N Shop sought dismissal of the garnishment proceeding based upon several alternative theories of defense. In addition to those defenses which we have discussed, EMC and Gas 'N Shop contended that they had fully complied with all terms of the award, that the garnishment proceeding was barred by the statute of limitations, and that the doctrines of res judicata, issue preclusion, estoppel, laches, acquiescence, inexclusable neglect, and unclean hands barred the garnishment proceeding. EMC and Gas 'N Shop also alleged that garnishment would violate their due process rights, in that Weber relied on certain court decisions which postdated her award. In this appeal, EMC and Gas 'N Shop contend that this court can rely upon any of these defenses as an alternative ground for affirming the judgment of the district court. Weber, however, argues that we should not consider these issues, because they were not decided by the district court and not raised by cross-appeal.

[5,6] An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.[8] An appellee's argument that a lower court's decision should be upheld on grounds specifically rejected below constitutes a request for affirmative relief, and the appellee must cross-appeal in order for that argument to be considered.[9] Here, the alternative defenses were presented to the district court, but the court did not reach or decide their merits. Accordingly, there was no ruling on these defenses from which a cross-appeal could have been taken. In order to preserve each party's right to meaningful appellate review of issues presented to but not decided by the district court, we decline to decide such issues in the first instance. Instead, we remand to the district court

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[8] *Walsh v. State*, 276 Neb. 1034, 759 N.W.2d 100 (2009).

[9] *Wasikowski v. Nebraska Quality Jobs Bd.*, 264 Neb. 403, 648 N.W.2d 756 (2002).

with directions to consider and decide whether the garnishment proceeding is barred by any of the alternative defenses asserted by EMC and Gas 'N Shop. This determination should be made on the existing record, unless the parties agree that the record may be reopened and expanded. We express no opinion as to the merit of any of the defenses.

CONCLUSION

For the reasons discussed, we reverse the judgment of the district court and remand for further proceedings as directed in this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., participating on briefs.
CONNOLLY, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
CHRISTOPHER A. EDWARDS, APPELLANT.
767 N.W.2d 784

Filed July 10, 2009. No. S-07-678.

1. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.
2. **Convictions: Evidence: Appeal and Error.** An appellate court will affirm a criminal conviction absent prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
3. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing for sufficiency of the evidence to sustain a conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
4. **Criminal Law: Words and Phrases.** The corpus delicti is the body or substance of the crime—the fact that a crime has been committed, without regard to the identity of the person committing it.
5. ____: ____. Corpus delicti is composed of two elements: the fact or result forming the basis of a charge and the existence of a criminal agency as the cause thereof.

6. **Criminal Law: Circumstantial Evidence: Proof.** While the corpus delicti must be established by evidence beyond a reasonable doubt, it may be proved by either direct or circumstantial evidence.
7. **Criminal Law: Homicide: Proof.** In a homicide case, corpus delicti is not established until it is proved that a human being is dead and that the death occurred as a result of the criminal agency of another.
8. ____: ____: ____. The body of a missing person is not required to prove the corpus delicti for homicide.
9. **Homicide: Circumstantial Evidence: Proof: Convictions.** In the absence of a body, confession, or other direct evidence of death, circumstantial evidence may be sufficient to support a conviction for murder.
10. **Proof of Death.** Neb. Rev. Stat. § 30-2207 (Reissue 2008) sets forth the evidence that can be used to prove the fact of death in proceedings under the Nebraska Probate Code, not the Nebraska Criminal Code.
11. **Proof of Death: Circumstantial Evidence: Limitations of Actions.** Neb. Rev. Stat. § 30-2207 (Reissue 2008) does not preclude the establishment of death by circumstantial evidence before the expiration of the 5-year statutory period.
12. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
13. **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.
14. **Jury Instructions: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
15. **Statutes: Intent.** Statutes which effect a change in the common law are to be strictly construed.
16. **Rules of Evidence: Proof of Death.** The Uniform Determination of Death Act does not establish a rule of evidence requiring that in all cases involving an alleged decedent, the fact of death must be medically established.
17. **Trial: Expert Witnesses.** Under the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), jurisprudence, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This gatekeeping function entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue.
18. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
19. **Trial: Expert Witnesses: Appeal and Error.** An appellate court reviews the record de novo to determine whether a trial court has abdicated its gatekeeping function when admitting expert testimony.
20. **Trial: Evidence: Expert Witnesses.** To aid the court in its evaluation of the relevance and reliability of an expert's opinion, it may consider several factors,

including but not limited to whether the reasoning or methodology has been tested and has general acceptance within the relevant scientific community.

21. ____: ____: ____. Once the reasoning or methodology of expert opinion testimony has been found to be reliable, the court must determine whether the methodology was properly applied to the facts in issue. In making this determination, the court may examine evidence to determine whether the methodology was properly applied and whether the protocols were followed to ensure that the tests were performed properly.
22. **Courts: Expert Witnesses.** Whether a theory or technique has been subjected to peer review is a factor a court may consider in making its gatekeeping determination whether expert opinion testimony is relevant and reliable.
23. ____: ____. A factor the court may consider in making its gatekeeping determination whether expert opinion testimony is relevant and reliable is whether a particular theory or technique has a high known or potential rate of error.
24. **Rules of the Supreme Court: Records: Appeal and Error.** Neb. Ct. R. App. P. § 2-109(D)(1)(f) and (g) requires that factual recitations be annotated to the record, whether they appear in the statement of facts or argument section of a brief. The failure to do so may result in an appellate court's overlooking a fact or otherwise treating the matter under review as if the represented fact does not exist.
25. **Expert Witnesses.** While a "reasonable degree of professional certainty" is the preferred form of an expert's opinion, the testimony should be excluded only where it gives rise to conflicting inferences of equal degree of probability such that the choice between them is a matter of conjecture.
26. **Expert Witnesses: Words and Phrases.** Expert testimony need not be couched in the magic words "reasonable certainty" or "reasonable probability," but must be sufficiently definite and relevant to provide a basis for the fact finder's determination of an issue or question.
27. **Expert Witnesses.** An expert's opinion is to be judged in view of the entirety of the opinion, and it is not validated or invalidated solely on the presence or lack of the words "reasonable degree of professional certainty."
28. **Criminal Law: Motions for Continuance: Appeal and Error.** A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.
29. **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.
30. **Motions for Continuance: Appeal and Error.** There is no abuse of discretion by the court in denying a continuance unless it clearly appears that the party seeking the continuance suffered prejudice as a result of that denial.
31. **Trial: Motions for Continuance: Time.** A trial court is vested with wide discretion in disposing of a motion for continuance filed on the eve of trial.
32. **Motions for Continuance: Appeal and Error.** Where due diligence by the moving party has not been shown, the ruling of the trial court overruling a motion for a continuance for the purpose of securing additional evidence will not be disturbed.

33. **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.
34. **Judges: 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.
35. **Trial: Evidence.** The concept of "opening the door" is a rule of expanded relevancy which authorizes admitting evidence which otherwise would have been irrelevant in order to respond to (1) admissible evidence which generates an issue or (2) inadmissible evidence admitted by the court over objection.
36. **Trial: Rebuttal Evidence.** The concept of "opening the door" is most often applied to situations where evidence adduced or comments made by one party make otherwise irrelevant evidence highly relevant or require some response or rebuttal.
37. **Trial: Evidence.** "Opening the door" is simply a contention that competent evidence which was previously irrelevant is now relevant through the opponent's admission of other evidence on the same issue.
38. **Constitutional Law: Criminal Law.** A criminal defendant has no constitutional right to inquire into irrelevant matters.

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

Denise E. Frost, of Johnson & Mock, Steven J. Lefler, of Lefler Law, and Matthew Higgins for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

GERRARD, J.

I. NATURE OF CASE

Jessica O'Grady was last seen on May 10, 2006, leaving her apartment on her way to Christopher A. Edwards' house. O'Grady has not been heard from since, by friends or family, and her body has never been found. But O'Grady's blood was found in Edwards' bedroom, on the mattress and walls, and on a weapon found in his closet. And O'Grady's blood was found in the trunk of Edwards' car. Edwards was convicted of second degree murder and use of a deadly weapon for killing O'Grady. The primary issue presented in this appeal is

whether the evidence was sufficient to prove that O'Grady was murdered.

II. BACKGROUND

1. O'Grady's Life and Disappearance

After graduating from high school in Omaha, Nebraska, O'Grady moved into an apartment with her friends Holly Stumme and Tracy Christianson, and at the time of her disappearance, she was working at a steakhouse in west Omaha. Shauna Stanzel, O'Grady's aunt, testified that she and O'Grady were very close and that O'Grady had lived with her for a time as a child. Stanzel said she spoke with O'Grady on a daily basis and agreed that it was "sort of a habit" that they "would call each other daily."

Stumme had been friends with O'Grady since they were both in the fifth grade. O'Grady and Stumme socialized together and talked and text-messaged "all the time." They saw each other every day and also spoke on the telephone often. Stumme testified that Edwards worked at the same steakhouse as O'Grady and that O'Grady spoke to her about Edwards on a regular basis. Stumme and Christianson both described a particular evening in April 2006 on which Edwards came over to O'Grady, Stumme, and Christianson's apartment, and O'Grady and Edwards were "flirting." Edwards was still there when Stumme went to bed, and the next morning, his clothing was still in the living room and his shoes were still by the door. Stumme and Christianson also said that Edwards had been at their apartment on May 9, 2006, the day before O'Grady was last seen.

Stanzel last saw O'Grady on Wednesday, May 10, 2006, after a softball game. Stumme and Christianson last saw O'Grady on the evening of May 10, when they and some other friends met at their apartment. O'Grady was using her cellular telephone to send and receive text messages and had been talking about Edwards throughout the evening. Then after O'Grady received a telephone call, she took a shower, fixed her hair, put on makeup, and left at about 11 or 11:15 p.m. As she left, she told Stumme and Christianson "to wish her luck, she was going to Chris' [residence]" and would see them later.

Keri Peterson, another friend of O'Grady's, said she and O'Grady routinely spoke on the telephone a "[c]ouple times a day." It was "unusual" for the two of them not to talk to one another in the course of a day. They last spoke at about 11:30 p.m. on the evening of May 10, 2006, when O'Grady called Peterson. O'Grady told Peterson that she was in her car, on her way to Edwards' residence. Peterson received a text message from O'Grady about an hour later that said, "No shenanigans for Jessica." Peterson explained that this was "code" for "no sex for Jessica." Peterson did not reply and was unable to reach O'Grady the next day.

The next day, Stumme was also unable to reach O'Grady, and by Friday, when O'Grady still had not come home, Stumme became concerned. Stumme went and talked to Stanzel. Stanzel had called O'Grady on Thursday and left a message, and she tried again on Friday. After speaking to Stumme, Stanzel contacted O'Grady's mother to see if she had heard from O'Grady. O'Grady's mother had not heard from her, so Stanzel's husband called the police.

After O'Grady failed to show up for a Sunday softball game, Stanzel met O'Grady's friends at O'Grady, Stumme, and Christianson's apartment. All of O'Grady's personal effects were still there, as was her cat. Stumme described O'Grady as very attached to her cat, explaining that O'Grady "would feed [her cat] everyday [sic] and any time she went out of town she would almost make me sign something saying that I was going to take care of [her cat]." Christianson similarly said that O'Grady held her cat all the time and called the cat "her baby."

Stanzel also went to the restaurant where O'Grady worked and discovered that O'Grady had not picked up her last paycheck. While she was there, Stanzel spoke to Edwards, who said he had not heard from O'Grady since May 9, 2006. Edwards said that he and O'Grady had planned to get together on May 10, but that he had canceled those plans.

Stanzel never heard from O'Grady again. The last charge to O'Grady's bank account, other than a single regularly recurring charge, occurred on May 10, 2006. O'Grady's vehicle was found in a parking lot across the street from the restaurant

where O'Grady worked, about a block and a half away. O'Grady's cellular telephone records reflect a pattern of making and receiving several telephone calls each day, including daily calls to and from Stumme and Peterson. Those records show that O'Grady's last two telephone calls occurred on the evening of May 10: an 11:29 p.m. call to Peterson and an 11:48 p.m. call to Edwards. O'Grady made no telephone calls after 11:48 p.m. on May 10. All the witnesses who testified about calling O'Grady after May 10 reported that their calls were immediately forwarded to O'Grady's voice mail, and O'Grady's telephone records indicated that all the calls made to O'Grady after May 10 were forwarded.

2. Edwards' Activity Before O'Grady's Disappearance

Michelle Wilkin met Edwards while they were working at the same restaurant in March 2005. They became friends, then developed a romantic relationship. Wilkin became pregnant with Edwards' child in January 2006. Their romantic relationship was purportedly exclusive. Wilkin recalled that on the evening of May 8, she and Edwards had a serious conversation about getting married. But later, when Wilkin became aware that Edwards was being investigated with respect to O'Grady's disappearance, she asked him why the police were interested in him. Edwards admitted to Wilkin that he and O'Grady had slept together. Wilkin testified that Edwards had told her "at some point that he had heard [O'Grady] was pregnant." But Wilkin said Edwards told her that after Wilkin and Edwards had discussed marriage, he had met with O'Grady at his house to tell O'Grady that he and O'Grady would no longer be involved.

Riley Wasserburger, a friend of Edwards since high school, said that he, Edwards, and Alex Ehly played golf together during the evening of May 10, 2006. Wasserburger said that during the course of the game, Edwards said that "he made a mistake, that he got a girl pregnant." Wasserburger could not remember the girl's name. Ehly testified that Edwards had previously told Ehly that he had gotten a girl named "Michelle" pregnant, but admitted that he did not hear the conversation between Edwards and Wasserburger. Then Wasserburger, Edwards, and

some other friends went to a movie, which ended at about 11:30 p.m. There was some discussion of going to play poker, but Edwards decided against it, and went to do something else, alone.

3. Investigation Into O'Grady's Disappearance

Omaha police interviewed Edwards in the course of speaking to anyone who had contact with O'Grady in the days before her disappearance. The police obtained permission to search Edwards' bedroom at his aunt's house, where he lived. When an Omaha police detective began to approach the bed, Edwards said he was "'not sure'" he wanted police "'checking that area.'" Police suggested that O'Grady might have hidden a note under the mattress, where Edwards would find it later. Edwards said that "'[made] sense'" to him and permitted the search to continue.

Spattered blood was found on the nightstand, headboard, clock radio, and ceiling above the bed. Edwards was asked to explain the bloodstains on the headboard and clock, and replied that "he had cut his wrist." A small bloodstain was located on the top of the mattress. Edwards was asked about the bloodstain and replied that "he had intercourse with a girlfriend who was menstruating." But on further investigation, a very large, damp bloodstain was found on the underside of the mattress, covering most of the bottom side of the mattress. Bloodstains were later found on the bedding, a chair in the room, a bookcase, and laundry baskets. Luminol, a chemical used to locate where blood has been cleaned up, was applied to the walls of the room. The Luminol suggested blood on large areas of the south and west walls. Stains that appeared to be blood were found on the ceiling, covered up by white paint.

A short sword was found in Edwards' closet. Blood was found on the sword. A shovel and a pair of garden shears were found in Edwards' vehicle. A bloodstain was found on the handle of the garden shears. More bloodstains were found on the trunk gasket of the car and on the underside of the trunk lid. A black, plastic trash bag was found in the garage next to the vehicle. The bag contained two bloodstained towels and a receipt from a drugstore in west Omaha. Edwards had been

videotaped purchasing poster paint, white shoe polish, and correction fluid at that drugstore on May 11, 2006, at 7:41 p.m. The poster paint was chemically identical to that found on Edwards' ceiling.

DNA profiles were recovered from blood on the headboard, ceiling, walls, and sword, and from the trunk of Edwards' car. The profile was consistent with O'Grady's DNA profile. Specifically, the chances of another unrelated Caucasian person having the same DNA profile were 1 in 26.6 quintillion. Edwards was excluded as a DNA contributor to nearly all of the samples. DNA profiles were also recovered from blood found on the mattress and were also consistent with O'Grady's DNA profile. The odds of another, unrelated Caucasian person having the same DNA profiles ranged from 1 in 15.6 billion to 1 in 46.5 quintillion. A partial profile was obtained from blood on the garden shears, also consistent with O'Grady's DNA profile; the chance of another, unrelated Caucasian contributor having the same DNA profile was 1 in 3.81 trillion. DNA profiles obtained from blood on the towels found in the garage next to Edwards' car were also consistent with O'Grady's DNA profile; the odds of another, unrelated Caucasian person contributing the DNA found on one of the towels were 1 in 1.96 quintillion, and for the other towel were 1 in 26.7 billion.

A laptop computer was seized from Edwards' bedroom. Forensic examination of the computer revealed that at 2:26 p.m. on May 9, 2006, someone had used that computer to perform Internet research on the human body. Specifically, a Google search had been performed for the term "arteries." The user had then viewed the first search result, a diagram of the human arterial system.

Stuart James, a forensic consultant, performed an analysis of the bloodstains found in the bedroom and car. James testified that the bloodstain on the mattress was a "saturation stain," meaning a volume of blood had been deposited on the surface of the mattress and had soaked into the fabric. James opined that a "significant bloodshed event" had occurred on or close to the mattress. James also opined that the source of the blood spattered on the headboard was over or close to the top of the mattress. And James opined, from the pattern of blood

spattered on the ceiling, that it was "cast-off" blood from seven individual swings of an object wet with blood. The stains were more consistent with a thin object, such as the sword found in Edwards' closet, than with a broad object. James opined that the bloodstains in the trunk of Edwards' car, on the garden shears found in Edwards' car, and on the towels found in the garage were transfer stains, produced by contact with a bloody surface.

4. Edwards Is Charged and Convicted

Edwards was charged by information with murder in the second degree and use of a deadly weapon to commit a felony.[1] Edwards was convicted, pursuant to jury verdict, of both charges. He was sentenced to a term of 80 years' to life imprisonment for second degree murder and a term of 20 to 20 years' imprisonment on the deadly weapon conviction, sentences to be served consecutively.[2] Edwards appeals.

III. ASSIGNMENTS OF ERROR

Edwards assigns, consolidated and restated, that the trial court erred in (1) not dismissing the charges because the evidence was insufficient; (2) refusing his proffered jury instruction defining "death"; (3) admitting testimony from the State's experts regarding DNA evidence; (4) overruling his motion to continue trial; and (5) refusing to permit him to adduce evidence of a nearly empty package of birth control pills found in O'Grady's car, a relationship with another man in which O'Grady allegedly became pregnant and induced a miscarriage with birth control pills, and testimony that O'Grady was pregnant by another man but "wanted" Edwards to be the father.

IV. ANALYSIS

1. Sufficiency of Evidence

[1-3] Edwards assigns that the court erred in not dismissing the charges because the evidence was insufficient. In reviewing

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[1] See Neb. Rev. Stat. §§ 28-304 and 28-1205 (Reissue 2008).

[2] See, *id.*; Neb. Rev. Stat. § 28-105 (Cum. Supp. 1998).

a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[3] An appellate court will affirm a criminal conviction absent prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.[4] The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[5]

[4-6] Edwards' argument is that the evidence failed to establish the corpus delicti of homicide. The corpus delicti is the body or substance of the crime—the fact that a crime has been committed, without regard to the identity of the person committing it.[6] Corpus delicti is composed of two elements: the fact or result forming the basis of a charge and the existence of a criminal agency as the cause thereof.[7] And while the corpus delicti must be established by evidence beyond a reasonable doubt, it may be proved by either direct or circumstantial evidence.[8]

[7] In other words, in arguing that the State did not prove the corpus delicti, Edwards is not arguing that the evidence is insufficient to establish that he murdered O'Grady—rather, he is arguing that the evidence was insufficient to establish that O'Grady was murdered at all. In a homicide case, corpus delicti is not established until it is proved that a human being is dead and that the death occurred as a result of the criminal agency of

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[3] *State v. Babbitt*, 277 Neb. 327, 762 N.W.2d 58 (2009).

[4] *Id.*

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

[6] See, *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991); *State v. Payne*, 205 Neb. 522, 289 N.W.2d 173 (1980).

[7] *Gallegos v. State*, 152 Neb. 831, 43 N.W.2d 1 (1950), *affirmed* 342 U.S. 55, 72 S. Ct. 141, 96 L. Ed. 86 (1951).

[8] See, *Morley, supra* note 6; *State v. Casper*, 192 Neb. 120, 219 N.W.2d 226 (1974).

another.[9] Thus, we must determine whether the State's evidence was sufficient to prove that O'Grady is dead and that her death was the result of a criminal act.[10]

[8] To begin with, it is well recognized that the body of a missing person is not required to prove the corpus delicti for homicide.[11] To require that the victim's body be discovered would be unreasonable; it would mean that a murderer could escape punishment by successfully disposing of the body, no matter how complete and convincing the other evidence of guilt.[12] Instead, the fact that a missing person's body has not been recovered does not mean that death cannot be proved by circumstantial evidence and may tend to prove the corpus delicti:

> The fact that [the victim's] body was never recovered would justify an inference by the jury that death was caused by a criminal agency. It is highly unlikely that a person who dies from natural causes will successfully dispose of his own body. Although such a result may be a theoretical possibility, it is contrary to the normal course of human affairs.
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> The fact that a murderer may successfully dispose of the body of the victim does not entitle him to an

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[9] See, *Payne, supra* note 6; *Gallegos, supra* note 7; *Reyes v. State*, 151 Neb. 636, 38 N.W.2d 539 (1949).

[10] See *Reyes, supra* note 9.

[11] See, e.g., *Government of Virgin Islands v. Harris*, 938 F.2d 401 (3d Cir. 1991); *Crain v. State*, 894 So. 2d 59 (Fla. 2004); *State v. Hall*, 204 Ariz. 442, 65 P.3d 90 (2003); *Fisher v. State*, 851 S.W.2d 298 (Tex. Crim. App. 1993); *State v. Nicely*, 39 Ohio St. 3d 147, 529 N.E.2d 1236 (1988); *Epperly v. Commonwealth*, 224 Va. 214, 294 S.E.2d 882 (1982); *State v. Pyle*, 216 Kan. 423, 532 P.2d 1309 (1975); *State v. Lung*, 70 Wash. 2d 365, 423 P.2d 72 (1967); *People v. Cullen*, 37 Cal. 2d 614, 234 P.2d 1 (1951); *Bruner v. People*, 113 Colo. 194, 156 P.2d 111 (1945), *abrogated on other grounds, Deeds v. People*, 747 P.2d 1266 (Colo. 1987); *Warmke v. Commonwealth*, 297 Ky. 649, 180 S.W.2d 872 (1944). Cf. *Gallegos, supra* note 7.

[12] See, *Harris, supra* note 11; *Nicely, supra* note 11; *Lung, supra* note 11; *Cullen, supra* note 11; *People v. Scott*, 176 Cal. App. 2d 458, 1 Cal. Rptr. 600 (1959).

> acquittal. That is one form of success for which society has no reward.[13]

And in this case, we are satisfied that the evidence presented was sufficient to establish the corpus delicti of homicide. Courts have generally held, under circumstances comparable to these, that the circumstantial evidence associated with the alleged victim's disappearance was sufficient to establish the corpus delicti.[14]

In particular, the evidence detailed O'Grady's habits and relationships and how they were abruptly severed without explanation on May 10, 2006. Proof of such personal connections, and the unlikelihood of such a voluntary, sudden disappearance, is often held to be persuasive circumstantial evidence of death resulting from foul play.[15] O'Grady's car was left in a parking lot, and all of her personal effects, including her cat, were abandoned in her apartment, which also suggests that her disappearance was not voluntary.[16] Nor did O'Grady pick up her last paycheck or take any money from her bank account after her disappearance, which would be unlikely if she had left of her own volition.[17]

And obviously, the fact that significant amounts of what was almost certainly O'Grady's blood were found in Edwards' bedroom and the trunk of his automobile is highly suggestive of an unlawful killing. Such bloodstains have often been held to provide circumstantial evidence of the missing person's death

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[13] *People v. Manson*, 71 Cal. App. 3d 1, 42, 139 Cal. Rptr. 275, 298 (1977). Accord, *Harris, supra* note 11; *Epperly, supra* note 11.

[14] See, generally, *Harris, supra* note 11 (collecting cases).

[15] See, e.g., *State v. Weston*, 367 S.C. 279, 625 S.E.2d 641 (2006); *Meyers v. State*, 704 So. 2d 1368 (Fla. 1997); *Fisher, supra* note 11; *State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992); *State v. Brown*, 310 Or. 347, 800 P.2d 259 (1990); *Nicely, supra* note 11; *Epperly, supra* note 11; *Derring v. State*, 273 Ark. 347, 619 S.W.2d 644 (1981); *Cullen, supra* note 11; *State v. Head*, 79 N.C. App. 1, 338 S.E.2d 908 (1986).

[16] See, e.g., *Meyers, supra* note 15; *Grissom, supra* note 15; *Brown*, *supra* note 15; *Nicely, supra* note 11; *Lung, supra* note 11; *Head, supra* note 15; *Scott, supra* note 12.

[17] See, e.g., *Brown, supra* note 15; *Scott, supra* note 12.

and that it was caused by a criminal act.[18] Courts have also relied upon a suspect's apparent attempts, such as Edwards', to conceal the victim's disappearance, or evidence of the crime.[19] The fact that such evidence also bears on who is guilty does not detract from its efficacy at establishing the corpus delicti.[20] And it does not take much imagination to see how bloodstains on a weapon, garden shears, towels, and the trunk of a car suggest both criminal activity and an explanation for the absence of the victim's body.

[9] Edwards notes that in many of the cases cited above, the conviction was supported with a confession or admission by the defendant. But that is not an unprecedented argument either, and in other cases, circumstances such as those presented here have been sufficient to prove the corpus delicti and support the conviction, without a confession.[21] The law is clear that in the absence of a body, confession, or other direct evidence of death, circumstantial evidence may be sufficient to support a conviction for murder.[22] There is no reason to treat the crime of murder differently from other crimes when considering the use of circumstantial evidence to establish their commission, and "[t]he presence or absence of a particular item of evidence is not controlling. The question is whether from all of the evidence it can reasonably be inferred that death occurred and that it was caused by a criminal agency."[23] The presence of a confession, admission, or incriminating statement

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[18] See, e.g., *Weston, supra* note 15; *Crain, supra* note 11; *Hall, supra* note 11; *Fisher, supra* note 11; *Grissom, supra* note 15; *Nicely, supra* note 11; *Epperly, supra* note 11; *Lung, supra* note 11; *Cullen, supra* note 11.

[19] See, e.g., *Weston, supra* note 15; *Crain, supra* note 11; *Fisher, supra* note 11; *Nicely, supra* note 11; *Bruner, supra* note 11; *Warmke, supra* note 11; *Scott, supra* note 12.

[20] See *Pyle, supra* note 11.

[21] See, e.g., *Crain, supra* note 11; *Nicely, supra* note 11; *Scott, supra* note 12.

[22] See *Nicely, supra* note 11.

[23] See *People v. Bolinski*, 260 Cal. App. 2d 705, 716, 67 Cal. Rptr. 347, 354 (1968). Accord *Harris, supra* note 11. See, also, *Draganescu, supra* note 5; *Scott, supra* note 12.

is a distinction without a difference.[24] And, as explained above, the circumstantial evidence presented in this case is easily sufficient to support the conviction.

Edwards also argues that the State's evidence failed to prove O'Grady's death under the standards set forth in the Nebraska Probate Code[25] or the Nebraska Uniform Determination of Death Act (UDDA).[26] Edwards' UDDA argument is also presented as a jury instruction argument, and we will discuss it more completely in that context; at this point, it suffices to say that we do not find the UDDA applicable under these circumstances. Nor is the Nebraska Probate Code pertinent. Edwards relies on § 30-2207, which provides:

> *In proceedings under this code* the rules of evidence in courts of general jurisdiction, including any relating to simultaneous deaths, are applicable unless specifically displaced by the code. In addition, the following rules relating to determination of death and status are applicable:
>
> (1) a certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death purportedly occurred is prima facie proof of the fact, place, date and time of death and the identity of the decedent;
>
> (2) a certified or authenticated copy of any record or report of a governmental agency, domestic or foreign, that a person is missing, detained, dead, or alive is prima facie evidence of the status and of the dates, circumstances and places disclosed by the record or report;
>
> (3) a person who is absent for a continuous period of five years, during which he has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry is presumed to be dead. His death is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier.

(Emphasis supplied.)

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[24] See *Nicely, supra* note 11.

[25] See Neb. Rev. Stat. §§ 30-2201 to 30-2902 (Reissue 2008).

[26] Neb. Rev. Stat. §§ 71-7201 to 71-7203 (Reissue 2003).

[10,11] Edwards' argument fails for two reasons. First, as the statutory language suggests, § 30-2207 sets forth the evidence that can be used to prove the fact of death in proceedings under the Nebraska Probate Code, not the Nebraska Criminal Code.[27] But beyond that, even if applicable, § 30-2207 does not require that any of those particular methods of proof be used to establish the fact of death—it simply provides that an official death certificate, government report, or 5-year absence support a presumption of death. The statute does not preclude the establishment of death by circumstantial evidence before the expiration of the 5-year period.[28] In fact, by presuming the fact of death from an unexplained 5-year absence, § 30-2207 arguably sets a lower bar for establishing the fact of death than is required in a criminal proceeding.[29] The statutory presumption of death created by § 30-2207 simply has no place in the law of homicide.[30] But in any event, even if § 30-2207 applied here, it was satisfied by the evidence establishing the fact of O'Grady's death.

In short, we find sufficient evidence in the record to support the jury's conclusion that O'Grady was dead and that Edwards killed her. Edwards' first assignment of error is without merit.

2. Jury Instruction on Determination of Death

The jury was instructed that in order to convict Edwards of murder in the second degree, it must find beyond a reasonable doubt that Edwards, "on or about May 10, 2006, did kill Jessica J. O'Grady"; that he "did so in Douglas County, Nebraska"; and that he "did so intentionally, but without premeditation." Edwards proposed an instruction that "[o]nly an individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all

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[27] See Neb. Rev. Stat. §§ 28-101 to 28-1350 (Reissue 2008).

[28] See *Woods v. Estate of Woods*, 681 So. 2d 903 (Fla. App. 1996). See, also, *Wells v. Equitable Life Assurance Society*, 130 Neb. 722, 266 N.W. 597 (1936); *Munson v. New England Mutual Life Ins. Co.*, 126 Neb. 775, 254 N.W. 496 (1934).

[29] Cf. *In re Estate of Krumwiede*, 264 Neb. 378, 647 N.W.2d 625 (2002).

[30] See *Scott, supra* note 12.

functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards." At the jury instruction conference, the court sustained the State's objection to the instruction and refused to give it.

[12-14] Edwards assigns the refusal of his proposed instruction as error. Whether jury instructions given by a trial court are correct is a question of law.[31] 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.[32] And 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.[33]

Edwards' proposed instruction was based on the UDDA and quoted § 71-7202 verbatim. So, there is little question that it was a correct statement of the law, at least in the abstract. But it was not warranted by the evidence presented in this case, because § 71-7202 was not implicated by these circumstances.

Traditionally, at common law, death was defined by the cessation of the circulatory and respiratory systems.[34] But the development of medical technology, and a better appreciation of human physiology, cast that standard into doubt.[35] Now, a person's respiration and circulation may be artificially supported after all brain functions cease irreversibly, and the medical profession has developed techniques for determining the loss of brain functions while cardiorespiratory support is

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[31] *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007).

[32] *Id.*

[33] *State v. Pischel*, 277 Neb. 412, 762 N.W.2d 595 (2009).

[34] See *State v. Meints*, 212 Neb. 410, 322 N.W.2d 809 (1982). See, also, *State v. Guess*, 244 Conn. 761, 715 A.2d 643 (1998); *State v. Olson*, 435 N.W.2d 530 (Minn. 1989).

[35] See, *Meints, supra* note 34; *Guess, supra* note 34; *Olson, supra* note 34.

administered.[36] The UDDA was drafted and enacted to address those advances in lifesaving technology.[37] It codifies the traditional common-law standard for determining death and extends it to include the new procedures for the determination of death based upon irreversible loss of all brain functions.[38] And by providing that the determination of death "be made in accordance with accepted medical standards,"[39] the UDDA leaves the medical profession "free to formulate acceptable medical practices and to utilize new biomedical knowledge, diagnostic tests, and equipment."[40]

In this case, the distinction between cardiorespiratory death and brain death is irrelevant. Under Nebraska law, either would be sufficient to prove the victim's death in a homicide case.[41] Presumably, Edwards is concerned with that part of § 71-7202 requiring a determination of death to "be made in accordance with accepted medical standards." Obviously, there was no evidence in this case that would support such a finding. But there is no indication that the UDDA was intended to supplant the settled common-law rule, discussed at length above, that the fact of death can be proved by circumstantial evidence. To require that death be *medically* established would amount to requiring direct evidence of death in every homicide, contrary to well-established law. And for that matter, Edwards' expansive reading of § 71-7202 would place it in direct conflict with § 30-2207, set forth above.

[15,16] Generally, statutes which effect a change in the common law are to be strictly construed.[42] We do not read the UDDA as establishing a rule of evidence requiring that in all

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[36] See Unif. Determination of Death Act, prefatory note, 12A U.L.A. 778 (2008).

[37] See *id.*

[38] See *id.*

[39] Unif. Determination of Death Act, *supra* note 36, § 1, 12A U.L.A. at 781.

[40] *Id.*, prefatory note, 12A U.L.A. at 779.

[41] See *Meints, supra* note 34.

[42] *Nelson v. Nelson*, 267 Neb. 362, 674 N.W.2d 473 (2004).

cases involving an alleged decedent, the fact of death must be medically established. Granted, there may be cases in which the UDDA's medical standards are implicated, when there is a question as to the cause or time of an alleged death, or where there is conflicting medical evidence about the alleged decedent's condition.[43] But in this case, there was no such question. The jury was entitled to conclude from the evidence presented, under any standard, that O'Grady was dead.

In short, the court's instructions correctly set forth the elements of the offense and what the jury needed to find for Edwards to be guilty. Edwards' proposed instruction was not warranted by the evidence, because O'Grady's death was not in medical dispute. His assignment of error is without merit.

3. DNA Evidence

Edwards argues, generally, that the court should have excluded the testimony of witnesses the State presented to explain the DNA evidence adduced at trial. Most of Edwards' arguments are based on the framework set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, and *Schafersman v. Agland Coop*.[44] Before discussing the specific facts relevant to this issue, it will be helpful to review a few of the basic propositions governing this inquiry.

[17-19] Under the *Daubert* and *Schafersman* jurisprudence, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This gatekeeping function entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue.[45] The standard for reviewing the admissibility of expert testimony is abuse of discretion,[46] although

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[43] See, e.g., *Meints, supra* note 34; *People v. Selwa*, 214 Mich. App. 451, 543 N.W.2d 321 (1995).

[44] See, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

[45] *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008).

[46] *Id.*

we review the record de novo to determine whether a trial court has abdicated its gatekeeping function when admitting expert testimony.[47]

[20,21] To aid the court in its evaluation of the relevance and reliability of an expert's opinion, it may consider several factors, including but not limited to whether the reasoning or methodology has been tested and has general acceptance within the relevant scientific community.[48] Once the reasoning or methodology of expert opinion testimony has been found to be reliable, the court must determine whether the methodology was properly applied to the facts in issue. In making this determination, the court may examine evidence to determine whether the methodology was properly applied and whether the protocols were followed to ensure that the tests were performed properly.[49]

(a) Background

The testing at issue in this case, the results of which were described above, was performed at the University of Nebraska Medical Center (UNMC). The methodology used at UNMC is generally accepted within the relevant scientific community. The standard procedures and protocols used by UNMC are certified by the American Society of Crime Laboratory Directors (ASCLD), which is associated with the Federal Bureau of Investigation, and other outside agencies that inspect the UNMC laboratory. Dr. James Wisecarver, UNMC's laboratory medical director, explained that the procedures, protocols, and equipment used by UNMC were audited and accredited by the ASCLD. Wisecarver testified that the hardware and software used by UNMC were "used by virtually every crime laboratory in the country" and that their "accuracy and authenticity ha[d] been established just through peer review of records by laboratories that have submitted profiles in testing and in serious casework where it's been reviewed." Wisecarver was not aware

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[47] See *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007).

[48] See *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006).

[49] See *id.*

of any margin of error in the software or any studies establishing a margin of error.

Mellissa Helligso, a forensic DNA analyst at UNMC, testified that to ensure that the testing equipment is working correctly and is not contaminated, the equipment is tested with control samples provided by the equipment manufacturer. Edwards objected to Helligso's testimony on foundational grounds, arguing that a technician was required to testify that the DNA testing equipment she used was operating properly. The objection was overruled, as was a similar objection made to Wisecarver's testimony. Edwards cross-examined Helligso with respect to how many unacceptable test runs had to occur in a row before it was necessary "to shut down and start over." Helligso replied that there were no standards for such an event. Wisecarver simply explained that successful control runs were necessary before the testing could proceed.

Disclaimers on UNMC's equipment state that it is "[f]or research use only" and "[n]ot for use in diagnostic systems." Helligso was unable to explain what the manufacturer might have meant by "research" and "diagnostic" use. After her testimony was completed, Edwards made a motion to strike it on the basis that Helligso had used the testing equipment in a manner inconsistent with how it is intended to be used. The motion was overruled. Later, Wisecarver explained that the disclaimer was there because it was required for any equipment that was not submitted to the federal Food and Drug Administration (FDA) for validation. Wisecarver explained that the cost of submitting some products for FDA approval was prohibitive, but that the products could be approved for general use with appropriate in-house validation studies. And Wisecarver testified that UNMC had done the appropriate validation studies to confirm that the processes and machines were valid.

Helligso also testified about a genetic mutation found in O'Grady's DNA profile, which produced some aberrant results. Helligso consulted with the testing equipment manufacturer and was assured that O'Grady's mutation was a documented mutation that had been seen in tests across the country.

After Wisecarver testified, Edwards made a motion to strike his testimony, because he was unable to testify about the margin

of error and because the testing equipment may not have been calibrated properly. Edwards claimed that there was no evidence of the reliability or accuracy of the testing hardware and software. And Edwards contended that Wisecarver's opinions were not stated "with a reasonable degree of professional certainty." Edwards argued that while "the case law is that it has to be probability not . . . certainty" and "that may not in and of itself be decisive of this motion to strike his testimony," the degree of certainty should be considered "cumulatively with everything else" in deciding the motion to strike.

The court reasoned that most of the information on which the motion was based was available pretrial, through depositions, and that the objection could have been "taken care of . . . a long time ago." Before trial, Edwards had moved for a *Daubert/Schafersman* order with respect to the State's blood spatter evidence, but not with respect to the DNA evidence. However, regardless of timeliness, the court also concluded that there was sufficient foundation for the witnesses' testimony, opinion or otherwise. So, Edwards' motion was overruled.

(b) Analysis

Edwards' argument, stated generally, is that the court should have stricken the testimony of Helligso and Wisecarver, thus excluding the State's evidence that the blood found in Edwards' home and car was almost certainly O'Grady's. In support of that argument, Edwards calls our attention to several claimed inadequacies in their testimony. He does not appear to contend that any one of those purported defects, standing alone, would suffice to support exclusion of the testimony. Rather, he seems to rely on their cumulative effect. But it is simpler for us to address each claim in turn.

Edwards complains that Helligso and Wisecarver did not testify about how, when, or by whom their testing apparatus had last been calibrated, although at trial, his objection was directed at the fact that the equipment's technician had not been called to lay that foundation. But Helligso testified specifically about how she used control samples to verify that the testing apparatus was functioning properly. The record establishes that Helligso was qualified to use the apparatus, run the

control tests, and interpret the results, and Edwards does not claim otherwise. This was sufficient foundation for the proper functioning of the testing apparatus.[50]

Edwards claims that UNMC's instruments should not have been used because they were intended for research purposes, not diagnostics. But Wisecarver testified that the research use disclaimer simply meant the equipment had not been submitted for FDA approval, and there is no suggestion in the record that the equipment was less reliable because it was not FDA-approved. Wisecarver explained that it was appropriate to use equipment approved for research purposes if its accuracy had been verified through an appropriate validation process, as UNMC's equipment had been. In other words, the "in-house" validation substitutes for FDA approval. Edwards' argument is, essentially, another way of framing an attack on the reliability of the equipment. But enough foundation was laid to show that the equipment was operating reliably.[51]

In a related argument, Edwards claims that "[c]ontrary to federal standards and its own protocol, UNMC did not have an outside laboratory or 'gold standard' professional peer review the tests and conclusions about which Helligso and Wisecarver testified."[52] This is an apparent reference to Wisecarver's testimony regarding the validation process mentioned above, in which the equipment is validated by testing part of a sample, sending the rest of the sample to an accredited "gold standard" laboratory, then comparing the results. It is not disputed that the DNA evidence tested in this case was not provided to another laboratory for verification. But Edwards has misconstrued Wisecarver's testimony. Wisecarver explained how a particular testing instrument can be validated as reliable for future use, not a process that must be repeated every time the instrument is used.

[22] In other words, Wisecarver explained that once a research instrument passes the "gold standard" validation, its

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[50] See *State v. Aguilar*, 268 Neb. 411, 683 N.W.2d 349 (2004).

[51] See *id.*

[52] Brief for appellant at 52.

reliability has been established and it can be used without an ongoing need to compare its results to those from other laboratories. There was no need to verify the results in this case with other laboratories, provided that foundation for the reliable functioning of the equipment was laid, which it was. Whether a theory or technique has been subjected to peer review is a factor a court may consider in making its gatekeeping determination.[53] But peer review of the testing performed on the evidence in this case was not necessary, given the undisputed fact that the methods and techniques of DNA testing used by UNMC are accepted and practiced by others in the field.[54]

[23] Edwards also complains that Helligso and Wisecarver did not testify to the margin of error associated with the software for the testing equipment. Another factor the court may consider in making its gatekeeping determination whether expert opinion testimony is relevant and reliable is whether a particular theory or technique has a high known or potential rate of error.[55] But here, the rate of error associated with the *theory or technique* was not at issue. Instead, Edwards is again questioning the reliability of the testing equipment, which was well established.

Edwards further challenges the reliability of the equipment by noting Helligso's testimony that ASCLD has not established a protocol for how many "unacceptable" control tests can be performed before the equipment must be shut down and restarted. And Wisecarver testified that he was not aware of how many unacceptable tests had been performed before the testing upon which his opinions in this case were based. But Helligso also testified that in this case, in general, there was no problem running any of the controls. The only evidence in the record of repeated unsuccessful tests was explained by Helligso as being the result of a mutation in O'Grady's genetic code, and Edwards does not explain how those results undermine

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[53] See *State v. Fernando-Granados*, 268 Neb. 290, 682 N.W.2d 266 (2004).

[54] See *King v. Burlington Northern Santa Fe Ry. Co.*, 277 Neb. 203, 762 N.W.2d 24 (2009).

[55] See *Fernando-Granados, supra* note 53.

the general reliability of the testing or the equipment used to perform it.

Edwards also claims that "UNMC does not maintain a master log of testing errors or problems to compare from case to case."[56] It is not clear that this is the case. UNMC's laboratory performs both forensic testing, as in this case, and clinical medical work for the UNMC hospital. Edwards' citation to the record for his claim directs us to Helligso's testimony that reported errors in hospital *clinical* work are logged into the clinical laboratory computer system, but that *forensic* results are not reported into the hospital clinical system. Helligso did not say that errors in forensic cases were not logged elsewhere. And later in the record, testimony from Wisecarver (to which Edwards did not direct us) suggests that *every* mistake or error is logged in the laboratory notes.

[24] Our court rules require that factual recitations be annotated to the record, whether they appear in the statement of facts or argument section of a brief.[57] The failure to do so may result in our overlooking a fact or otherwise treating the matter under review as if the represented fact does not exist.[58] While Edwards has provided us with an annotation to the record, it does not support his claim, and other evidence in the record appears to contradict him. In any event, Edwards does not explain how the absence of a master log would affect the reliability of the testing performed in this case.

[25-27] Finally, Edwards complains that Helligso and Wisecarver did not express their opinions in terms of a "reasonable degree of professional certainty."[59] But while that is the preferred form of an expert's opinion, the testimony should be excluded only where it gives rise to conflicting inferences of equal degree of probability such that the choice between

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[56] Brief for appellant at 52.

[57] See Neb. Ct. R. App. P. § 2-109(D)(1)(f) and (g).

[58] *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008).

[59] Brief for appellant at 52.

them is a matter of conjecture.[60] Expert testimony need not be couched in the magic words "reasonable certainty" or "reasonable probability," but must be sufficiently definite and relevant to provide a basis for the fact finder's determination of an issue or question.[61] In short, an expert's opinion is to be judged in view of the entirety of the opinion, and it is not validated or invalidated solely on the presence or lack of the words "reasonable degree of professional certainty."[62]

Based on our review of the record, we find that Helligso and Wisecarver testified with sufficient certainty for their opinions to be relevant and helpful to the trier of fact.[63] We find, on our de novo review of the record, that the trial court did not abdicate its gatekeeping responsibility.[64] And, after considering all of Edwards' claimed deficiencies in the DNA evidence, we find that the district court did not abuse its discretion in permitting Helligso and Wisecarver to testify.[65] Edwards' assignment of error to the contrary is without merit.

4. Motion to Continue

[28-30] Edwards assigns that the district court erred in overruling a motion he made for a continuance. A decision whether to grant a continuance in a criminal case is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.[66] 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.[67] And there is no abuse of discretion by the court in denying a continuance unless it

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[60] See *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007).

[61] See *id.*

[62] See *id.*

[63] See *id.*

[64] See *Fickle, supra* note 47.

[65] See *Schreiner, supra* note 45.

[66] *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007).

[67] *State v. Davis*, 277 Neb. 161, 762 N.W.2d 287 (2009).

clearly appears that the party seeking the continuance suffered prejudice as a result of that denial.[68]

(a) Background

Trial was scheduled to begin on a Monday morning. On the preceding Friday, Edwards filed a motion to continue, claiming that it was necessary to continue trial because of evidence that had only been disclosed by the State the day before. The evidence was a police report of an interview with Chayse Bates, in which Bates suggested that O'Grady had, at some point in the past, become pregnant but miscarried. Bates said that O'Grady had claimed to be pregnant, but a home pregnancy test had been negative. Nonetheless, O'Grady told Bates that she had seen a doctor who told her she was pregnant. But sometime after Bates and O'Grady moved into an apartment together, O'Grady "advised [Bates] that she had had a miscarriage, apparently because she was still taking birth control pills."

Edwards contended that the evidence was material, because a nearly depleted package of birth control pills had been found in O'Grady's car and a miscarriage could have explained the blood found on Edwards' mattress. Thus, Edwards asserted that the police report was evidence of a "habit" of pregnancy and induced miscarriage. Edwards' counsel claimed that a continuance was necessary so that she could confer with her client and bring in an expert witness to testify whether birth control pills can be used to induce miscarriage.

The court, however, credited the State's argument that the police report did not provide any information to support Edwards' miscarriage theory that had not already been known to the defense. The possibility that O'Grady had been pregnant, and miscarried, had already been suggested. The court also noted that Edwards had three attorneys, one of whom could work part time on getting expert testimony during the expected 2 weeks of trial. The court overruled the motion to continue.

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[68] *Thurman, supra* note 66.

(b) Analysis

[31] Edwards argues that the court abused its discretion in denying the continuance, because it would have been difficult for counsel to try to "find an expert medical witness by night, while trying a highly publicized murder case during the day."[69] But it is also difficult for a trial court to administer its docket if a highly publicized murder case is delayed immediately before trial—particularly when that case involves a volume of evidence that requires 2 weeks to present. That is why a trial court is vested with wide discretion in disposing of a motion for continuance filed on the eve of trial.

[32] And more importantly, there is no explanation in the record or the briefs why the expert testimony sought by Edwards had not been procured earlier. We have said that where due diligence by the moving party has not been shown, the ruling of the trial court overruling a motion for a continuance for the purpose of securing additional evidence will not be disturbed.[70] The record of the pretrial proceedings in this case makes clear that Edwards was aware of the birth control package found in O'Grady's car and the theory that she might have induced a miscarriage. The police report might have provided some marginal support for that theory, but did not originate it.

In short, Edwards sought to continue a complicated case on the eve of trial in order to procure an expert witness to support a theory that had been present in the case throughout the pretrial proceedings. We find no merit to Edwards' claim that the court abused its discretion in overruling his motion.

5. Evidence of O'Grady's Sexual History

[33,34] Finally, Edwards assigns that the court erred in excluding certain evidence as irrelevant. 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

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[69] Brief for appellant at 59.

[70] *State v. Broomhall*, 221 Neb. 27, 374 N.W.2d 845 (1985). See, also, *Thurman, supra* note 66.

factor in determining admissibility.[71] 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.[72]

(a) Background

Before trial, Edwards moved for an order permitting him to introduce evidence of O'Grady's sexual history; specifically, her relationship with Chris McClanathan. The State countered with a motion in limine seeking to preclude such evidence, with respect to McClanathan and Bates, under Nebraska's rape shield law.[73] While the court found that the rape shield law was inapplicable, the court concluded that the evidence at issue should be excluded because it was irrelevant and because it was inadmissible character evidence.

When O'Grady's friend Peterson testified, she said that Bates was O'Grady's "ex-boyfriend." On cross-examination, Edwards' counsel was not permitted to ask Peterson why Bates and O'Grady's relationship had ended. Edwards' counsel also made an offer of proof that Stumme and Peterson would, if asked, testify that O'Grady had a sexual relationship with McClanathan. Counsel also proffered that Stumme would have testified that O'Grady told her that O'Grady had a miscarriage in October 2005. And counsel proffered that Peterson would have testified that O'Grady might have been pregnant in a previous relationship and may have had a miscarriage. The State objected to the evidence on the grounds of hearsay, relevance, and the motion in limine, and the offers of proof were overruled.

Later, Edwards offered birth control pills found in O'Grady's car into evidence. Edwards made an offer of proof that if Bates were allowed to testify, he would testify that O'Grady had told Bates that she was pregnant with his child, but had had a miscarriage because she took some birth control pills. Edwards also offered to prove that

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[71] *Draganescu, supra* note 5.

[72] *Id.*

[73] Neb. Rev. Stat. § 28-321 (Reissue 2008).

> if Teresa Peterson, Keri Peterson's mother, were allowed to testify, she would testify that Jessica O'Grady had on May 8th of 2006 told Teresa Peterson that she, Ms. O'Grady, was pregnant even though she, Ms. O'Grady, never saw the pregnancy test. That Ms. O'Grady originally said that Ms. O'Grady thought Chris Edwards was the father, but when Ms. Teresa Peterson and Ms. O'Grady talked about her sexual contact with Chris McClanathan and then Chris Edwards, Chris McClanathan's sexual encounter with Ms. O'Grady preceded that of Mr. Edwards.
>
> When Ms. Peterson did the math and went backwards, . . . Ms. Peterson came to the conclusion, based on the information that Ms. O'Grady provided her, that Mr. McClanathan would be the father of the child; if, in fact, Ms. O'Grady was pregnant. And that Ms. Peterson would further say that Ms. O'Grady really wanted Chris Edwards to be the father of the child.

Those offers of proof were also overruled.

(b) Analysis

Edwards argues that the evidence he proffered was relevant and admissible. 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.[74] Evidence which is not relevant is not admissible.[75]

It should be noted, to begin with, that Edwards' appellate brief is devoted to explaining how his proffered evidence was supposedly relevant. This overlooks the fact that the objections sustained by the court were based on relevance *and* hearsay,[76] and the court's ruling on the motion in limine also concluded that the evidence was inadmissible character evidence.[77] Much of the evidence Edwards sought to adduce was based on

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[74] Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2008).

[75] Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 2008).

[76] See Neb. Evid. R. 801 and 802, Neb. Rev. Stat. §§ 27-801 and 27-802 (Reissue 2008).

[77] See Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008).

hearsay statements allegedly made by O'Grady. And the theory on which Edwards relies to explain its relevance is essentially that O'Grady purportedly committed a previous act and may have acted in conformity with that act in this instance.[78] Edwards' brief does not explain how his proffered evidence, even if relevant, overcame the State's other objections.

But beyond that, the court did not abuse its discretion in concluding that the evidence was irrelevant. Taken at face value, the evidence simply would have established that O'Grady may have used birth control pills and may have previously had a miscarriage. Edwards' theory is that the same thing may have happened again—explaining the blood on his mattress—but the evidence he proffered was insufficient to establish that theory. Evidence is relevant when it tends 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, and Edwards did not proffer evidence tending to establish that a previous miscarriage, or the use of birth control pills, made it more likely that the blood on Edwards' mattress was the result of *another* miscarriage. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.[79] But here, there was not sufficient evidence to support the condition of fact upon which the relevance of Edwards' proffered evidence depended.

Edwards suggests that the evidence was admissible under Neb. Evid. R. 406, as "[e]vidence of the habit of a person . . . relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit . . . ."[80] But even if Edwards' evidence proved the single incident that he claims, it would be an insufficient showing of a "routine" or "habit," both because the single incident would not establish a

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[78] See *id.*

[79] Neb. Evid. R. 104(2), Neb. Rev. Stat. § 27-104(2) (Reissue 2008).

[80] Neb. Evid. R. 406(1), Neb. Rev. Stat. § 27-406(1) (Reissue 2008).

"routine,"[81] and because the relevance of the evidence depends on Edwards' claim that O'Grady engaged in a deliberate volitional act, not a "habit."[82]

[35-37] And Edwards also suggests that the State "opened the door" to his proffered evidence by suggesting, at trial, that Edwards may have been motivated to kill O'Grady because she was pregnant.[83] The concept of "opening the door" is a rule of expanded relevancy which authorizes admitting evidence which otherwise would have been irrelevant in order to respond to (1) admissible evidence which generates an issue or (2) inadmissible evidence admitted by the court over objection.[84] The rule is most often applied to situations where evidence adduced or comments made by one party make otherwise irrelevant evidence highly relevant or require some response or rebuttal.[85] "Opening the door" is simply a contention that competent evidence which was previously irrelevant is now relevant through the opponent's admission of other evidence on the same issue.[86]

The State did not open the door to the proffered evidence. Edwards' motive to commit the crime for which he was on trial was obviously at issue throughout the case, and the evidence he proffered was not responsive to the State's argument. Edwards' proffered evidence was irrelevant, for the reasons explained above, and the State's theory of Edwards' motive did not make his evidence relevant.

[38] In short, Edwards' brief does not address all of the reasons the court found his proffered evidence to be inadmissible, and we are unpersuaded by the argument that he makes.

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[81] See, e.g., *Thompson v. Boggs*, 33 F.3d 847 (7th Cir. 1994); *Jones v. Southern Pacific R.R.*, 962 F.2d 447 (5th Cir. 1992); *United States v. Pinto*, 755 F.2d 150 (10th Cir. 1985); *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494 (4th Cir. 1977).

[82] See, e.g., *U.S. v. Troutman*, 814 F.2d 1428 (10th Cir. 1987); *United States v. Sampol*, 636 F.2d 621 (D.C. Cir. 1980).

[83] Reply brief for appellant at 13.

[84] *Sturzenegger, supra* note 58.

[85] *Id.*

[86] See *id.*

The court did not abuse its discretion in concluding that the evidence was irrelevant. Edwards also argues, briefly, that the court's exclusion of this evidence violated his constitutional right to present a complete defense. But this argument is also without merit, as a criminal defendant has no constitutional right to inquire into irrelevant matters.[87]

V. CONCLUSION

The evidence was sufficient to support the corpus delicti of homicide and Edwards' convictions. We find no error in the district court's refusal of Edwards' proposed jury instruction, denial of his motion for continuance, or rejection of his proffered evidence. To the extent that Edwards also suggests that the court committed cumulative error, his argument is without merit. Therefore, the court's judgment is affirmed.

AFFIRMED.

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[87] See *State v. Schenck*, 222 Neb. 523, 384 N.W.2d 642 (1986).

ANDREA LACEY, APPELLEE, V. STATE OF NEBRASKA, ACTING THROUGH THE NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLANT.

768 N.W.2d 132

Filed July 10, 2009. No. S-08-626.

1. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
2. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
3. **Judgments: Verdicts.** To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
4. **Employer and Employee: Discrimination.** An employer cannot raise a defense under *Faragher v. Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998), if a supervisor's harassment results in the discharge, demotion, or undesirable reassignment of the harassed employee.

5. **Verdicts: Appeal and Error.** A civil jury verdict will not be disturbed on appeal unless clearly wrong.
6. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Affirmed.

Jon Bruning, Attorney General, and Ryan C. Gilbride for appellant.

Kathleen M. Neary, of Vincent M. Powers & Associates, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Andrea Lacey filed an employment discrimination claim against the State of Nebraska pursuant to the Nebraska Fair Employment Practice Act and title VII of the Civil Rights Act of 1964. Lacey alleged sexual harassment, retaliatory discharge, and retaliatory failure to hire. A jury awarded Lacey $60,000 in damages on her sexual harassment claim but found in favor of the State on the retaliation claims. The State appeals, and we affirm.

SCOPE OF REVIEW

[1] 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. *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006).

[2] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Poppe v. Siefker*, 274 Neb. 1, 735 N.W.2d 784 (2007).

[3] To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law

and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Frank v. Lockwood*, 275 Neb. 735, 749 N.W.2d 443 (2008).

FACTS

Lacey began her employment with the Department of Correctional Services (DCS) as a temporary employee on December 20, 2003. As a warehouse technician, she performed office work, ordered supplies, and "pulled" orders for all of the correctional facilities in Nebraska. Her employment was to end on June 11, 2005. Jeff Ehlers, Lacey's first supervisor, stated that she performed her job very well. When Ehlers was promoted to acting warehouse manager, Jeff Drager became Lacey's supervisor.

Drager testified that he tried to create a fun atmosphere at the warehouse by promoting "bagging" on fellow employees, or giving each other a hard time in a joking manner. This joking consisted of sexual comments and questions directed toward Lacey that started within 2 weeks of the beginning of her employment. Examples of Drager's behavior include asking Lacey how often she and her boyfriend had sex, asking her questions about oral sex with her boyfriend, asking Lacey whether she had sex in the parking lot, and asking whether she had sex when she got home. Drager often commented to Lacey that she looked tired, asked her whether she was out having sex all night and whether her boyfriend wore her out the night before, and commented that she probably had sex all of the time because she was at a time in her life when women want to have sex frequently. He talked about the size of male genitalia and repeatedly asked Lacey whether size mattered to her.

The vulgarity persisted and ranged in frequency from two to three times per week to every day. By June 2004, Drager made comments to Lacey almost daily. Ron Looking Elk, Lacey's coworker, overheard the sexual comments Drager made to Lacey three to four times per week. Looking Elk told Drager that he was "crossing the line," but Drager laughed off the warning. Looking Elk also testified that Ehlers heard some of Drager's comments to Lacey, but that Ehlers said he did not

want to hear the conversation and that Ehlers would leave the room. Drager usually made comments to Lacey when other people were not around.

Drager also subjected Lacey to uninvited touching. He would lean his chest on her back while she was sitting down and place his face next to hers. On one occasion, he ran his fingers through her hair. Lacey testified that Drager constantly stared at her breasts and told her the uniforms she and other employees wore did not fit her the way they fit the men. He threw candy and shot rubberbands at her chest area, trying to get the objects to go down the front of her blouse. Drager followed Lacey around so often that other employees teased her that he was her shadow. Lacey testified that he treated her differently than he treated the male employees.

On one occasion, Lacey observed Drager sitting on stairs outside the room where she was working. When she asked him what he was doing, he said he was "just watching" her. Lacey told Ehlers about the incident, but he did not follow up on the complaint. In response to Drager's harassment, Lacey asked him to stop and told him to leave her alone.

On June 27, 2004, Lacey told Ehlers that she was fed up with Drager's behavior and was going to quit. Ehlers told her not to quit, and he instructed her to make a list of the instances of harassment. The next day, Lacey and Ehlers met with Jan Lehmkuhl, the DCS materiel administrator, at the central DCS office. She informed Lacey that DCS had zero tolerance for sexual harassment and asked Lacey to go back to the warehouse. Lacey agreed to do so, under the impression that the matter would be resolved. She returned to work and continued to work with Drager 40 hours per week. After the meeting, no one contacted Lacey to determine whether the situation had improved.

DCS did not investigate Drager's actions until the end of July 2004. At that time, the investigator concluded that Drager violated the sexual harassment policies of the State. Ehlers ordered Drager and Lacey to stay away from each other and instructed Lacey to report to Mark McCoy instead of Drager. Drager had stopped making inappropriate comments to Lacey after she filed the complaint.

Ehlers was away from the warehouse between August 16 and 19, 2004. During that time, McCoy observed Drager following Lacey around. On August 18, McCoy telephoned Ehlers and told him that Drager was bothering Lacey. Drager had called Lacey into his office and asked her to sign a paper stating that he was of good character. Lacey refused, and Drager told her that she "pissed him off" and that he was going to "[expletive] [her] up." Looking Elk overheard Drager tell Lacey that "if this got back to his wife, he was gonna [expletive] her up." McCoy and Looking Elk observed Lacey crying after Drager confronted her.

A disciplinary hearing was held on August 20, 2004, regarding Lacey's initial complaint against Drager. Drager did not mention the August 18 incident and stated there had not been any problems since the beginning of the investigation. Following the hearing, Drager was transferred from the warehouse to a position at the Lincoln Correctional Center. On September 2, Lehmkuhl issued Drager a written order directing him to stay away from Lacey.

On December 22, 2004, an inmate assigned to work in the DCS warehouse was found to be in possession of tobacco, which is contraband. The inmate claimed that Lacey had sold him the tobacco. An officer investigated the allegations. There was no evidence corroborating the inmate's claims, but the officer concluded that Lacey was guilty because "she was calm about the whole situation and didn't seem to think that it was that big a deal." Lacey's employment was terminated in December 2004 as a result of the investigation. Lehmkuhl recommended that Lacey not be eligible for rehire in the future. Lacey applied for a full-time job as a warehouse technician with DCS in June 2005, and she was not hired.

Lacey filed a complaint on June 7, 2006, alleging violations of the Nebraska Fair Employment Practice Act and title VII of the Civil Rights Act of 1964. She alleged sexual harassment, retaliatory discharge, and retaliatory failure to hire. After the close of the evidence, the district court denied both parties' motions for directed verdict, and the issues were submitted to the jury. The jury found for the State on both retaliation claims and found for Lacey on the sexual harassment claim.

It awarded her $0 for lost wages and benefits and $60,000 for other compensatory damages. The court overruled the State's motions for new trial and for judgment notwithstanding the verdict. The State appeals.

ASSIGNMENTS OF ERROR

The State claims that the district court erred in (1) overruling the State's motion for directed verdict and (2) overruling its motions for new trial and for judgment notwithstanding the verdict.

ANALYSIS

Motion for Directed Verdict

The State claims that the district court erred in overruling its motion for directed verdict, because it was entitled to what it refers to as a "*Faragher* defense" to Lacey's sexual harassment claims. Brief for appellant at 9. We conclude that the *Faragher* defense does not apply and that the district court properly overruled the State's motion for directed verdict.

The *Faragher* defense is based on *Faragher v. Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). In *Faragher*, the plaintiff was a former lifeguard who worked for the marine safety section of the parks and recreation department of the city of Boca Raton, Florida. She brought a lawsuit under title VII of the Civil Rights Act of 1964 and alleged that two of her supervisors created a sexually hostile atmosphere by subjecting her and the other female lifeguards to uninvited and offensive touching and lewd remarks. There was evidence that other supervisors were aware of the inappropriate behavior and did nothing to stop the harassment and that the city failed to provide the marine safety section employees with copies of its sexual harassment policy. The plaintiff prevailed in district court, but the 11th Circuit Court of Appeals reversed.

[4] The U.S. Supreme Court granted certiorari and held that "an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of a plaintiff victim." *Faragher*, 524

U.S. at 780. Therefore, an employer can avoid liability when a supervisor abuses his supervisory authority to engage in sexual harassment if the employer shows that (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and (2) the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. *Faragher, supra*. The employer must prove both prongs of the defense. An employer cannot raise a *Faragher* defense if the supervisor's harassment results in the discharge, demotion, or undesirable reassignment of the harassed employee. *Id.*

The U.S. Court of Appeals for the Eighth Circuit recently considered the *Faragher* defense in *Weger v. City of Ladue*, 500 F.3d 710 (8th Cir. 2007). In *Weger*, a police captain commented on an officer's breast reduction surgery and subjected the officer to unwanted touching. The court found that the employer, a police department, acted reasonably to prevent and promptly correct sexually harassing behavior when it permanently reassigned the offending captain and the harassment stopped the day it was reported. The police department's actions were sufficient to satisfy the first prong of the *Faragher* defense. With regard to the second prong, the plaintiff knew that employees were to immediately report inappropriate behavior pursuant to the police department's antiharassment policy, yet she waited more than a year before reporting the harassment. This delay was unreasonable, and the city satisfied the second prong of the defense.

Assuming, but not deciding, that the State could raise such a defense in this case, we examine the record to determine if the State met both prongs of the defense. 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. *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006). The district court did not err in denying the directed verdict unless the only conclusion reasonable minds could reach from the evidence was (1) that the State exercised reasonable care to prevent and correct sexual harassment and (2) that Lacey

unreasonably failed to take preventative or corrective opportunities provided by the State to avoid harm.

We cannot conclude, as a matter of law, that the State exercised reasonable care to prevent and correct the sexual harassment in this case. Drager frequently asked Lacey sexual questions. Other employees overheard the comments Drager made and agreed that the comments crossed the line of what was appropriate. Drager subjected Lacey to uninvited touching by leaning his chest against her back and putting his face next to her face when he talked to her and by running his fingers through her hair. He also threw candy and shot rubberbands at her chest area and constantly followed her around the warehouse. When the State finally investigated Drager's actions, his behavior was found to be inappropriate.

Ehlers was aware of Drager's inappropriate behavior toward Lacey before June 2004, but he failed to stop the harassment. When Lacey complained to Ehlers and filed the formal report with Lehmkuhl, Ehlers verbally instructed Lacey to report to a different supervisor and told Drager to stay away from her. Unlike the solution undertaken by the police department in *Weger v. City of Ladue*, 500 F.3d 710 (8th Cir. 2007), the State's only solution was to tell the parties to stay away from each other. Drager resumed harassing Lacey as soon as Ehlers was absent from the warehouse for a few days. Only after Drager threatened Lacey was he given a written warning and transferred to a different facility. This action was not taken until approximately 2 months after Lacey initially reported the harassment. Reasonable minds could differ as to whether these actions by the State rose to the level of "reasonable care to prevent and correct promptly any sexually harassing behavior," as required by the first prong of the *Faragher* defense. See *Faragher v. Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998).

We also conclude that the State did not establish as a matter of law that it met the second prong of the *Faragher* defense. Reasonable minds could differ regarding whether Lacey unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

In *Faragher*, 524 U.S. at 808, the U.S. Supreme Court noted that the lifeguards were isolated from the city's higher management and that the city had "entirely failed to disseminate its policy against sexual harassment among the beach employees" and failed to keep track of the conduct of the supervisors. Conversely, in *Weger*, the court found that the female officer unreasonably delayed reporting the sexual harassment when she did not report the harassment for over a year even though she was aware that an antiharassment policy was in place.

The record does not establish that Lacey knew how to properly report workplace harassment. Lehmkuhl noted that she did not think of giving Lacey a copy of the administrative regulations regarding workplace harassment because Lacey was a temporary employee. The State argues that it was unreasonable for Lacey to wait 6 months before filing a complaint. This argument is based on the assumption that Lacey had a copy of the State's sexual harassment policy. Considering that Lacey did not receive the policy, a reasonable jury could conclude that Lacey's failure to report the harassment before June 2004 was objectively reasonable.

Furthermore, the jury was instructed that if Lacey met her burden of proof, it must consider the State's defenses. Specifically, a portion of the second jury instruction states that

> [i]n connection with the for[e]going defenses the burden of proof is on the [State] to prove, by the greater weight of the evidence, each and all of the following:
>
> 1. That the [State] took steps to prevent and correct promptly any harassing behavior;
>
> 2. That the steps [the State] took were reasonable;
>
> 3. That [Lacey] failed to timely complain of the sexual harassment; and
>
> 4. That [Lacey's] failure to do so was unreasonable.

This instruction incorporates the elements of the *Faragher* defense. As the jury awarded Lacey $60,000 for her sexual harassment claim, it clearly considered and rejected this defense.

Because reasonable minds could reach different conclusions as to whether the State took sufficient steps to prevent

and promptly correct sexual harassment and whether Lacey unreasonably failed to timely report the harassment, a directed verdict in favor of the State was not appropriate and the district court did not err in failing to grant the State's motion.

Next, the State alleges that it was entitled to a directed verdict on Lacey's retaliatory discharge and retaliatory failure to hire claims. The jury found for the State on both of these claims; therefore, the State cannot claim prejudice. Accordingly, this claim has no merit.

Motions for New Trial and for Judgment Notwithstanding Verdict

The State claims that the district court erred in failing to grant its motions for new trial and for judgment notwithstanding the verdict, because the jury's verdict was excessive and the result of passion and prejudice. These claims are also without merit.

[5] On appeal, a motion for new trial is reviewed for abuse of discretion. See *Poppe v. Siefker*, 274 Neb. 1, 735 N.W.2d 784 (2007). A motion for judgment notwithstanding the verdict is appropriate only when the facts are such that reasonable minds can draw but one conclusion. See *Frank v. Lockwood*, 275 Neb. 735, 749 N.W.2d 443 (2008). Furthermore, a civil jury verdict will not be disturbed on appeal unless clearly wrong. *Christian v. Smith*, 276 Neb. 867, 759 N.W.2d 447 (2008).

[6] "A verdict may be set aside as excessive only where it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or it is clear that the jury disregarded the evidence or controlling rules of law." *Johnson v. Schrepf*, 154 Neb. 317, 47 N.W.2d 853, 855 (1951) (syllabus of the court). It is well settled that "[t]he amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved." *State ex rel. Stenberg v. Consumer's Choice Foods*, 276 Neb. 481, 493, 755 N.W.2d 583, 593 (2008). Accord, *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006); *Jones v. Meyer*, 256 Neb. 947, 594 N.W.2d 610 (1999).

The jury awarded Lacey $0 for lost wages and benefits and $60,000 for other compensatory damages. As evidence of compensatory damages, Lacey testified that she suffered significant stress, had difficulty sleeping, and cried often. She also lost a significant amount of weight during the time she was employed at the warehouse, dropping from a size 12 to a size 1 or 2. Her physician placed her on antidepressant medication for stress; she had never taken antidepressants before that time.

Drager's harassment of Lacey continued for months. It ranged in frequency from two to three times per week to every day. Such harassment took its toll, causing Lacey depression and severe weight loss. She has more than adequately proved her mental and physical distress. Accordingly, the jury's verdict of $60,000 was not so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or that the jury disregarded the evidence or rules of law. The district court did not abuse its discretion in denying the State's motions for new trial and for judgment notwithstanding the verdict.

CONCLUSION

The district court did not err in denying the State's motions for directed verdict, new trial, and judgment notwithstanding the verdict. We therefore affirm the judgment of the district court.

AFFIRMED.

MILLER-LERMAN, J., participating on briefs.

STATE OF NEBRASKA, APPELLANT, V. JOAQUIN FIGEROA, ALSO KNOWN AS MARIO SANTA MARIA, ALSO KNOWN AS JOSE ALONZO, APPELLEE.

767 N.W.2d 775

Filed July 10, 2009. No. S-08-848.

1. **Right to Counsel: Waiver: Appeal and Error.** In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a "clearly erroneous" standard of review.
2. **Criminal Law: Judgments: Jurisdiction: Appeal and Error.** Absent specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.
3. **Appeal and Error.** The purpose of appellate review pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 2008) is to provide an authoritative exposition of the law to serve as precedent in future cases.
4. **Double Jeopardy: Juries: Pleas.** Jeopardy attaches (1) in a case tried to a jury, when the jury is impaneled and sworn; (2) when a judge, hearing a case without a jury, begins to hear the evidence as to the guilt of the defendant; or (3) at the time the trial court accepts the defendant's guilty plea.
5. **Constitutional Law: Right to Counsel: Waiver.** A defendant may waive the constitutional right to counsel, so long as the waiver is made knowingly, voluntarily, and intelligently.
6. **Right to Counsel: Waiver.** Formal warnings do not have to be given by the trial court to establish a knowing, voluntary, and intelligent waiver of the right to counsel. In other words, a formalistic litany is not required to show such a waiver was knowingly and intelligently made.
7. ____: ____. When considering whether a defendant voluntarily, knowingly, and intelligently waived his right to counsel, an appellate court reviews the totality of the circumstances appearing in the record.
8. ____: ____. An appellate court employs a two-step analysis to determine whether a defendant should be allowed to waive counsel. First, the court considers whether the defendant was competent to waive counsel, and second, it considers whether the defendant has voluntarily, knowingly, and intelligently waived counsel.
9. ____: ____. Where a defendant has waived the right to counsel, the dispositive inquiry is whether the defendant was sufficiently aware of the right to have counsel and of the possible consequences of a decision to proceed without counsel. Consideration may be given to a defendant's familiarity with the criminal justice system.
10. ____: ____. A waiver of counsel need not be prudent, just knowing and intelligent.

Appeal from the District Court for Dakota County, WILLIAM BINKARD, Judge, on appeal thereto from the County Court for Dakota County, KURT RAGER, Judge. Exception sustained.

Kimberly M. Watson, Dakota County Attorney, for appellant.

Dennis R. Hurley, of Hurley Law Offices, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Joaquin Figeroa, also known as Mario Santa Maria or Jose Alonzo, appeared pro se in the county court for Dakota County, Nebraska, and pled guilty to false reporting and resisting arrest, both Class I misdemeanors.[1] Figeroa was ordered to pay costs of $44, and he was sentenced to 250 days in county jail for the false reporting conviction and to 1 year in the Department of Correctional Services for the resisting arrest conviction, running consecutively. Figeroa appealed his convictions to the district court, and the district court reversed. The district court concluded that the county court had failed to adequately inform Figeroa of his right to counsel. Accordingly, the district court remanded the matter to the county court for further proceedings and ordered the county court to strike the guilty plea and reverse Figeroa's judgment and sentences. The State brought this error proceeding pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 2008).

BACKGROUND

Figeroa appeared without counsel at a group arraignment in the county court for Dakota County and was informed of his constitutional rights. The court said in relevant part: "You have the right to an attorney of your own choice at your own expense. If you cannot afford one, the Court can appoint an attorney for you at public expense." After the court completed the general rights advisory, Figeroa was individually advised of the nature of his charges and the possible penalties. The court asked Figeroa if he heard and understood the rights given to the

[1] See Neb. Rev. Stat. §§ 28-904 and 28-907 (Reissue 2008).

group, and Figeroa said that he heard and understood his rights. The following conversation took place:

> THE COURT: As for an attorney, do you wish to request counsel at public expense if you cannot afford one, hire your own at your own expense, or proceed without one?
>
> [Figeroa]: Proceed without one.
>
> THE COURT: Did anyone promise you anything or threaten you in any way in order to get you to do that?
>
> [Figeroa]: No, sir.
>
> THE COURT: Are you currently under the influence of alcohol or drugs?
>
> [Figeroa]: No, sir.

Based on this conversation, the court concluded that Figeroa knowingly waived his right to counsel and allowed him to proceed pro se. The record reflected that Figeroa was a convicted felon and had an extensive criminal history.

Ultimately, Figeroa pled guilty and was sentenced. On February 13, 2008, Figeroa filed his notice of appeal to the district court for Dakota County, asserting as error, among other things, that he did not knowingly, intelligently, and voluntarily waive his right to an attorney. Figeroa argued that he was not adequately informed of his right to counsel, because the court's use of the word "can" implied that the court was not required to appoint counsel, at the State's expense, even if Figeroa was unable to afford to secure his own.

The district court for Dakota County, acting as an intermediate appellate court, entered an order reversing Figeroa's judgment and sentences, based on Figeroa's assigned error that he did not knowingly, voluntarily, and intelligently waive his right to counsel. The district court concluded that Figeroa was not informed of his constitutional right to counsel, because the county court's statement that "[i]f you cannot afford one, the Court can appoint an attorney for you at public expense" was misleading. Accordingly, the district court ordered that the guilty plea be stricken and that the judgment and sentences of the county court be reversed, and the matter remanded for further proceedings. The district court did not make any determinations regarding Figeroa's remaining assignments

of error. The State brought this error proceeding pursuant to § 29-2315.01.

ASSIGNMENT OF ERROR

The State argues that the district court erred in concluding that the county court failed to sufficiently advise Figeroa of his constitutional right to legal counsel at public expense.

STANDARD OF REVIEW

[1] In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a "clearly erroneous" standard of review.[2]

ANALYSIS

[2,3] The State requests that this court reverse the district court's order and affirm the county court's judgment and sentences. Absent specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.[3] In the present case, the State appealed the district court's decision under § 29-2315.01, which provides one exception to the general rule. Section 29-2315.01 allows the county attorney to request appellate review of an adverse decision or ruling in a criminal case in district court after a final order or judgment in the criminal case has been entered, but § 29-2315.01 does not allow an appellate court to review issues upon which no ruling was made.[4] The purpose of appellate review pursuant to § 29-2315.01 is to provide an authoritative exposition of the law to serve as precedent in future cases.[5]

[4] Because the State brought this appeal as an error proceeding, disposition of this case is governed by Neb. Rev. Stat. § 29-2316 (Reissue 2008). Section 29-2316 provides:

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[2] *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007); *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006).

[3] *State v. Hense*, 276 Neb. 313, 753 N.W.2d 832 (2008).

[4] See, *State v. Dorcey*, 256 Neb. 795, 592 N.W.2d 495 (1999); *State v. Jensen*, 226 Neb. 40, 409 N.W.2d 319 (1987).

[5] See *State v. Hense, supra* note 3.

> The judgment of the court in any action taken pursuant to section 29-2315.01 shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy, but in such cases the decision of the appellate court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered or which may thereafter arise in the state. When the decision of the appellate court establishes that the final order of the trial court was erroneous and the defendant had not been placed legally in jeopardy prior to the entry of such erroneous order, the trial court may upon application of the prosecuting attorney issue its warrant for the rearrest of the defendant and the cause against him or her shall thereupon proceed in accordance with the law as determined by the decision of the appellate court.

In *State v. Vasquez*,[6] we held that jeopardy attaches (1) in a case tried to a jury, when the jury is impaneled and sworn; (2) when a judge, hearing a case without a jury, begins to hear the evidence as to the guilt of the defendant; or (3) at the time the trial court accepts the defendant's guilty plea.

In the present case, jeopardy attached when the county court accepted Figeroa's guilty plea; thus, we are unable, under § 29-2316, to reinstate Figeroa's judgment and sentences, regardless of the outcome of this case. In other words, our decision in this error proceeding cannot affect the judgment of the district court. However, our decision determines the law to govern in any similar cases now pending or that may subsequently arise.

The sole issue presented by the parties in this appeal is whether Figeroa knowingly, voluntarily, and intelligently waived his right to counsel before the county court. The State argues that Figeroa was sufficiently advised and aware of his constitutional right to counsel. The State argues that the county court's use of the word "can" was appropriate, because the court is not required to appoint counsel if the defendant has

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[6] *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006).

sufficient funds to hire his own. Thus, the State maintains that Figeroa knowingly and intelligently waived his right to counsel and exercised his right of self-representation. On the record before us, we conclude that the county court did not err in concluding that Figeroa's waiver of counsel was knowing, voluntary, and intelligent.

[5,6] A defendant may waive the constitutional right to counsel, so long as the waiver is made knowingly, voluntarily, and intelligently.[7] We have explained that formal warnings do not have to be given by the trial court to establish a knowing, voluntary, and intelligent waiver of the right to counsel.[8] In other words, a formalistic litany is not required to show such a waiver was knowingly and intelligently made.[9]

[7-10] Instead, when considering whether a defendant voluntarily, knowingly, and intelligently waived his right to counsel, we review the totality of the circumstances appearing in the record.[10] We employ a two-step analysis to determine whether a defendant should be allowed to waive counsel. First, we consider whether the defendant was competent to waive counsel, and second, we consider whether the defendant has voluntarily, knowingly, and intelligently waived counsel.[11] The dispositive inquiry is whether the defendant was sufficiently aware of the right to have counsel and of the possible consequences of a decision to proceed without counsel.[12] Consideration may be given to a defendant's familiarity with the criminal justice system.[13] A waiver of counsel need not be prudent, just knowing and intelligent.[14]

The district court did not find, and Figeroa does not argue, that his waiver of counsel was involuntary, nor does he argue

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[7] See *State v. Hessler, supra* note 2.

[8] See *State v. Delgado*, 269 Neb. 141, 690 N.W.2d 787 (2005).

[9] *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991).

[10] See *State v. Gunther, supra* note 2.

[11] See *State v. Hessler, supra* note 2.

[12] *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997).

[13] *Id.*

[14] *Id.*

that he was incompetent. The record does not reveal any reason why the court should doubt Figeroa's competence to waive counsel. As such, we conclude that Figeroa was competent to waive counsel.[15]

But the district court concluded that Figeroa's waiver was not knowing and intelligent, because the county court, by using the word "can" instead of "will,"

> gave [Figeroa] the impression that if the court, in an expansive manifestation of magnanimity were to feel like appointing an attorney to represent defendant, or wanted to do so, or thought that it might be an acceptable idea to do so, then the court would not be prohibited from doing so.

Thus, the district court found that Figeroa was not adequately aware of his right to counsel.

A similar argument was rejected in *State v. Fernando-Granados*.[16] In that case, the defendant was advised, "'"[Y]ou have the right to consult with a lawyer and have a lawyer present with you during questioning."'"[17] He was then advised, "'[I]f [you do] not have the money to pay for a lawyer the Court [could, may, can] ha[s] the ability to appoint one.'"[18] We concluded that reading the two warnings together, the defendant was clearly advised of his right to have an attorney present during questioning. We reasoned, "Although the phrase 'will appoint' was not used, the advisement was nevertheless sufficient to reasonably inform him of his right to an attorney, and to apprise him that a method, i.e., appointment by the court, existed for ensuring that an attorney was available to him."[19] We concluded, "The challenged warning . . . was sufficient to accomplish what the U.S. Supreme Court stated as its purpose, namely, to prevent a misunderstanding that the right

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[15] See *State v. Hessler, supra* note 2.

[16] *State v. Fernando-Granados*, 268 Neb. 290, 682 N.W.2d 266 (2004).

[17] *Id.* at 306, 682 N.W.2d at 279.

[18] *Id.*

[19] *Id.* at 307, 682 N.W.2d at 280.

to consult a lawyer is conditioned upon having the funds to obtain one."[20]

In the present case, Figeroa was both advised of his right to counsel and questioned regarding his knowledge of that right. Specifically, the county court stated, "If you cannot afford [an attorney], the Court can appoint an attorney for you at public expense." Figeroa was later asked if he understood his rights, to which he stated he did. The court again inquired, "As for an attorney, do you wish to request counsel at public expense if you cannot afford one, hire your own at your own expense, or proceed without one?" Not only did Figeroa's answers indicate that he was aware of his constitutional right to counsel, but the two admonitions, read together, made it sufficiently clear that an attorney would be provided to Figeroa in the event that he was not financially able to obtain his own.

Read together, the two admonitions, considered in conjunction with Figeroa's experience with the criminal justice system, were sufficient to make Figeroa aware of his constitutional right to counsel.[21] Thus, the county court's finding that Figeroa was aware of his constitutional right to counsel and thus voluntarily, knowingly, and intelligently waived that right was not clearly erroneous, and the State's exception to the district court's order has merit and is sustained.

CONCLUSION

Considering the totality of the circumstances, we find no error in the county court's warnings and we conclude that the county court did not clearly err in concluding that Figeroa knowingly, voluntarily, and intelligently waived his right to counsel. Thus, the district court erred in not affirming the county court's judgment and sentences. The State's exception is sustained; however, the limitations of § 29-2316 preclude this court from reinstating Figeroa's judgment and sentences, despite the district court's error.

EXCEPTION SUSTAINED.

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[20] *Id.* at 307, 682 N.W.2d at 279-80.

[21] See *State v. Rhines*, 548 N.W.2d 415 (S.D. 1996).

GERRARD, J., concurring in part, and in part dissenting.

I agree with the majority's conclusion that pursuant to *State v. Fernando-Granados*,[1] the district court erred in concluding that Figeroa was not effectively informed of his constitutional right to counsel. But I disagree with the conclusion that the county court's convictions and sentences cannot be reinstated pursuant to Neb. Rev. Stat. § 29-2316 (Reissue 2008). I recognize that this court's decision in *State v. Vasquez*[2] is factually on point. But I would follow our prior holdings in *State v. Griffin*,[3] *State v. Neiss*,[4] and *State v. Schall*[5] and reinstate the county court's judgment. I respectfully dissent from the majority's conclusion to the contrary.

The majority relies on its holding in *State v. Hense*[6] that whether a defendant "has been placed legally in jeopardy" within the meaning of § 29-2316 does not depend on double jeopardy analysis. But for nearly 20 years before that, we had held—without amendment from the Legislature—that the Legislature intended for errors to be correctible through error proceedings consistent with double jeopardy principles.[7] And it is also well established that while a penal statute is given a strict construction, it should be given a construction which is sensible and prevents injustice or an absurd consequence.[8] We should try to avoid a statutory construction which would lead to an absurd result.[9] The result in this case is unjust and impractical.

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[1] *State v. Fernando-Granados*, 268 Neb. 290, 682 N.W.2d 266 (2004).

[2] *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006).

[3] *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005).

[4] *State v. Neiss*, 260 Neb. 691, 619 N.W.2d 222 (2000).

[5] *State v. Schall*, 234 Neb. 101, 449 N.W.2d 225 (1989).

[6] *State v. Hense*, 276 Neb. 313, 753 N.W.2d 832 (2008).

[7] See *id.* (Gerrard, J., concurring in part, and in part dissenting; Heavican, C.J., and Stephan, J., join).

[8] See *State v. Hochstein and Anderson*, 262 Neb. 311, 632 N.W.2d 273 (2001).

[9] *State v. Hamilton*, 277 Neb. 593, 763 N.W.2d 731 (2009).

We have concluded, as a matter of law, that Figeroa was correctly informed of his rights and knowingly, intelligently, and voluntarily pled guilty to the offenses with which he was charged. In other words, Figeroa was convicted and sentenced in a fair and lawful proceeding, yet, under this court's interpretation of § 29-2316, we are apparently prohibited from affirming the result of that proceeding. And the court's construction of the prohibition against reversing the district court's judgment "when the defendant in the trial court has been placed legally in jeopardy"[10] results in the defendant in this case facing *more* jeopardy. Prosecutorial and judicial resources will be wasted providing Figeroa with a new trial to which he is not entitled—in order to "protect" his right to be free from being tried twice for the same offense. This does not make sense.

As I explained in my dissenting opinion in *Hense*, I believe that § 29-2316 incorporates double jeopardy principles[11] and permits reversal of the district court's judgment where double jeopardy would not preclude it.[12] That reading of § 29-2316 is even more sensible where, as here, the district court is acting as an intermediate appellate court, and the only effect of reversing the district court's judgment is to affirm the valid convictions and sentences. It is well established that under the Double Jeopardy Clause, an appellate court's order reversing a conviction is subject to further review.[13] And that was precisely the conclusion we reached under § 29-2316 in *Griffin* and *Schall*.[14]

I recognize how this court's decisions in *Hense* and *Vasquez* might command the majority's disposition of this case. But I see little in § 29-2316 to compel the conclusion that the

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[10] See § 29-2316.

[11] See, U.S. Const. amend. V; Neb. Const. art. I, § 12.

[12] *Hense, supra* note 6 (Gerrard, J., concurring in part, and in part dissenting; Heavican, C.J., and Stephan, J., join). See, also, *Neiss, supra* note 4.

[13] See, *Smith v. Massachusetts*, 543 U.S. 462, 125 S. Ct. 1129, 160 L. Ed. 2d 914 (2005); *United States v. Wilson*, 420 U.S. 332, 95 S. Ct. 1013, 43 L. Ed. 2d 232 (1975).

[14] See, *Griffin, supra* note 3; *Schall, supra* note 5.

Legislature intended to insulate the decisions of the district court, sitting as an intermediate appellate court, from further appellate review. Under this court's construction of the statute, a district court's reversal of a lower court's judgment has become "'tantamount to a verdict of acquittal at the hands of the jury, not subject to review.'"[15] That is almost precisely what § 29-2316 was meant to *preclude*—not what it is meant to accomplish.

And I worry about what is coming next. In this case, the only result—so far—is an unnecessary trial. In previous cases, defendants have received the benefit of lesser convictions or sentences than they might have deserved.[16] But more is sure to come, and the court's current construction of § 29-2316 would leave us powerless to effectively correct more serious errors. In the present case, the proverbial chickens the court hatched in *Hense* have come home to roost. Wolves are sure to follow.

It is my hope that this court corrects course before more unintended mischief happens. We recently stated that "remaining true to an intrinsically sounder doctrine better serves the values of stare decisis than following a more recently decided case inconsistent with the decisions that came before it."[17] Returning to the sound doctrine of *Griffin*, *Neiss*, and *Schall* would serve us well. And failing that, the Legislature could amend the statutes relating to prosecutorial appeals, as the U.S. Congress has, to authorize the State to appeal whenever constitutionally permissible.[18] Otherwise, I fear a serious miscarriage of justice will occur that we will be powerless to undo. I respectfully dissent from the court's ultimate disposition.

HEAVICAN, C.J., and STEPHAN, J., join in this concurrence and dissent.

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[15] *Wilson, supra* note 13, 420 U.S. at 345.

[16] See, *State v. Head*, 276 Neb. 354, 754 N.W.2d 612 (2008); *Hense, supra* note 6; *Vasquez, supra* note 2. See, also, *State v. Stafford, post* p. 109, 767 N.W.2d 507 (2009).

[17] *State v. Hausmann*, 277 Neb. 819, 828, 765 N.W.2d 219, 226 (2009), citing *Mayhew v. Mayhew*, 205 W. Va. 490, 519 S.E.2d 188 (1999).

[18] See, 18 U.S.C. § 3731 (2006); *Wilson, supra* note 13.

STATE OF NEBRASKA, APPELLANT, V. WILLIAM J. STAFFORD, APPELLEE.

767 N.W.2d 507

Filed July 10, 2009. No. S-08-881.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is a matter of law that requires an appellate court to reach an independent conclusion irrespective of the determination made by the court below.
2. **Criminal Law: Judgments: Jurisdiction: Appeal and Error.** Absent specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.
3. **Criminal Law: Judgments: Jurisdiction: Statutes: Appeal and Error.** Certain exceptions are permitted by statute from the general rule that the State has no right to appeal an adverse ruling in a criminal case, but because such statutes are penal statutes, they are to be strictly construed against the government.
4. **Sentences: Legislature: Intent.** Under Neb. Rev. Stat. § 29-2320 (Reissue 2008), the Legislature has specifically chosen to exempt misdemeanor sentences from excessive leniency review.
5. **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.

Appeal from the District Court for Sarpy County: MAX KELCH, Judge. Appeal dismissed.

Jennifer A. Miralles, Deputy Sarpy County Attorney, and Jonathan E. Roundy, Senior Certified Law Student, for appellant.

Patrick J. Boylan, Chief Deputy Sarpy County Public Defender, and Scott B. Blaha, Senior Certified Law Student, for appellee.

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

PER CURIAM.

This is an appeal brought by the State from William J. Stafford's conviction for driving under the influence of alcohol (DUI), third offense. The question presented by the State is whether the trial court imposed an excessively lenient sentence as a result of the court's determination that evidence of a prior DUI conviction was inadmissible for sentence enhancement

purposes. The first issue we must decide, however, is whether the State followed the correct procedure in seeking appellate review of the issue it is attempting to raise.

BACKGROUND

Stafford was charged by information with one count of theft and one count of DUI. The theft charge is not directly at issue in this appeal. Stafford pled guilty and was convicted on each charge. The State offered evidence of three prior DUI convictions. Evidence of two of the convictions was received without objection, and those convictions are not at issue here.

Nor did Stafford object to exhibit 3, the contested evidence in this appeal. But the district court asked Stafford's counsel if he had any argument as to whether exhibit 3 was a valid DUI conviction. The problem, as observed by the State, was that on the critical page of the exhibit, the sentencing court had checked the box indicating that Stafford had entered a plea, but failed to check any of the boxes that would have indicated whether Stafford pled guilty, not guilty, or no contest. Below that, the sentencing court checked the box indicating that Stafford had been found guilty of DUI.

The district court concluded it was unable to find that Stafford had pled guilty to the DUI charge. Therefore, the court found that exhibit 3 was not a valid prior conviction for DUI and sentenced Stafford for third-offense DUI. The court specifically found:

> Exhibit 1 was a valid prior conviction for . . . Stafford, for driving under the influence of alcohol or drugs from 2002; Exhibit 4 is a valid prior conviction from 2003; and, therefore, he has two valid prior convictions for driving under the influence of alcohol or drugs. *Therefore, the present offense is a 3rd offense DUI, a Class W Misdemeanor, and that finding is made on the record.*

(Emphasis supplied.) Stafford was sentenced to 180 days' imprisonment, to be served consecutively to the sentence for his theft conviction. His operator's license was revoked for a period of 15 years. The State filed a notice of appeal.

ASSIGNMENT OF ERROR

The State assigns that the district court erred when it determined that exhibit 3, a certified copy of Stafford's DUI conviction from Douglas County, was not valid for enhancement purposes because it lacked a clarifying checkmark.

STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is a matter of law that requires an appellate court to reach an independent conclusion irrespective of the determination made by the court below.[1]

ANALYSIS

[2,3] We turn first to a question of jurisdiction. Absent specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.[2] Certain exceptions from this general rule are permitted by statute, but because such statutes are penal statutes, they are to be strictly construed against the government.[3] In this case, the State did not pursue an error proceeding, pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 2008). Instead, the State appealed pursuant to Neb. Rev. Stat. § 29-2320 (Reissue 2008), claiming that the sentence imposed was excessively lenient. We note that although § 29-2320 was recently amended,[4] that amendment is not relevant to this case, and for ease of reference, we cite to the codified version of the statute that was in effect when this appeal was taken.

[4] Section 29-2320 provides that

> [w]henever a defendant is found guilty of a felony following a trial or the entry of a plea of guilty or tendering a plea of nolo contendere, the prosecuting attorney charged with the prosecution of such defendant may appeal the sentence imposed if such attorney reasonably believes,

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[1] *State v. Caniglia*, 272 Neb. 662, 724 N.W.2d 316 (2006).

[2] *State v. Hense*, 276 Neb. 313, 753 N.W.2d 832 (2008).

[3] *Id.*

[4] See L.B. 63, 101st Leg., 1st Sess.

> based on all of the facts and circumstances of the particular case, that the sentence is excessively lenient.

Under § 29-2320, a prosecuting attorney may appeal sentences imposed in *felony* cases when he or she reasonably believes the sentence is excessively lenient.[5] The Legislature has specifically chosen to exempt misdemeanor sentences from excessive leniency review.[6] And in this case, Stafford was specifically convicted and sentenced for third-offense DUI, a Class W misdemeanor.[7] Thus, as *State v. Vasquez*[8] explains, the sentence imposed cannot be reviewed for excessive leniency.

[5] The State makes two arguments in response. First, the State contends that "because the conviction for DUI *should* have been determined to be a felony, it is appealable as a felony until the ultimate issue is decided."[9] But this argument is inconsistent with the plain language of § 29-2320, which permits a prosecuting attorney to appeal only when "a defendant is found guilty of a felony." 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] Accordingly, as we concluded in *Vasquez*, we are without power to affect Stafford's misdemeanor sentence.[11]

The State also argues that we have jurisdiction because Stafford was, in the same proceeding, convicted and sentenced for theft by receiving property valued between $500 and $1,500, a Class IV felony.[12] The State contends that it "obtained jurisdiction to have the entire sentence reviewed when it exercised its right to appeal the one felony sentence under Neb. Rev. Stat.

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[5] See *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006).

[6] See *id.*

[7] See Neb. Rev. Stat. §§ 28-106 (Reissue 2008) and 60-6,197.03(4) (Supp. 2007).

[8] *Vasquez, supra* note 5.

[9] Reply brief for appellant at 2 (emphasis supplied).

[10] *Vasquez, supra* note 5.

[11] *Id.*

[12] See Neb. Rev. Stat. §§ 28-517 and 28-518(2) (Reissue 2008).

§ 29-2320 because Nebraska courts consider the full sentence stemming from a multi-count prosecution."[13]

But there are two problems with this argument. The first is that the State's brief does not take issue with the sentence imposed on Stafford for theft. Section 29-2320 provides that when a defendant is found guilty of a felony, the prosecuting attorney may "appeal the sentence imposed" if he or she believes it to be excessively lenient. It would defy our basic principles of statutory construction to conclude that the "sentence imposed" refers to anything other than the sentence imposed for the defendant's felony conviction. Instead, as we stated in *Vasquez*, our principles of statutory construction compel the conclusion that the Legislature "chose to exempt misdemeanor sentences from excessive leniency review."[14]

Beyond that, even if we assume that there is some weight to the State's claim that the sentences imposed for misdemeanors and felonies in a multiple-count proceeding can be considered together for excessive leniency review—a matter we do not decide—such a principle is not implicated here. As previously noted, the State has taken no issue with the sentence for theft. Nor has the State complained about the cumulative effect of the sentences imposed. Instead, the State's entire argument is focused on the enhancement proceeding and exhibit 3. Even if we were to consider the DUI sentence as part of an excessively lenient "package" of sentences, our authority under § 29-2320 is limited to reviewing a sentence imposed for a *felony* conviction.[15] In this case, that would be Stafford's conviction for theft, which the State has not asked us to review.

In short, under § 29-2320, an appellate court lacks the authority to review a sentence imposed for a misdemeanor conviction. Therefore, we lack the authority to grant the only relief requested by the State in this appeal, and the appeal must be dismissed.

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[13] Reply brief for appellant at 2-3.

[14] *Vasquez, supra* note 5, 271 Neb. at 915, 716 N.W.2d at 452.

[15] See Neb. Rev. Stat. § 29-2323 (Reissue 2008).

CONCLUSION

The only issue raised by the State in this appeal is whether Stafford's conviction for third-offense DUI, a Class W misdemeanor, was excessively lenient. Under § 29-2320, we lack authority to review a misdemeanor sentence for excessive leniency. Therefore, this appeal is dismissed.

APPEAL DISMISSED.

GERRARD, J., concurring.

I agree with the court's conclusion that under Neb. Rev. Stat. § 29-2320 (Reissue 2008), the State cannot appeal an excessively lenient sentence imposed for a misdemeanor conviction. I write separately to point out that the unpalatable result in this case is a collateral result of the court's decision in *State v. Hense*.[1]

Obviously, the State could have brought an error proceeding in this case, pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 2008). But under this court's decisions in *Hense* and *State v. Head*,[2] the defendant could not have been resentenced, even if the district court's refusal to enhance the defendant's sentence was incorrect. The State, quite reasonably, wanted Stafford resentenced for what it believes to be the correct offense. And there is a reasonable interpretation of Neb. Rev. Stat. § 29-2316 (Reissue 2008) under which this court could, consistent with principles of double jeopardy, order the defendant to be resentenced if the district court had erred.[3] But under our current interpretation of § 29-2316, the State had no other option but to try § 29-2320.

I certainly understand the State's dilemma in this case. But this court's holding in *Hense* should not be compounded by another error in disregarding the plain language of § 29-2320. Because § 29-2320 does not permit the State to appeal under these circumstances, I concur in the court's opinion.

HEAVICAN, C.J., and STEPHAN, J., join in this concurrence.

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[1] *State v. Hense*, 276 Neb. 313, 753 N.W.2d 832 (2008).

[2] *State v. Head*, 276 Neb. 354, 754 N.W.2d 612 (2008).

[3] See *Hense*, *supra* note 1 (Gerrard, J., concurring in part, and in part dissenting; Heavican, C.J., and Stephan, J., join). See, also, *State v. Neiss*, 260 Neb. 691, 619 N.W.2d 222 (2000).

STATE OF NEBRASKA, APPELLEE, V. BART G. HILDING, APPELLANT.

769 N.W.2d 326

Filed July 17, 2009. No. S-08-585.

1. **Motions to Suppress: Confessions: Constitutional Law: Miranda Rights: Appeal and Error.** In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, including claims that it was procured in violation of 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. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.
2. **Trial: Jurors.** The retention or rejection of a juror is a matter of discretion for the trial court. This rule applies both to the issue of whether a venireperson should be removed for cause and to the situation involving the retention of a juror after the commencement of trial.
3. **Trial: Joinder: Appeal and Error.** Severance is not a matter of right, and a ruling of the trial court with regard thereto will not be disturbed on appeal absent a showing of prejudice to the defendant.
4. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
5. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
6. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.
7. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
8. **Miranda Rights: Police Officers and Sheriffs.** Once *Miranda* warnings have been given, an individual has the right to cut off questioning by invoking his or her *Miranda* rights, and once an individual has invoked the right to cut off questioning, the police are restricted to scrupulously honoring that right. However, before the police are under such a duty, the invocation of the right to cut off questioning must be unambiguous and unequivocal.
9. **Trial: Juries.** Under Neb. Rev. Stat. § 29-2004 (Reissue 2008), a court may discharge a regular juror because of sickness and replace him or her with an alternate juror.

10. **Trial: Joinder.** Whether offenses are properly joined involves a two-stage analysis in which it is determined first, whether the offenses are related and properly joinable under Neb. Rev. Stat. § 29-2002 (Reissue 2008), and second, whether an otherwise proper joinder was prejudicial to the defendant.
11. **Convicted Sex Offender: Pleas: Presentence Reports: Sentences.** A sentencing judge need not consider only the elements of an offense in determining whether an aggravated offense as defined in Neb. Rev. Stat. § 29-4005(4)(a) (Reissue 2008) has been committed. Instead, the court may make this determination based upon information contained in the record, including the factual basis for a plea-based conviction and information contained in the presentence report.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Matthew G. Graff for appellant.

Jon Bruning, Attorney General, and Erin E. Leuenberger for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Bart G. Hilding appeals his convictions and sentences for two counts of first degree sexual assault and one count of stalking. Hilding asserts, inter alia, that the district court for Lancaster County erred in overruling his motion to suppress statements he made in a police interview, overruling his motion to sever the stalking charge from the sexual assault charges for purposes of trial, and finding that the sexual assaults were aggravated offenses and therefore ordering him to be subject to lifetime registration and lifetime supervision. We affirm Hilding's convictions and sentences.

STATEMENT OF FACTS

Hilding and M.S. began a relationship in 2005. The two lived together for a time, but Hilding moved out after difficulties arose. The relationship continued for some time thereafter, but according to M.S., the sexual relationship ended and became more of a friendship by January 2007.

At approximately 4:30 a.m. on April 27, 2007, M.S. reported to police that Hilding had sexually assaulted her in her apartment. M.S. later reported that Hilding had also sexually assaulted her on April 6 and that he had been harassing her in the months since they had broken up. As part of their investigation of the reported assaults, police officers provided M.S. with equipment to record her subsequent telephone calls with Hilding. The State later charged Hilding with two counts of first degree sexual assault in violation of Neb. Rev. Stat. § 28-319 (Reissue 2008) and one count of stalking in violation of Neb. Rev. Stat. § 28-311.03 (Reissue 2008).

Hilding was arrested on May 5, 2007. He was taken to the Lincoln Police Department and placed in an interview room. Hilding was given *Miranda* warnings by Sgt. Robert Farber, and Hilding signed a "Miranda Warning and Waiver" form in which he acknowledged that he understood his rights and that he was willing to answer questions or make a statement. Farber questioned Hilding about his relationship with M.S. and his recent contacts with her. At one point during the questioning, Hilding said, "I don't know exactly what you're leading up [to], and I'm telling you I probably shouldn't be answering any of these questions." However, Hilding continued to answer Farber's questions. Later in the interview, after Farber told Hilding that M.S. had "a completely different version of this story" regarding the April 27 incident, Hilding said, "Okay. See and this is why I probably shouldn't be talking about this. I probably should have an attorney." Farber continued the interview, and Hilding again continued to answer questions until Farber ended the interview.

Prior to trial, Hilding filed a motion to suppress the statements he made to police. The court overruled the motion with respect to Hilding's May 5, 2007, interview with Farber. The court found that Hilding had been informed of his *Miranda* rights; that his waiver of such rights was made knowingly, intelligently, and freely; and that his statements were made knowingly, voluntarily, and intelligently and were not induced by promises or obtained as a result of force, fear, oppression, or coercion. The court also found that Hilding "never requested to be permitted to talk to an attorney, never indicated that he

did not want to continue with the interview and never raised this issue again." The court specifically found that Hilding's comments that he "probably shouldn't be talking about this" and "probably should have an attorney" were not requests to cease the interview or requests for an attorney. A video recording and a transcript of the May 5 interview were admitted into evidence at trial over Hilding's objection.

Also prior to trial, Hilding filed a motion to sever the charge of stalking from the sexual assault charges for purposes of trial. The court overruled the motion to sever.

A jury trial was held February 20 through 27, 2008. The court recessed the trial for the weekend on Friday, February 22, after the State had begun presenting its evidence. When the trial resumed on Monday, February 25, the court announced that one of the jurors was ill with the flu and had a sinus infection. Hilding requested a recess until the next day to see if the juror's condition would improve; however, the court determined that it was best to continue the trial with an alternate juror replacing the juror who was ill. Hilding did not thereafter object to the court's decision, and the trial resumed.

At trial, the State's main witness was M.S. She testified that she began dating Hilding in March 2005 and that they moved in together in March 2006. The two began having problems in their relationship, and Hilding moved out in August. However, they continued to work on the relationship and continued a sexual relationship for some months afterward.

When M.S. learned in December 2006 that Hilding was dating another woman, she decided that her relationship with Hilding was over. She communicated this to Hilding, but between January and March 2007, Hilding continued to make frequent telephone calls to her. She thought his purpose was to keep tabs on her and to find out whether she was dating other men. M.S. testified that she was determined to continue a friendship with Hilding "because it was easier to stay his friend and to take his phone calls than to not take his phone calls." During that period, M.S. met socially with Hilding in public places, but she did not want to be alone with him because she did not want to feel pressure to have sex with him.

On the evening of April 5, 2007, M.S. worked the closing shift as a bartender at a sports bar. At approximately 10 p.m., Hilding came to the bar with flowers for her. Hilding stayed at the bar, and M.S. served him drinks. After some time, M.S. determined that Hilding had had enough to drink; she and Hilding argued because he wanted more drinks. At closing time, M.S. told Hilding he needed to leave the bar. He tried to stay to talk to her, but he eventually left. When M.S. took trash outside, Hilding was at the side of the bar wanting to talk to her. She told him he needed to leave, and she went back into the bar.

When M.S. finished work, she went to her car and noticed that there was some damage to the vehicle and that some cash had been left on the windshield. M.S. suspected that Hilding had caused the damage and had left the cash, because earlier in the evening, he had talked about damaging her car so that she could collect insurance money. He had also told her that he had cash he could use to pay money he owed her. M.S. called Hilding to ask whether he had hit her car. He denied hitting her car but admitted that he had left the money on her windshield.

After reporting the damage to her car to police, M.S. returned home between 1 and 2 a.m. on April 6, 2007. When she pulled into the parking lot for her apartment, Hilding approached her car and said he wanted to inspect the damage. He again denied that he had hit her car. M.S. told Hilding she was mad at him and wanted him to go home. Hilding asked whether he could come up to her apartment to charge his cellular telephone. M.S. refused, but Hilding insisted that they go up to the apartment, and he grabbed her coat and pushed and prodded her to her apartment door.

When they got inside the apartment, Hilding told her to go to the bedroom. She initially refused but eventually complied because she was scared of what he might do. When they reached the bedroom, he told her to take off her shirt. She again refused but eventually complied out of fear. She continued to tell him that he needed to leave, and she threatened to call the police. Hilding grabbed her cellular telephone, snapped it in half and threw it across the room. Hilding insisted that M.S. retrieve his

cellular telephone charger; in the course of his so insisting and M.S.' retrieving the charger, Hilding hit M.S.' arm and kicked her in the lower back. Hilding told M.S. to take off her pants and said that they were going to have sex. She was crying and told him she did not want to, but he took off her jeans and underwear and pushed her onto the bed. Hilding forced M.S. to have sexual intercourse with him, forced her to perform oral sex on him, and performed oral sex on her. At times, Hilding told M.S. to be quiet and used his hands or a pillow to muffle her because she was crying and telling him to stop. Hilding eventually stopped and fell asleep, but M.S. could not leave because he was on top of her.

When M.S.' alarm clock went off at 6:30 a.m., she woke Hilding and told him he needed to leave because she needed to go to her daytime job at a radio station. While they were getting ready to leave, Hilding said he hoped M.S. was not mad at him, that he did not want to hurt her, and that he hoped she would not "turn him in." Hilding left the apartment when M.S. left for work. As they parted, M.S. told Hilding that she did not want to ever talk to him again. M.S. did not call the police after the April 6, 2007, incident because she was embarrassed and scared and thought that Hilding would leave her alone. Approximately a week later, Hilding again began making frequent telephone calls to M.S. Although M.S. told Hilding she was mad about what had happened and did not want to talk to him anymore, Hilding would not discuss the incident and acted as if it had not happened.

On the evening of April 26, 2007, M.S. finished work at the bar at approximately 9 p.m. Hilding had called M.S. earlier that day to see what she was doing that night, and she told him she was working all night. After she left work, she went to other bars with friends. After the bars closed, M.S. went to the home of a male friend, and they had consensual sex. She did not stay the night with him but instead returned to her apartment because she had to work the next day.

When M.S. arrived home at approximately 2:30 a.m. on April 27, 2007, she parked her car and, while she was walking toward her apartment building, saw Hilding in the parking lot. She ran to her apartment to try to get inside and avoid him.

Hilding ran after her and caught up to her just as she entered her apartment. Hilding kept her from closing the door and forced his way into the apartment. He asked M.S. what she had done that night and whether she had had sex with anyone. She denied that she had. Hilding pushed her to the floor and took down her pants and underwear and said that he wanted to smell her vagina to determine whether she had had sex with another man. He did so and then told her that they were going to have sex and that she should choose whether she wanted to do it in the bed or in the shower. She told him she did not want to have sex, but he insisted that she choose the bed or the shower. She told him she had to use the bathroom and he followed her there. He eventually coerced her to undress and get into the shower where he forced her to engage in sexual intercourse. M.S. cried throughout the incident and told Hilding she did not want to have sex.

After they got out of the shower, Hilding made comments to M.S. indicating that he had seen her at a bar earlier that evening, but she had not seen him there. Hilding told M.S. to give him her cellular telephone because he wanted to delete voice mails he had left for her. He forced M.S. to tell him the code to delete the voice mails by threatening to kill her cat if she did not tell him. As Hilding looked through the list of incoming calls, he questioned M.S. regarding calls she had received from other men, and he wrote down the men's telephone numbers. Hilding left the apartment at approximately 4:30 a.m., and M.S. called the police to report the assault. She also called some of the men whose telephone numbers Hilding had written down because she was afraid he might contact the men and try to harm them.

Police officers came to M.S.' apartment to interview her and to take her to a hospital for an examination. As part of the investigation, the police gave M.S. equipment to record the telephone calls with Hilding and conducted a controlled call from M.S. to Hilding a few days after the assault. A recording and a transcript of the conversation were entered into evidence at trial.

In the telephone conversation, M.S. confronted Hilding about his showing up uninvited at her apartment in the early hours of

April 27, 2007, and at other times and about his actions after forcing himself into her apartment on April 27. Hilding admitted being at her apartment and having sex with her, but denied that he had forced her to do so. Despite such denial, Hilding told M.S., "I'm sorry for whatever I did that hurt you. I'm sorry for whatever, whatever, whatever."

During the days after the controlled call, Hilding made several more calls to M.S. Recordings and transcripts of the calls were entered into evidence at trial. In the calls, Hilding questioned M.S. about her sexual activity with other men and told her that he thought she had a sexually transmitted disease. Hilding eventually threatened that he would "tell everybody" that M.S. had a sexually transmitted disease. Hilding threatened M.S., saying, "I will fuckin seriously fuck you over so hard you won't even fuckin get it." Hilding also threatened that if M.S. did not agree to meet with him, he would "be over at your house kicking your fucking door in" and that he would "go over to [a male friend of M.S.'] house or I'll kick your fuckin brother in his god damn chest." Hilding stated:

> And then I will go out of my way to seriously fuck everybody that you come in regular contact with. You will not only lose your fuckin job at the bar you will probably lose your job at the radio station. I am not in the mood to fuckin play anymore.

In connection with M.S.' testimony, the court, over Hilding's objection, admitted into evidence and published to the jury printed copies of more than 20 e-mails that Hilding sent to M.S. from April 27 through May 4, 2007. The content of the e-mails included apologies for how Hilding had treated M.S., accusations that M.S. had lied to him and that she had contracted a sexually transmitted disease, and threats that he would "tell everybody your little secret." On the printed copy of one of the e-mails in which Hilding asserted that M.S. had contracted a sexually transmitted disease, M.S. made notations to indicate that other addresses to which Hilding had sent the e-mails were addresses that belonged to her friends and relatives. Also included was Hilding's e-mail that he had sent to M.S.' brother accusing her brother of "screwing up" the relationship between Hilding and M.S. Although the court

overruled Hilding's objection, the court differentiated between the telephone calls and the e-mails and instructed the jury that the e-mail evidence was received solely in regard to the stalking charge and that the jury was not to consider the e-mails in regard to the sexual assault charges.

Hilding testified at trial in his own defense. He admitted that he had sexual relations with M.S. on April 6 and 27, 2007, but he testified that M.S. consented to such relations. With regard to the April 6 incident, Hilding testified that M.S. invited him up to her apartment and that he did not push or pull her to the apartment. Hilding testified that it was her suggestion that they go to bed together and that she asked him to stay the night. Hilding denied purposefully breaking M.S.' cellular telephone and testified that either he broke it accidentally or it was already broken when he touched it.

With regard to the April 27, 2007, incident, Hilding testified that during the day on April 26, he and M.S. had made plans to meet that night. Hilding spent most of the evening with his girlfriend, but after leaving his girlfriend at her home, he went to M.S.' apartment building. M.S. arrived shortly after he did. Hilding denied chasing M.S. to her apartment and forcing his way into her apartment. He testified instead that she willingly allowed him into the apartment. Hilding testified that M.S. initiated sexual contact by undressing him and leading him to the shower where they engaged in consensual intercourse. They continued to the bedroom, but Hilding eventually left because he realized he should not have been with M.S. and instead should have been with his girlfriend. Hilding testified that M.S. became upset with him when she realized that he was leaving and that prior to that time, she had not been upset or crying.

With regard to his telephone conversations with M.S. after the April 27, 2007, incident, Hilding testified that he was surprised by M.S.' accusations regarding the April 6 and 27 incidents and was suspicious of her purpose in making the accusations. He testified that he accused M.S. of having a sexually transmitted disease, not because he believed she did but because she was making accusations against him and he wanted to respond in kind. Hilding admitted that he was

"being an asshole," but described his behavior as a reaction to M.S.' accusations.

The jury found Hilding guilty of both counts of first degree sexual assault and the count of stalking. The court sentenced Hilding to imprisonment for 10 to 16 years on each of his convictions for first degree sexual assault and for 1 year on his conviction for stalking. The court ordered that all three sentences be served consecutive to one another. For purposes of Nebraska's Sex Offender Registration Act, the court found that both convictions for first degree sexual assault were "aggravated offenses" as defined in Neb. Rev. Stat. § 29-4005 (Reissue 2008), and the court therefore ordered that Hilding would be subject to lifetime registration. The court further ordered that pursuant to Neb. Rev. Stat. § 83-174.03(1)(c) (Reissue 2008), Hilding would be subject to lifetime community supervision by the Office of Parole Administration upon release from imprisonment.

Hilding appeals his convictions and sentences.

ASSIGNMENTS OF ERROR

Hilding asserts that the district court erred in (1) overruling his motion to suppress his statements to Farber in the May 5, 2007, interview and admitting the statements into evidence, (2) discharging the juror who became ill, (3) overruling his motion to sever the stalking charge from the sexual assault charges for trial, and (4) finding that he committed aggravated offenses and therefore ordering that he be subject to lifetime registration and lifetime supervision. Hilding also asserts that there was not sufficient evidence to support his convictions and that the court had imposed excessive sentences.

STANDARDS OF REVIEW

[1] In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, including claims that it was procured in violation of 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), we apply a two-part standard of review. With regard to historical facts, we review the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however,

is a question of law, which we review independently of the trial court's determination. *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[2] The retention or rejection of a juror is a matter of discretion for the trial court. See *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006). This rule applies both to the issue of whether a venireperson should be removed for cause and to the situation involving the retention of a juror after the commencement of trial. See *id*.

[3] Severance is not a matter of right, and a ruling of the trial court with regard thereto will not be disturbed on appeal absent a showing of prejudice to the defendant. *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003).

[4] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *State v. Hamilton*, 277 Neb. 593, 763 N.W.2d 731 (2009).

[5,6] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009). Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. *Id*.

[7] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *Id*.

ANALYSIS

The District Court Did Not Err in Overruling the Motion to Suppress Because Hilding Did Not Unambiguously and Unequivocally Invoke His Miranda Rights During the Police Interview.

Hilding first claims that the district court erred when it overruled his motion to suppress the statements he made to Farber

in the May 5, 2007, interview and in allowing such statements into evidence at trial. We conclude that the statements were made after Hilding waived his *Miranda* rights; that Hilding did not thereafter unambiguously and unequivocally invoke his *Miranda* rights; and that therefore, the court did not err in overruling his motion to suppress such statements and in allowing such statements into evidence.

Hilding directs our attention to two statements and argues that these statements were clear and unambiguous invocations of both his right to remain silent and his right to counsel and that Farber did not scrupulously honor such invocations. In its ruling on the motion to suppress, the court found that in the May 5, 2007, interview, Farber properly informed Hilding of his *Miranda* rights and that Hilding waived such rights. The court found that Hilding did not make a request to cease the interview or a request for an attorney when he said that he "probably shouldn't be talking about this" and that he "probably should have an attorney."

[8] In order to counter the pressures of a custodial interrogation, the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), "established the familiar *Miranda* advisements of the right to remain silent and to have an attorney present at questioning." *State v. Rogers*, 277 Neb. 37, 51, 760 N.W.2d 35, 50 (2009). Once *Miranda* warnings have been given, an individual has the right to cut off questioning by invoking his or her *Miranda* rights, and once an individual has invoked the right to cut off questioning, the police are restricted to scrupulously honoring that right. See *id.* However, before the police are under such a duty, the invocation of the right to cut off questioning must be unambiguous and unequivocal. See *id.*

In the present case, there is no dispute that Hilding was in custody at the time of the questioning and was therefore entitled to *Miranda* protections. Compare *Montejo v. Louisiana*, 556 U.S. 778, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986) (concerning invocation of right to counsel at arraignment). Further, there is no dispute that he was given proper *Miranda* warnings and that he initially waived his

Miranda rights. The sole issue is whether Hilding invoked his right to cut off questioning, thereby requiring Farber to scrupulously honor that right.

As noted above, invocation of the right to cut off questioning must be unambiguous and unequivocal. In *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), the U.S. Supreme Court held that in order to require police to cease questioning until counsel is present, "the suspect must unambiguously request counsel," meaning that he or she "must articulate his [or her] desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." However, the Court further stated that "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." *Id.* In *Davis*, the Court affirmed the trial court's finding that the defendant's statement, "'Maybe I should talk to a lawyer,'" was not a request for counsel and that therefore, law enforcement officers were not required to stop questioning. 512 U.S. at 462.

In the present case, Hilding's only references to cutting off the interview were when he said, "I probably shouldn't be answering any of these questions," and when he later said, "I probably shouldn't be talking about this." His only reference to counsel during the interview was when he stated that he "probably should have an attorney." These statements are not unambiguous and unequivocal invocations of *Miranda* rights. Hilding's statements that he "probably shouldn't be talking about this" or answering questions were ambiguous and equivocal in and of themselves, and their equivocal nature was perpetuated when Hilding continued to talk and answer questions immediately after making such statements. Hilding's statement that he "probably should have an attorney" was similar to the defendant's statement in *Davis* that "'[m]aybe I should talk to a lawyer.'" See 512 U.S. at 462. Because Hilding's statement was ambiguous and equivocal, a reasonable officer under the circumstances would have

understood only that Hilding was considering invoking his right to counsel.

Hilding did not unambiguously and unequivocally invoke his right to cut off questioning, and Farber was not required to cease questioning. We therefore conclude that the district court did not err when it overruled Hilding's motion to suppress his statements made in the interview.

The District Court Did Not Err in Discharging a Juror Who Became Ill and Replacing Her With an Alternate Juror.

Hilding asserts that the district court erred when it discharged a juror who became ill after the State began presenting evidence. We conclude that the court did not abuse its discretion by discharging the juror and replacing her with an alternate juror.

After a juror became ill with the flu and a sinus infection, the court decided to continue the trial with an alternate juror. The court stated:

> Well, I guess one of the concerns is if we don't recess, then if we lose another juror, we've got a mistrial and we start all over again and I'm of the position, I'm not an expert but I guess it is probably — it may not even be a 50/50 chance that [the juror] will be back tomorrow and we lose a day. We've already lost a half hour so I think it is best that we excuse her and just go ahead and see if we can complete matters this week with the 12 remaining jurors. I guess we'll do that.

Hilding acknowledges on appeal that Neb. Rev. Stat. § 29-2004(2) (Reissue 2008) provides that "[i]f, before the final submission of the cause a regular juror dies or is discharged, the court shall order the alternate juror . . . to take his or her place in the jury box." However, Hilding argues that "discharged" as used in § 29-2004 should be read as referring to cause pursuant to the jury challenge statute, Neb. Rev. Stat. § 29-2006 (Reissue 2008), and that illness is not considered cause for discharge under § 29-2006.

We find nothing which indicates that "discharged" as it is used in § 29-2004(2) refers only to a discharge for one of

the causes set forth in § 29-2006. We note in this regard that § 29-2006 does not refer to the "discharge" of a juror, but instead sets forth "good causes for challenge to any person called as a juror or alternate juror." Section 29-2006 deals with challenges to a potential juror, whereas § 29-2004 refers to the discharge of one who has already been chosen as a juror.

[9] Section 29-2004 does not specify the reasons for which a regular juror might be discharged, requiring replacement by an alternate juror. We note, however, that Neb. Rev. Stat. § 29-2023 (Reissue 2008) refers to cases in which the "jury shall be discharged on account of sickness of a juror." We also note that Neb. Rev. Stat. § 25-1117 (Reissue 2008) refers to discharge of the jury "on account of the sickness of a juror." We note further that Neb. Rev. Stat. § 29-1413 (Reissue 2008) provides that "[i]n case of the sickness . . . of any grand juror, after the grand jury shall be affirmed or sworn, it shall be lawful for the court, at its discretion to cause another to be sworn or affirmed in his stead." Long ago, in *Catron v. State*, 52 Neb. 389, 72 N.W. 354 (1897), this court determined that there was no prejudicial error when a juror was excused because of a sickness in his family and was replaced by a new juror. By reference to other statutes and case law, we logically conclude that a sensible reading of § 29-2004 indicates that a court may discharge a regular juror because of sickness and replace him or her with an alternate juror. See *Wooden v. County of Douglas*, 275 Neb. 971, 751 N.W.2d 151 (2008) (court will construe statutes relating to same subject matter together so as to maintain consistent and sensible scheme).

The court in this case did not abuse its discretion when it discharged the juror. The court considered a recess until the juror's health improved, but based on the nature of her illness and the potential that an extended recess would cause hardships for other jurors, the court concluded that it was the better course to excuse the juror and continue the trial with the alternate juror. Such decision was within the court's discretion, and we find no merit to Hilding's assignment of error.

The District Court Did Not Err in Overruling Hilding's Motion to Sever Because the Stalking Charge Was Properly Joined With the Sexual Assault Charges and Joinder Did Not Prejudice Hilding.

Hilding next claims that the district court erred when it overruled his motion to sever the stalking charge from the first degree sexual assault charges for purposes of trial. We conclude that the charges were properly joined and that the court did not err when it overruled the motion to sever.

In moving to sever the stalking charge from the sexual assault charges, Hilding asserted that the charges were not related and argued that the inclusion of the stalking charge in the trial for the sexual assaults would expose the jury to irrelevant and unduly prejudicial evidence. The court reasoned that in light of the expected theories of the case, most of the evidence related to the stalking charge would be admissible with regard to the issue of consent in the sexual assault charges and that there was no prejudice in trying all counts together. In this regard, the court stated that Hilding refused "to accept the end of the relationship [with M.S.] and his numerous phone calls, phone messages, etc. are highly relevant to show that he may have been inclined to 'take' what may no longer be permissibly bestowed." For completeness, we note that although the court indicated that the evidence of the telephone calls was relevant to both the stalking charge and the sexual assault charges, the court determined that evidence of the e-mails Hilding sent to M.S. related only to the stalking charge and that the court gave the jury a limiting instruction to that effect at trial.

[10] Offenses may be joined pursuant to Neb. Rev. Stat. § 29-2002 (Reissue 2008), which provides:

> (1) Two or more offenses may be charged in the same indictment, information, or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> . . . .

> (3) If it appears that a defendant or the state would be prejudiced by a joinder of offenses in an indictment, information, or complaint or by such joinder of offenses in separate indictments, informations, or complaints for trial together, the court may order an election for separate trials of counts, indictments, informations, or complaints, grant a severance of defendants, or provide whatever other relief justice requires.

We have set forth a two-stage analysis in which it is determined first, whether the offenses are related and properly joinable under § 29-2002, and second, whether an otherwise proper joinder was prejudicial to the defendant. See *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003).

Offenses are properly joinable under § 29-2002 if they "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." We determine that the stalking charge and the sexual assault charges are sufficiently related for purposes of joinder. The sexual assaults, as well as the series of telephone calls relating thereto which support the stalking charge, form a series of connected transactions. The April 6 and 27, 2007, incidents were a frequent topic of the telephone calls that occurred after April 27. Hilding admitted that the threats he made in the calls were a response to M.S.' allegations that he had sexually assaulted her.

We further determine that joinder was not prejudicial to Hilding, because the facts generally related to the stalking charge would have been admissible in a trial of the sexual assault charges. See *Mowell, supra*. The evidence of the telephone calls between Hilding and M.S. after the April 27, 2007, incident supports the stalking charge but is also relevant to the issue of consent in connection with the sexual assault charges. Hilding and M.S. discussed the April 6 and 27 incidents in the calls, and the calls demonstrate the nature of the relationship between Hilding and M.S. and would provide some evidence for the jury to determine whether or not M.S. consented to sexual activity with Hilding.

We conclude that the stalking charge and the sexual assault charges were properly joined and that joinder did not prejudice Hilding. The district court therefore did not err when it overruled Hilding's motion to sever the stalking charge from the sexual assault charges.

There Was Sufficient Evidence to Support Hilding's Convictions for Sexual Assault and Stalking.

Hilding asserts that there was insufficient evidence to support his convictions for stalking and for sexual assault. We conclude that the evidence was sufficient to support the convictions.

With regard to the stalking charge, Hilding was convicted of a violation of § 28-311.03, which provides that a person is guilty of stalking if he or she "willfully harasses another person or a family or household member of such person with the intent to injure, terrify, threaten, or intimidate." Hilding notes that many of the calls between himself and M.S. were initiated by M.S. and that some were made at the request of the police. He asserts that his statements were responses to allegations made by M.S. and were invited by the controlled calls initiated by the police.

The evidence in this case included evidence of numerous telephone calls initiated by Hilding to M.S. and of numerous e-mails Hilding sent to M.S. Most of these communications were initiated by Hilding rather than by M.S., and at least some of the communications by M.S. were responding to messages from Hilding. Furthermore, the stalking charge was supported by numerous statements Hilding made to M.S. in the telephone calls and e-mails, and such statements could rationally support a conviction regardless of which party initiated the communications. Hilding made numerous statements to the effect that he would tell people, including M.S.' family, friends, and coworkers, that M.S. had a sexually transmitted disease. He also made numerous threats of physical harm to M.S., to her brother, and to the men that M.S. dated. The jury reasonably could have found that Hilding's harassing communications were intended "to injure, terrify, threaten, or intimidate" M.S. and amounted to stalking. See § 28-311.03.

With regard to the sexual assault charges, Hilding was convicted of two violations of § 28-319, which provides that a person is guilty of first degree sexual assault if he or she "subjects another person to sexual penetration . . . without the consent of the victim." In Neb. Rev. Stat. § 28-318(8)(a) (Reissue 2008), "[w]ithout consent" is defined to mean, inter alia, that "[t]he victim was compelled to submit due to the use of force or threat of force or coercion, or . . . the victim expressed a lack of consent through words."

Hilding concedes that at trial, he admitted to sexual intercourse with M.S. on the days charged and states that the only issue at trial was whether M.S. consented. He also acknowledges that the issue is "largely one of witness credibility," but he argues that M.S.' testimony was "so conflicting and her conduct so implausible" that her testimony stating she did not consent is unbelievable and could not as a matter of law constitute proof beyond a reasonable doubt. Brief for appellant at 24-25.

The testimony of M.S., if believed by the jury, could establish that the sexual penetration was "without consent" as defined in § 28-318(8)(a). She testified that Hilding used force, the threat of force, or coercion to compel her to submit to sexual penetration and, additionally, that she expressed her lack of consent through words by telling him she did not want to have sex. Hilding's sole argument is that M.S.' testimony was not credible; however, the jury, as the fact finder, found her testimony to be credible. When reviewing a criminal conviction for sufficiency of the evidence, we, as an appellate court, do not pass on the credibility of witnesses, see *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009), and because the jury as the trier of fact could have found the essential elements of first degree sexual assault beyond a reasonable doubt based on M.S.' testimony, the evidence was sufficient to support Hilding's two convictions for first degree sexual assault.

We conclude that the evidence was sufficient to support Hilding's convictions for stalking and two counts of first degree sexual assault.

The Facts of the Case Were Properly Examined to Determine Whether Hilding Committed Aggravated Offenses and Was Therefore Subject to Lifetime Registration and Lifetime Supervision.

Under Nebraska statutes, a defendant is subject to lifetime registration and lifetime supervision when he or she has committed certain "aggravated offenses." Hilding asserts that the district court erred when it found, "[u]nder the facts of this case," that he committed "aggravated offenses" as defined by § 29-4005(4) which resulted in the court's ordering that he be subject to lifetime registration pursuant to § 29-4005(2) and that he be subject to lifetime supervision pursuant to § 83-174.03(1)(c). As his sole argument in his brief on appeal, Hilding claims that it was improper to look at the facts of his case to determine that he committed aggravated offenses rather than looking solely to the statutory elements of the offenses of which he stands convicted. We find this assignment of error to be without merit.

Hilding notes that § 29-4005(4)(a) requires that to be an aggravated offense, an offense involving a victim age 12 years or older must involve the use of force or the threat of serious violence. Hilding argues that the finding based on the record that the sexual assaults in this case were "aggravated offenses" was erroneous, because under the first degree sexual assault statute, § 28-319, under which Hilding was convicted, the use of force or the threat of serious violence is not a necessary element. He argues that in making the determination of whether an offense is an aggravated offense, only statutory elements of the offense should be considered.

[11] We recently rejected the same argument in *State v. Hamilton*, 277 Neb. 593, 763 N.W.2d 731 (2009). In *Hamilton*, we held that

> a sentencing judge need not consider only the elements of an offense in determining whether an aggravated offense as defined in § 29-4005(4)(a) has been committed. Instead, the court may make this determination based upon information contained in the record, including the factual basis for a plea-based conviction and information contained in the presentence report.

277 Neb. at 602, 763 N.W.2d at 738.

In the present case, it was determined from the record that the sexual assaults for which Hilding was convicted were aggravated offenses. Information contained in the record includes the evidence at trial, and the evidence in this case supported a finding that the sexual assaults involved the use of force or the threat of serious violence and were therefore aggravated offenses. See § 29-4005(4)(a). As noted above, in connection with sufficiency of the evidence, testimony by M.S. supported a finding that Hilding used force or the threat of serious violence to carry out the sexual assaults on M.S. Such information supports a finding that the offenses were aggravated offenses, thereby subjecting Hilding to lifetime registration and lifetime supervision. We therefore reject Hilding's argument that the determination of "aggravated offenses" is limited to an examination of the statutory elements.

At oral argument, for the first time, Hilding made additional arguments that were not briefed regarding the orders for lifetime supervision and lifetime registration. An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal. *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006). However, we have examined the record, and we find no plain error with regard to such orders.

The Sentences Imposed by the District Court Were Not Excessive.

Finally, Hilding asserts that the district court imposed excessive sentences for all three convictions. We conclude that Hilding's sentences were not excessive.

We note first that Hilding's sentences were within statutory limits. Hilding was convicted of two counts of first degree sexual assault, which is a Class II felony pursuant to § 28-319(2), and one count of stalking, which is a Class I misdemeanor pursuant to Neb. Rev. Stat. § 28-311.04(1) (Reissue 2008). The court sentenced Hilding to imprisonment for 10 to 16 years on each of his convictions for first degree sexual assault, which sentences were within the limits for a Class II felony of imprisonment for a minimum of 1 year and a maximum of 50 years pursuant to Neb. Rev. Stat. § 28-105(1) (Reissue 2008). The court sentenced Hilding to imprisonment for 1 year on his conviction for stalking, which sentence was within the limits for

a Class I misdemeanor of a maximum of imprisonment for 1 year pursuant to Neb. Rev. Stat. § 28-106 (Reissue 2008). The sentences were ordered to be served consecutively.

Hilding asserts that the sentences of imprisonment were an abuse of discretion, both in the length of the sentences and in the fact that he was sentenced to imprisonment rather than probation. He argues that the record does not establish that M.S. suffered or was threatened with serious physical or emotional harm. He also argues that he is unlikely to commit another crime and that he would likely respond affirmatively to probationary treatment.

Hilding points to nothing in the record of the sentencing which would indicate an improper basis for the sentences. Although the record does not indicate that M.S. suffered serious physical harm, the evidence indicates that Hilding used force and threats in perpetrating the sexual assaults. The record does not contain evidence to support Hilding's suggestion that M.S. did not suffer emotional harm. Further, Hilding's criminal history dating from 1992 refutes his assertion that he is unlikely to commit another crime and would respond well to probation. His criminal history included convictions for assault and third degree assault, three convictions for destroying property, two convictions for violating a protection order, two convictions for harassing telephone calls, and various convictions for traffic offenses. Hilding's criminal history also included various arrests on charges such as disturbing the peace, criminal mischief, and trespassing.

In light of the seriousness of the offenses in this case and Hilding's criminal history, we find no abuse of discretion in the sentencing. We reject Hilding's claim that his sentences were excessive.

CONCLUSION

Having rejected each of Hilding's assignments of error, we affirm his convictions and sentences for two counts of first degree sexual assault and one count of stalking.

AFFIRMED.

WRIGHT, J., participating on briefs.

IN RE 2007 ADMINISTRATION OF APPROPRIATIONS OF THE WATERS OF THE NIOBRARA RIVER. JACK BOND AND JOE MCCLAREN RANCH, APPELLANTS, V. NEBRASKA PUBLIC POWER DISTRICT AND DEPARTMENT OF NATURAL RESOURCES, APPELLEES.

768 N.W.2d 420

Filed July 17, 2009. No. S-08-823.

1. **Administrative Law: Appeal and Error.** In an appeal from the Department of Natural Resources, an appellate court reviews the director's factual determinations to decide whether such determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable.
2. **Statutes.** Statutory interpretation is a question of law.
3. **Jurisdiction.** Subject matter jurisdiction is a question of law.
4. **Administrative Law: Appeal and Error.** An appellate court decides questions of law independently of the legal determinations made by the director of the Department of Natural Resources.
5. **Standing.** 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.
6. ____. Only a party that has standing may invoke the jurisdiction of a court or tribunal.
7. **Moot Question.** The central question in a mootness analysis is whether changes in circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.
8. ____. A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the litigation's outcome.
9. **Election of Remedies.** The election of remedies doctrine generally applies in two instances: when a party seeks inconsistent remedies against another party or persons in privity with the other party or when a party asserts several claims against several parties for redress of the same injury.
10. **Election of Remedies: Damages.** The election of remedies doctrine prevents a plaintiff from receiving double recovery for a single injury or compensation that exceeds the damages sustained.
11. **Administrative Law: Waters: Jurisdiction.** The Department of Natural Resources has jurisdiction over all matters concerning water rights for irrigation, power, and other uses, except as such jurisdiction is specifically limited by statute.

Appeal from the Department of Natural Resources. Reversed and remanded for further proceedings.

Donald G. Blankenau and Thomas R. Wilmoth, of Husch, Blackwell & Sanders, L.L.P., for appellants.

Jon Bruning, Attorney General, Justin D. Lavene, and Marcus A. Powers for appellee Department of Natural Resources.

Stephen D. Mossman, of Mattson, Ricketts, Davies, Stewart & Calkins for appellee Nebraska Public Power District.

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

CONNOLLY, J.

SUMMARY

In this appeal, we address the interplay of preference rights and appropriation rights in a surface water dispute. The Department of Natural Resources (Department) has exclusive original jurisdiction to determine the validity of surface water appropriations.

This appeal presents the issue whether the Department retained jurisdiction over a junior appropriators' challenge to a senior appropriator's right to surface water after the junior appropriators obtained a condemnation award to use the water under their constitutionally superior preference rights.

The Department determined that the condemnation award rendered the appropriation dispute moot and that it lacked jurisdiction for further proceedings. On appeal, however, it has reversed its position and agrees with the junior appropriators. It now argues that the relief requested in the administrative hearing was distinct from the junior appropriators' preference rights. It requests that we remand the cause to it for further proceedings. But the other appellee and senior appropriator, Nebraska Public Power District (NPPD), contends that the Department correctly determined that the case was moot. We hold that the case is not moot.

BACKGROUND

OVERVIEW OF SURFACE WATER RIGHTS

Nebraska's laws governing surface water management, regulation, and allocation present a mosaic of private and public

rights. This appeal centers on two of those rights: appropriation rights and preference rights.

An appropriation right is the right to divert unappropriated stream water for beneficial use.[1] Under the prior-appropriation system, each appropriator's right to divert unappropriated waters from a stream for a beneficial purpose receives a date of priority. An appropriation's priority date is the date when the Department approves the appropriator's right to divert water.

In a perfect world, there would be sufficient water to satisfy all appropriations for a given stream. But when a stream has insufficient water to satisfy all appropriation rights on it, the appropriator first in time is first in right.[2] That is, a senior appropriator with an earlier priority date has the right to continue diverting water against a junior appropriator with a later appropriation date when both appropriators are using the water for the same purpose.[3] But when the appropriators use the water for different purposes, a junior appropriator may nonetheless have a superior preference right over senior appropriators.

Under the Nebraska Constitution and statutes, when there is insufficient water to satisfy all appropriations, certain water uses take preference over others, despite the appropriators' priority dates.[4] So in times of shortage, aggrieved water users with superior preference rights may exercise their constitutional preference to obtain relief when the prior-appropriation system would otherwise deny such users access to water.[5] Those using the water for domestic purposes have preference over those claiming it for any other purpose.[6] And those using

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[1] Neb. Rev. Stat. § 46-204 (Reissue 2004). See, also, Neb. Const. art. XV, § 6.

[2] Neb. Rev. Stat. § 46-203 (Reissue 2004).

[3] § 46-204. See, also, *State, ex rel. Cary v. Cochran*, 138 Neb. 163, 292 N.W.2d 239 (1940).

[4] See, Neb. Const. art. XV, § 6; § 46-204 and Neb. Rev. Stat. § 70-668 (Reissue 2003).

[5] *Id.*

[6] *Id*.

water for agricultural purposes have preference over those using it for manufacturing and power purposes.[7] And so, the junior appropriators' use of the diverted water for agricultural purposes took preference over NPPD's use of the water for power generation.[8]

Simply having a superior preference right, however, does not give that appropriator unfettered use of the water. An appropriator having a superior preference right, but a junior appropriation right, can use the water to the detriment of a senior appropriator having an inferior preference right. But the junior appropriator must pay just compensation to the senior appropriator.[9] So, although NPPD's appropriation right was senior to that of the junior appropriators, the junior appropriators could continue to divert water if they compensated NPPD.[10]

Under Nebraska's statutes, if an irrigation district or appropriator with a superior preference right cannot agree with a power generator on the compensation for use of the water, then the appropriator can commence a condemnation proceeding in county court to determine the compensation.[11] In a condemnation proceeding, the county court appoints appraisers, who then return an award.[12] The compensation award cannot be greater than the cost of replacing the power that the power plant would have generated if it had retained use of the water.[13] For the Department, whether the parties agree on the compensation or the junior appropriators obtain a condemnation award, the result is the same: the Department cannot order the junior appropriators to cease diverting water to satisfy the senior appropriation for the period agreed to by the parties or contained in the condemnation award.

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[7] *Id.*

[8] See *id.*

[9] Neb. Rev. Stat. § 70-669 (Reissue 2003).

[10] See *id*. See, also, Neb. Rev. Stat. § 76-711 (Reissue 2003).

[11] Neb. Rev. Stat. § 70-672 (Reissue 2003). See, generally, Neb. Rev. Stat. §§ 76-701 to 76-726 (Reissue 2003 & Cum. Supp. 2008).

[12] § 76-706.

[13] § 70-669.

This explanation of the rights at issue and the governing statutory schemes should provide a lens through which to view our analysis.

Administrative Proceeding

Jack Bond and Joe McClaren Ranch (collectively junior appropriators) own real property in Cherry County, Nebraska. In 2006, the Department granted them surface water appropriation rights on the Niobrara River. The rights granted each the ability to divert certain quantities of water from the river for agricultural use.

Near Spencer, Nebraska, downstream from the appropriators' properties, NPPD owns and operates a hydropower facility on the Niobrara River. The hydropower facility has been in operation since 1927. NPPD claims to hold surface water appropriations for the facility, the most recent of which dates to 1942.

In the spring of 2007, NPPD claimed that the Niobrara lacked sufficient water to satisfy all appropriation rights. NPPD requested that the Department administer the river so that it allowed NPPD to use the water according to its senior appropriation right. On May 1, after concluding that there was insufficient water for all appropriations, the Department issued closing notices. The junior appropriators and about 400 other junior water users received closing notices. The closing notices directed them to cease water diversions for the benefit of NPPD's hydropower facility.

The junior appropriators questioned the closing notices. So on May 11, 2007, they filed an administrative hearing request with the Department to determine whether the closing notices were validly issued.[14] The junior appropriators alleged that NPPD may have abandoned its appropriation rights, in whole or in part, and if it had, then no valid appropriation right justified the closing notices. Alternatively, the junior appropriators alleged that even if NPPD had a valid appropriation right, any call for water would be futile because it would not result in additional water reaching NPPD's facility. The junior

[14] Neb. Rev. Stat. § 61-206(1) (Cum. Supp. 2006).

appropriators also requested the Department to stay any future closing notices until it issued a final order regarding the validity of NPPD's appropriation right.

Initially, the Department lifted the May 1, 2007, closing notices. This allowed the junior appropriators to continue diverting water from the river. But on August 1, while the hearing was still pending, the Department issued new closing notices to the junior appropriators. In response, in case No. A-07-858, one junior appropriator appealed the issuance of the new closing notices to the Nebraska Court of Appeals. He argued that the Department, by issuing new closing notices, implicitly denied their request for a stay of any future closing notices pending a decision on NPPD's appropriation right. On October 10, the Court of Appeals sustained both NPPD's and the Department's summary dismissal motions and dismissed the appeal for lack of a final order.

Junior Appropriators Exercise Preference Rights in Condemnation Proceeding

Meanwhile, on August 17, 2007, the junior appropriators filed a petition for condemnation of NPPD's water rights in the Boyd County Court. In their petition, the junior appropriators stated that they still disputed the validity of NPPD's appropriation right but "[b]ecause resolution of this issue may take several irrigation seasons," they elected to also exercise their preference rights. They also explicitly stated that they did not waive or concede any claims, allegations, or positions regarding the Department's administrative proceeding. The county court appointed appraisers who established a compensation award for NPPD for 20 years. NPPD is currently appealing that award.

After the appraisers returned an award and the Court of Appeals dismissed the first appeal, the Department asked its director to dismiss the junior appropriators' administrative proceeding. It argued that because the junior appropriators exercised their constitutional preference rights, they were not subject to any closing notices for 20 years. Because the junior appropriators were not subject to a closing notice to satisfy NPPD's appropriations for 20 years, the Department argued

that they lacked standing in the administrative proceeding. NPPD also filed a motion to dismiss. It claimed that the junior appropriators' condemnation proceeding had mooted the appropriation controversy.

The Director's Order

The director concluded that the junior appropriators' condemnation award divested the Department of jurisdiction over the administrative proceeding. He determined that the junior appropriators lacked standing. He determined that because of the condemnation award, the junior appropriators could not be subject to closing notices in favor of NPPD for the next 20 years. He concluded that they had no legally protectable interest or right in the controversy that would benefit from their requested relief. He rejected their argument that they had standing because their junior appropriation status devalued their property. He reasoned that because the parties' appropriation status could change in 20 years, this argument raised only a hypothetical question. Because there was "no active controversy remaining in the case," the director concluded that the Department lacked subject matter jurisdiction for further proceedings. The junior appropriators appeal.

ASSIGNMENT OF ERROR

The junior appropriators alleged that the director erred in concluding the Department lacked subject matter jurisdiction and dismissing the case.

STANDARD OF REVIEW

[1-4] In an appeal from the Department, we review the director's factual determinations to decide whether such determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable.[15] Statutory interpretation, however, is a question of law.[16] Subject matter

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[15] See *In re Applications T-851 & T-852*, 268 Neb. 620, 686 N.W.2d 360 (2004).

[16] *Evertson v. City of Kimball, ante* p. 1, 767 N.W.2d 751 (2009).

jurisdiction also is a question of law.[17] We decide questions of law independently of the legal determinations made by the director.[18]

ANALYSIS

Parties' Contentions

The appropriators contend that the director erred in determining that they did not retain standing in the appropriation dispute. They argue that they have a continuing interest in obtaining a determination that the closing notices were illegally issued. They point out that if NPPD's appropriation rights have been abandoned or forfeited, then they have no obligation to compensate NPPD. They also argue their property value is lessened without a final determination because a prospective buyer knows that the property's irrigation rights are time restricted to 20 years. Finally, they argue that a favorable determination in the administrative proceeding would moot their preference rights case and their money would be returned.

Initially, the Department determined that when the junior appropriators obtained the condemnation award, that action divested the Department of jurisdiction because there was no remaining active case or controversy. On appeal, the Department has changed course. It now agrees with the junior appropriators that it has jurisdiction. NPPD disagrees. It claims that by obtaining a condemnation award, the junior appropriators mooted the administrative proceeding.

The Issue Is Mootness, Not Standing

We first clarify the framework under which we decide this appeal. In his order, the director made statements showing that he dismissed the administrative proceeding for lack of subject matter jurisdiction. He determined that the junior appropriators no longer had standing because the condemnation award mooted the appropriation dispute. But the director's reasoning blurs the distinction between standing and mootness.

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[17] See *Gilbert & Martha Hitchcock Found. v. Kountze*, 275 Neb. 978, 751 N.W.2d 129 (2008).

[18] See *In re Applications T-851 & T-852, supra* note 15.

[5,6] 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.[19] It is true that a litigant must have a personal interest in the controversy both at the commencement of the litigation and throughout its existence.[20] But standing is a component of jurisdiction; only a party that has standing may invoke the jurisdiction of a court or tribunal.[21] And the junior appropriators did not lose standing if they possessed it under the facts existing when they commenced the litigation.[22]

[7] Mootness differs from standing. Mootness refers to events occurring after the filing of suit which eradicate the requisite personal interest in the resolution of the dispute that existed at the beginning of the litigation.[23] Although a moot case is subject to summary dismissal,[24] it does not necessarily prevent a court from exercising jurisdiction.[25] But if an exception does not apply, a court must dismiss a case when the issues are no longer alive because the litigants lack a personal interest in their resolution. Dismissal is required because the court or tribunal can no longer give any meaningful relief.[26] The central question in a mootness analysis is whether changes in circumstances that prevailed at the beginning of litigation

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[19] See *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006).

[20] *Id.*

[21] See, *Ottaco Acceptance, Inc. v. Larkin*, 273 Neb. 765, 733 N.W.2d 539 (2007); *Myers, supra* note 19.

[22] See *Myers, supra* note 19.

[23] See, e.g., *Ridderbush v. Naze*, No. 94-1861, 1995 WL 496754 (7th Cir. Aug. 17, 1995) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 64 F.3d 665 (7th Cir. 1995)).

[24] *BryanLGH v. Nebraska Dept. of Health & Human Servs.*, 276 Neb. 596, 755 N.W.2d 807 (2008).

[25] See *Evertson, supra* note 16.

[26] See, e.g., *DiMaio v. Democratic Nat.* Committee, 555 F.3d 1343 (11th Cir. 2009). Compare *Smith v. Colorado Organ Recovery Sys.*, 269 Neb. 578, 694 N.W.2d 610 (2005).

have forestalled any occasion for meaningful relief.[27] A case is not moot unless a court cannot fashion some meaningful form of relief, even if that relief only partially redresses the prevailing party's grievances.[28] A court assesses a plaintiff's personal interest under the framework of standing at the commencement of the litigation and under mootness thereafter.[29]

Here, obviously, the Department has original, exclusive jurisdiction to decide disputes over surface water appropriations.[30] And NPPD does not argue that the junior appropriators lacked standing when they filed their petition requesting a hearing regarding the validity of NPPD's senior appropriation. Thus, we analyze the issue whether the case was moot.

Case Was Not Moot

[8] A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the litigation's outcome.[31] Here, the junior appropriators challenged the validity of NPPD's senior appropriation. The junior appropriators' condemnation award provides them a 20-year superior preference over NPPD. But, currently, they must compensate NPPD for the water they divert from the river. So, a determination that NPPD had abandoned or forfeited its appropriations would immediately benefit the junior appropriators. And as the Department now acknowledges, we have recognized the priority of an appropriation as an important property right. Minimally, a senior appropriation entitles the permit holder to compensation from

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[27] See, e.g., *American Bird Conservancy v. Kempthorne*, 559 F.3d 184 (3d Cir. 2009); *Southern California Painters & Allied v. Rodin*, 558 F.3d 1028 (9th Cir. 2009); *City of Sequim v. Malkasian*, 157 Wash. 2d 251, 138 P.3d 943 (2006).

[28] *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 113 S. Ct. 447, 121 L. Ed. 2d 313 (1992); *In re Continental Airlines*, 91 F.3d 553 (3d Cir. 1996).

[29] See *Myers, supra* note 19.

[30] § 61-206(1).

[31] See *In re Interest of Taylor W.*, 276 Neb. 679, 757 N.W.2d 1 (2008).

a superior-use appropriator.[32] These facts alone show that the junior appropriators have a legally cognizable interest in the outcome of the administrative proceeding before the Department. Thus, events occurring after the hearing request did not preclude the director from fashioning meaningful relief. The case is not moot.

Election of Remedies Doctrine Does Not Apply

[9,10] Finally, we reject NPPD's argument that the election of remedies doctrine barred the junior appropriators' requested relief in the administrative proceeding. That doctrine generally applies in two instances: when a party seeks inconsistent remedies against another party or persons in privity with the other party or when a party asserts several claims against several parties for redress of the same injury.[33] The doctrine prevents a plaintiff from receiving double recovery for a single injury or compensation that exceeds the damages sustained.[34] But that reasoning does not apply here. First, NPPD does not inform us how a favorable decision in the administrative proceeding would result in a double recovery for the junior appropriators. More important, the junior appropriators were not seeking inconsistent remedies. They were enforcing separate rights.

[11] The Legislature has given the Department jurisdiction over all matters concerning water rights for irrigation, power, and other uses, "except as such jurisdiction is specifically limited by statute."[35] Section 70-672 presents a limitation. It states that any person seeking to acquire water being used for power shall use the procedure to condemn property as set forth in chapter 76, article 7, of the Nebraska Revised Statutes. Thus, condemnation proceedings are the only way a junior appropriator with a superior preference right may enforce that right; the

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[32] *Loup River P. P. D. v. North Loup River P. P. & I. D.*, 142 Neb. 141, 5 N.W.2d 240 (1942); *Vonburg v. Farmers Irrigation District*, 132 Neb. 12, 270 N.W. 835 (1937).

[33] See *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001).

[34] See *id.*

[35] § 61-206(1).

Department has no authority to condemn water or force parties to accept a subordination agreement.[36] But nothing in the condemnation procedures precludes junior appropriators with a superior agricultural preference right from also challenging the validity of senior appropriation right. Similarly, nothing in the appropriation procedures precludes junior appropriators from seeking a condemnation of the senior appropriation.[37]

In short, neither of these statutory procedures is exclusive or inconsistent. They provide separate means of enforcing separate water rights. A condemnation proceeding is the Legislature's means of protecting an appropriator's constitutionally superior preference for water use when relief under the appropriation procedures is not available.

As this case illustrates, the protection has gaps. The Department's issuance of the closing notices to the junior appropriators despite their preference right leaves the junior appropriators with limited options that will ensure them continued access to water: junior appropriators can either initiate condemnation proceedings and assert their superior preference right or challenge the validity of the senior appropriation right. Yet, to hold that junior appropriators must choose between these procedures would force them into the precarious position of relinquishing their preference rights to challenge the validity of a senior appropriation with an inferior preference status. This interpretation of the statutes would be inconsistent with preference rights under the Nebraska Constitution. We conclude the argument is without merit.

CONCLUSION

We conclude that the junior appropriators' administrative proceeding was not moot. The Department's director therefore erred in dismissing their hearing request. We remand the cause to the director for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., participating on briefs.

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[36] See, generally, *Hickman v. Loup River Public Power Dist.*, 173 Neb. 428, 113 N.W.2d 617 (1962).

[37] See § 61-206(1).

HOMESTEAD ESTATES HOMEOWNERS ASSOCIATION, A NEBRASKA NONPROFIT CORPORATION, APPELLEE, V. THOMAS D. JONES AND MICHELLE L. PETERSON-JONES, HUSBAND AND WIFE, APPELLANTS.

768 N.W.2d 436

Filed July 17, 2009. No. S-08-1042.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Easements: Equity.** An adjudication of rights with respect to an easement is an equitable action.
3. **Declaratory Judgments: Equity: Appeal and Error.** In reviewing an equity action for a declaratory judgment, an appellate court decides factual issues de novo on the record and reaches conclusions independent of the trial court. But when credible evidence is in conflict on material issues of fact, the court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed.

Grant A. Forsberg, of Forsberg & Jolly Law, P.C., L.L.O., for appellants.

David V. Chebatoris, of Svoboda & Chebatoris Law Office, for appellee.

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

STEPHAN, J.

This appeal questions whether the owners of property subject to an ingress/egress easement may prevent the easement holder from upgrading the surface of a roadway over the easement in order to preserve the "charm of the area." We affirm the judgment of the district court for Cass County declaring that the easement holder had the right to upgrade the roadway, where it was not shown that the upgrade would damage or interfere with the enjoyment of the servient estate.

FACTS

Homestead Estates is a subdivision of eight residential lots, each approximately 5 acres in size, located in Cass County, Nebraska. Homestead Estates is legally described as the southwest quarter of the northeast quarter of Section 19, Township 12 North, Range 12 East of the 6th P.M. The Homestead Estates Homeowners Association (the Association) is a Nebraska nonprofit corporation composed of the owners of property within Homestead Estates.

Homestead Estates was developed by Ronald and Jean Barnhart in 2004. At that time, the Barnharts also owned the land legally described as the northwest quarter of the northeast quarter of Section 19, Township 12 North, Range 12 East of the 6th P.M. This land is immediately to the north of and contiguous with the land on which Homestead Estates was developed. The Barnharts established a 66-foot-wide ingress and egress easement running along the east side of this property, from Homestead Estates on the south to Nebraska State Highway 66 on the north. This easement is the only means of access to Homestead Estates. Currently, the easement contains a gravel road known as Red Barn Road.

The plat for Homestead Estates was filed with the Cass County register of deeds on June 24, 2004. The easement is set forth on the plat. The plat specifically notes that the owners of property within Homestead Estates "agree to contribute to the maintenance of the ingress and egress easements." The plat also contains a reference to separate covenants for Homestead Estates that were filed with the register of deeds. One of the covenants specifically references the roadway easement and provides that the Barnharts would install "a non-hard-surfaced roadway into the development so as to service all tracts therein. The road will be rocked initially and at necessary intervals to [e]nsure safe travel over the same." The covenant further provided that the owners of the tracts in Homestead Estates would "pay their equal share of the cost and expense of maintenance, repair, upgrading or snow removal on the roadway."

Appellants, Thomas D. Jones and Michelle L. Peterson-Jones (the Joneses), purchased their residential property in 2005. Their home is located on a separate parcel directly east of the

property on which Red Barn Road is situated; the house itself is located approximately 150 feet east of the easement. The parcel on which the Joneses' home is situated does not include Homestead Estates or the easement. At the time the Joneses purchased their residential property, Homestead Estates and the ingress/egress easement which included Red Barn Road were in existence and the plat of Homestead Estates had been filed with the register of deeds.

In September 2006, the Joneses purchased the 40-acre tract immediately west of their residential property and to the immediate north of Homestead Estates. This is the property over which the easement runs. This property is undeveloped and is generally used by the Joneses for recreational purposes.

During the fall of 2006, the Association discussed upgrading Red Barn Road from a gravel road to some type of asphalt or harder, smoother surface. The Association obtained three bids for upgrading the road with asphalt millings. Subsequently, the Joneses' counsel made demand upon the Association to "cease and desist" any upgrade of Red Barn Road. The Association subsequently filed this declaratory judgment action, seeking a determination of the respective rights and duties of the parties with respect to the ingress/egress easement.

A bench trial was held on August 1, 2008. The Joneses testified that they wanted Red Barn Road to remain gravel, because they feared an asphalt or other hard-surface road would detract from the rural setting of their home and cause people to speed on Red Barn Road. The Joneses also expressed concern for the safety of their four children and their pets, based upon their belief that vehicles would travel faster on a hard-surface roadway. A real estate agent testified that paving the road might negatively affect the property value of the Joneses' residence. An engineer testified about the necessity of properly constructing an asphalt road and the expense of constructing and maintaining it.

Based upon this evidence, the district court concluded that the Association had the right to upgrade and maintain Red Barn Road by installing an asphalt surface. The court determined that the Joneses' residential property was not a part of the servient estate, but was "merely a property located adjacent

to" the servient estate. The court determined that although the Joneses also owned the servient estate, they had not shown that their use of those 40 acres of undeveloped property would be negatively affected by the upgrade to the easement. The court also found that the Joneses purchased both the residential property and the undeveloped servient estate with full knowledge of the existence of Homestead Estates and the easement. The court's judgment allowed the Association to upgrade Red Barn Road with "crushed asphalt, asphalt milling, or poured asphalt" and to "maintain, repair, upgrade, and remove snow from the roadway" at its expense.

The Joneses filed this timely appeal.

ASSIGNMENTS OF ERROR

The Joneses assign, renumbered, that the district court erred in (1) finding that the plan to resurface Red Barn Road was reasonably necessary for the convenient enjoyment of the servitude, (2) admitting into evidence the covenants for Homestead Estates, (3) finding that the resurfacing of Red Barn Road would not unreasonably interfere with the Joneses' enjoyment of their property, and (4) finding that resurfacing Red Barn Road would not unreasonably damage the Joneses' property.

STANDARD OF REVIEW

[1] An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.[1]

[2,3] An adjudication of rights with respect to an easement is an equitable action.[2] In reviewing an equity action for a declaratory judgment, an appellate court decides factual issues de novo on the record and reaches conclusions independent of the trial court.[3] But when credible evidence is in conflict on

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[1] *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006); *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005).

[2] See, *Bors v. McGowan*, 159 Neb. 790, 68 N.W.2d 596 (1955); *R & S Investments v. Auto Auctions*, 15 Neb. App. 267, 725 N.W.2d 871 (2006).

[3] *Mogensen v. Mogensen*, 273 Neb. 208, 729 N.W.2d 44 (2007).

material issues of fact, the court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.[4]

ANALYSIS

In resolving this dispute, the district court relied upon the principles set forth in the Restatement (Third) of Property,[5] which provides:

> Except as limited by the terms of the servitude . . . the holder of an easement . . . is entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the servitude. The manner, frequency, and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefitted by the servitude. Unless authorized by the terms of the servitude, the holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.

The Joneses rely upon § 4.10 in their appeal. Although we have not previously adopted or cited this section of the Restatement, we note that it is consistent with our cases recognizing that an easement "'"carries with it by implication the right . . . of doing whatever is reasonably necessary for the full enjoyment of the easement itself". . . ."'[6] and that the owner of an easement "'may make the way as useable as possible for the purpose of the right owned so long as he does not increase the burden on the servient tenement or unreasonably interfere with the rights of the owner thereof.'"[7] In keeping with our general practice of disposing of appeals on the theories which were

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[4] *Id.*

[5] Restatement (Third) of Property: Servitudes § 4.10 at 592 (2000).

[6] *Ricenbaw v. Kraus*, 157 Neb. 723, 728, 61 N.W.2d 350, 355 (1953), quoting *Scheeler v. Dewerd*, 256 Wis. 428, 41 N.W.2d 635 (1950). Accord 28A C.J.S. *Easements* § 196 (2008).

[7] *Bors v. McGowan, supra* note 2, 159 Neb. at 800, 68 N.W.2d at 602. Accord 25 Am. Jur. 2d *Easements and Licenses* § 82 (2004).

presented to the trial court,[8] we apply the principles stated in § 4.10 of the Restatement in our de novo review.

Relying on § 4.10 of the Restatement, the Joneses argue that the record fails to establish that the resurfacing of Red Barn Road was reasonably necessary for Homestead Estates' enjoyment of the servitude. The district court did not make an explicit finding on this issue. In its order, however, the court noted that Homestead Estates had developed significantly in the 4 years since it was initially platted and that traffic had increased over Red Barn Road as the area further developed. The court also noted that various residents of Homestead Estates testified that upgrading the road would improve safety, eliminate potholes, eliminate dust, and make it easier to remove snow in the winter months.

In addition, the district court noted that the Homestead Estates covenants that were incorporated in the plat did not restrict the use of Red Barn Road to that of a rock road, but instead provided that the roadway could be upgraded. The Joneses argue that these covenants should not have been admitted into evidence or considered by the district court because they are not binding on the Joneses. Clearly, the covenants apply only to owners of property within Homestead Estates, and as the Joneses are not such owners, the covenants do not bind them. In the context of the instant case, however, the district court properly considered the covenants as additional evidence relating to the issue of whether the upgrade of the roadway was a reasonable use of the easement by the owners of residential property within Homestead Estates. Based upon our de novo review, we conclude that the district court did not err in implicitly finding that the road upgrade was reasonably necessary or in relying in part on the covenants in reaching that finding.

The Joneses' primary argument is based on the last sentence of § 4.10, which provides that an easement holder is "not entitled to cause unreasonable damage to the servient

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[8] See, *Schindler v. Walker*, 256 Neb. 767, 592 N.W.2d 912 (1999); *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996).

estate or interfere unreasonably with its enjoyment."[9] Their general contention at trial was that paving Red Barn Road would negatively affect the aesthetic value of their rural setting and would result in increased speeding along the road and thus create safety hazards. The evidence presented by the Joneses in support of these contentions related almost exclusively to how paving the road might impact the Joneses' residential property and their use of it. For example, Michelle Peterson-Jones testified that the proposed upgrade of Red Barn Road

> certainly would take away from the charm of the area, and what [the Joneses are] trying to accomplish and what we like to see out our window. You know, we like to see that kind of dirt road area, and I . . . absolutely really would prefer not to see an asphalt road, particularly if it's in disrepair.

Likewise, the Joneses' concern regarding potential speeding on a resurfaced Red Barn Road was primarily from their perspective as owners of the land adjacent to the parcel of land which included the easement.

Section 4.10 however, prohibits only unreasonable damage to or interference with the "servient estate," i.e., "[a]n estate burdened by an easement."[10] As the district court noted and the parties do not dispute, the easement over which Red Barn Road runs does not lie on the Joneses' residential property and thus, the concerns raised by the Joneses with respect to that property are not properly considered in the analysis of whether the upgrade would unreasonably affect the servient estate. The servient estate at issue in this action is the undeveloped land owned by the Joneses, and the record is almost entirely silent as to the effect of the road upgrade on this property. Based upon our de novo review, we conclude that the Joneses did not prove that the proposed resurfacing of Red Barn Road would cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.

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[9] See Restatement, *supra* note 5, § 4.10 at 592.

[10] Black's Law Dictionary 629 (9th ed. 2009).

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

McCORMACK, J., participating on briefs.

JAMES L. SACK, APPELLANT, V. CARLOS CASTILLO, JR., DIRECTOR OF NEBRASKA DEPARTMENT OF ADMINISTRATIVE SERVICES, APPELLEE.

768 N.W.2d 429

Filed July 17, 2009. No. S-08-1278.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose 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.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions of law independently of the trial court's conclusions.
4. **Judgments: Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
5. **Statutes.** To the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute.
6. **Statutes: Legislature: Intent.** Repeal of a statute by implication is not favored and will not be found unless the Legislature's intent makes another construction of the statute untenable.
7. ____: ____: ____. 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.
8. **Statutes.** Where general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same.
9. **Constitutional Law: Statutes: Presumptions: Proof.** Statutes are afforded a presumption of validity, and the burden of establishing that a statute is unconstitutional is on the one attacking its validity. All reasonable doubts will be resolved in favor of its constitutionality.

10. **Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in decisions to admit evidence based on relevancy or admissibility, and those decisions will not be overturned by an appellate court in the absence of an abuse of discretion.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed.

James L. Sack, pro se.

Jon Bruning, Attorney General, and Dale A. Comer for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

James L. Sack was employed by the State of Nebraska from December 9, 1974, through December 29, 2006, when he retired at the age of 62. Sack brought this claim against the director of the Department of Administrative Services (the State). Sack contends he was deprived of property rights when the State removed 2,786.83 hours of unused sick leave accrued from December 31, 1988, to December 31, 2005, and in excess of the statutorily allowable 1,440 hours. Sack also alleges that he was not paid for 1,174.87 hours of unused sick leave upon his retirement. Sack claims the statutes requiring the State to remove unused sick leave in excess of the statutory maximum, Neb. Rev. Stat. §§ 81-1323 and 81-1324 (Reissue 2008), are unconstitutional because Sack had a vested property right in his sick leave. Sack further argues that Neb. Rev. Stat. §§ 81-1320 to 81-1326 (Reissue 2008) are special legislation and unconstitutional and that the district court erred in admitting legislative history into evidence. We affirm the decision of the district court.

FACTS

The facts of this case are undisputed. As noted, Sack was a permanent, full-time employee of the State from December 9, 1974, through December 29, 2006, when he retired at the

age of 62. Sack was employed as a revenue audit manager and was not a part of any bargaining unit. Sack claims that his sick leave balance was reduced by a total of 2,786.83 hours from December 31, 1988, through December 31, 2005. At the time of his retirement, Sack's sick leave balance was 1,566.50 hours, and he was paid for 25 percent of those hours pursuant to §§ 81-1324 and 81-1325. The statutes governing the accumulation and use of sick leave were in place when Sack was hired and throughout his employment with the State.

The sick leave provisions that Sack complains of were enacted as 1973 Neb. Laws, L.B. 340, and have been codified at §§ 81-1320 to 81-1326. L.B. 340, at §§ 4 to 6, granted state employees certain sick leave benefits and provided as follows:

> Sec. 4. The sick leave account [of state employees] shall be balanced as of December 31 each year. Sick leave shall be cumulative for not more than one thousand four hundred forty hours.
>
> Sec. 5. All sick leave shall expire on the date of separation and no employee shall be reimbursed for sick leave outstanding at the time of termination, except as provided in this act.
>
> Sec. 6. Each employee who is eligible for retirement under any existing state or federal retirement system shall, upon termination of his employment with the state by reason of retirement or voluntary resignation, in good standing, be entitled to payment of one-fourth of his accumulated unused sick leave, with the rate of payment based upon his regular pay at the time of termination or retirement.

Although portions of the 1973 bill have been amended, the pertinent provisions are largely the same and are currently set out in §§ 81-1323 to 81-1325.

Sack contends that because he "earned" his sick leave, divesting him of any unused sick leave was a violation of his property rights. Sack's argument is based on the premise that §§ 81-1323 to 81-1325 are in conflict with the Nebraska Wage Payment and Collection Act. Sack also contends that the statutes which provided for removal of his sick leave are special

legislation in violation of the Nebraska Constitution and that the district court erred when it admitted the legislative history for L.B. 340 into evidence.

ASSIGNMENTS OF ERROR

Sack assigns that the district court erred when it granted the State's motion for summary judgment. Sack argues, consolidated and renumbered, that he had a vested right to all earned sick leave under the Nebraska Wage Payment and Collection Act and that §§ 81-1320 to 81-1326 constitute special legislation in violation of the Nebraska Constitution. Sack also assigns as error the district court's decision to allow as evidence the legislative history for L.B. 340.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose 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.[1]

[2,3] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[2] When reviewing questions of law, an appellate court resolves the questions of law independently of the trial court's conclusions.[3]

[4] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.[4]

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[1] *Hughes v. Omaha Pub. Power Dist.*, 274 Neb. 13, 735 N.W.2d 793 (2007).

[2] *Id.*

[3] *Id.*; *Eggers v. Rittscher*, 247 Neb. 648, 529 N.W.2d 741 (1995).

[4] *Japp v. Papio-Missouri River NRD*, 271 Neb. 968, 716 N.W.2d 707 (2006).

ANALYSIS

Sack Does Not Have Property Right in His Sick Leave

Sack argues that L.B. 340 conflicts with the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 2004). As previously noted, L.B. 340 was passed in 1973, the year before Sack was hired by the State, and controls the amount of sick leave that can be accumulated by state employees. Included in L.B. 340 is a provision that an employee cannot retain more than 1,440 hours of accumulated sick leave and that on December 31 of each year, sick leave is to be balanced to 1,440 hours if the employee has accumulated more.

Sack contends that the Nebraska Wage Payment and Collection Act, enacted in 1977, superseded L.B. 340 and that it granted him property rights in his accumulated sick leave. Because "sick leave" is considered part of fringe benefits under § 48-1229(3), Sack claims the provisions under L.B. 340 deprive him of the "compensation" that he had "earned." According to Sack, L.B. 340 and the Nebraska Wage Payment and Collection Act constitute a "'unilateral employment contract,'" and his accumulated sick leave is "deferred compensation" due to him at the time of his separation.[5] Although Sack acknowledges that he was aware of the sick leave policy as defined by L.B. 340 at the time he was hired, he contends that the Nebraska Wage Payment and Collection Act changed the sick leave policy in 1977 for at-will employees and repealed the pertinent sections of L.B. 340. We disagree.

[5] Contrary to Sack's claims, there is no indication that the Nebraska Wage Payment and Collection Act repealed L.B. 340. Although the act and L.B. 340 both deal with sick leave granted to state employees, to the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute.[6] Clearly, L.B. 340

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[5] Brief for appellant at 25-26.

[6] *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005); *Cox Nebraska Telecom v. Qwest Corp.*, 268 Neb. 676, 687 N.W.2d 188 (2004).

is the more specific of the two statutes dealing with accrual of sick leave. The Nebraska Wage Payment and Collection Act applies to all employers and any fringe benefits offered. L.B. 340 applies to state employees' accrual of sick leave and provides more detail as to when and how an employee may accrue sick leave.

[6-8] Furthermore, repeal of a statute by implication is not favored and will not be found unless the Legislature's intent makes another construction of the statute untenable.[7] As a result, 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.[8] Finally, where general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same.[9] There is no indication in the statutes that the Nebraska Wage Payment and Collection Act repealed L.B. 340.

We also note that our decision in *Loves v. World Ins. Co.*[10] gives employers, including the State, the power to dictate the conditions under which sick leave can be used. In *Loves*, a retiring employee sued for compensation for her accrued sick time.[11] When the employee was hired, there was a provision in the employee handbook that allowed compensation for all accrued and unused sick leave upon retirement. Approximately 8 years before the employee retired, however, the employer changed its policies to disallow compensation for unused sick leave.[12] This court found that the employment

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[7] See *Hammond v. City of Broken Bow*, 239 Neb. 437, 476 N.W.2d 822 (1991).

[8] *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000); *In re Invol. Dissolution of Battle Creek State Bank*, 254 Neb. 120, 575 N.W.2d 356 (1998).

[9] See, *Bergan Mercy Health Sys., supra* note 8; *State v. Roth*, 222 Neb. 119, 382 N.W.2d 348 (1986), *disapproved on other grounds, State v. Wright*, 261 Neb. 277, 622 N.W.2d 676 (2001).

[10] *Loves v. World Ins. Co.*, 276 Neb. 936, 758 N.W.2d 640 (2008).

[11] *Id.*

[12] *Id.*

was at will, that the employee had no contract with her employer, and that there was no indication the employer did not have the power to change its policies. We stated that the Nebraska Wage Payment and Collection Act "does not prohibit an employer from providing a sick leave benefit which may be used only in the event of illness or injury and which has no monetary value upon termination of employment if it is not so used."[13] We also found that because the employee had continued her employment after the change in policies, she acquiesced to those changes. The same can be said of Sack, who acknowledges that he was aware of the sick leave policy when he was hired and that there was no reason for him to believe that he ought to be treated differently than any other State employee.

L.B. 340 Is Not Unconstitutional

[9] Sack contends that L.B. 340 is unconstitutional, largely because the provisions deprive him of a "property right" in his accumulated sick leave.[14] As the State points out, Sack bears a heavy burden to show that the statute is unconstitutional. Statutes are afforded a presumption of validity,[15] and the burden of establishing that a statute is unconstitutional is on the one attacking its validity.[16] All reasonable doubts will be resolved in favor of its constitutionality.[17]

Sack claims that L.B. 340 is special legislation in violation of Neb. Const. art. III, § 18, because it applies only to state employees. According to Sack, §§ 4 to 6 of L.B. 340, codified at §§ 81-1323 through 81-1325, "arbitrarily and unreasonably set him and other state employees apart as inferior or second-class from all other employees in Nebraska that are subject to

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[13] *Id.* at 941, 758 N.W.2d at 644.

[14] Brief for appellant at 32.

[15] *Bauers v. City of Lincoln*, 255 Neb. 572, 586 N.W.2d 452 (1998).

[16] See, *State ex rel. Stenberg v. Omaha Expo. & Racing*, 263 Neb. 991, 644 N.W.2d 563 (2002); *Bergan Mercy Health Sys., supra* note 8.

[17] *Soto, supra* note 6.

the [Nebraska] Wage [Payment and Collection] Act and are not employed by the [S]tate."[18]

Although Sack does not contest the "'rational basis'" for enacting a sick leave policy for state employees, he claims that the sick leave policy deprives him of his vested right in his accumulated sick leave.[19] In essence, Sack's argument is that he was allowed to accumulate more than the statutorily allowed 1,440 hours but that the State took those accumulated hours away at the end of each year from 1988 through 2005. Sack is referring to § 4 of L.B. 340, codified at § 81-1323, which requires the State to balance each employee's sick leave account on December 31 of every year.

In its order, the district court found that L.B. 340 did not constitute special legislation, because there was no arbitrary or unreasonable method of classification and it was not a closed class.[20] Sack conceded there was good reason for the State to create a system for its employees for accumulating and using sick leave. The class of "state employees" is neither arbitrary nor closed.

As we noted in *Loves*, employers have the right to restrict the use or payment of sick leave. The State, as an employer, has the right to restrict the use and payment of sick leave for its own employees. It follows that the class of "state employees" is not arbitrary. The class is also not closed, because every time someone begins to work for the State, that individual begins to accumulate sick leave as provided for under L.B. 340. Therefore, L.B. 340 does not contain an arbitrary or unreasonable method of classification, as is required to find that a statute constitutes special legislation.

Sack's argument that the statutes deprive him of a contractual property right also fails. First, the court must consider whether there has been an impairment of the contract, whether the actions of the defendant in fact acted as a substantial

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[18] Brief for appellant at 34.

[19] *Id.* at 35.

[20] See, e.g., *Bergan Mercy Health Sys., supra* note 8.

impairment of the contractual relationship, and whether that impairment was nonetheless permissible and legitimate.[21]

Sack agreed to the sick leave plan when he began working for the State, and he admitted as much in his brief. Sack was aware that he would not be able to accrue more than 1,440 hours of sick leave, and he was also aware that the sick leave balancing would occur on December 31 of every year. These provisions were a part of Sack's "employment contract" with the State from the beginning of his employment. Sack cannot show that the State took anything from him that he was promised or that his "contract" was impaired. Sack therefore cannot demonstrate that the State's formulation of its sick leave policy was not a permissible, legitimate use of its sovereign power.

District Court Did Not Err in Admitting Legislative History for L.B. 340

Sack argues that the district court erred when it admitted the legislative history for L.B. 340 into evidence. The State had offered the legislative history to support its argument that L.B. 340 was not special legislation.

[10] We have allowed courts to consider legislative history when determining whether a statute constitutes special legislation.[22] The exercise of judicial discretion is implicit in decisions to admit evidence based on relevancy or admissibility, and those decisions will not be overturned by an appellate court in the absence of an abuse of discretion.[23] The State concedes that the statute is unambiguous on its face and that therefore, the legislative history is not required to interpret it. However, the State argues that Sack invited the use of the legislative history when he claimed L.B. 340 was special legislation. We agree, and find that the district court did not err when it admitted the legislative history into evidence.

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[21] See *Miller v. City of Omaha*, 253 Neb. 798, 573 N.W.2d 121 (1998).

[22] *Hug v. City of Omaha*, 275 Neb. 820, 749 N.W.2d 884 (2008).

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

CONCLUSION

We do not find any merit to Sack's assignments of error. Sack was aware of the sick leave policy when he was hired by the State, and he acquiesced to those policies by accepting continued employment. Furthermore, Sack has not shown that L.B. 340 is unconstitutional or that he has been deprived of a property right.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LUIS O. BARRANCO, APPELLANT.

769 N.W.2d 343

Filed July 24, 2009. No. S-08-142.

1. **Criminal Law: Juries.** Under Neb. Rev. Stat. § 29-2022 (Reissue 2008), the defendant has the right to have the jury kept together until the jury agrees upon a verdict or is discharged by the court.
2. ____: ____. The basic purpose of Neb. Rev. Stat. § 29-2022 (Reissue 2008) is to preserve the right to a fair trial by shielding the jury from improper contact by others and restricting the opportunities for improper conduct by jurors during the course of their deliberations.
3. **Criminal Law: Juries: Presumptions: Proof.** In the absence of express agreement or consent by the defendant, a failure to comply with Neb. Rev. Stat. § 29-2022 (Reissue 2008) by permitting the jurors to separate after submission of the case is erroneous, creates a rebuttable presumption of prejudice, and places the burden upon the prosecution to show that no injury resulted.
4. **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.
5. ____: ____: ____. Trial errors generally occur during the presentation of the case to the jury and may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether they were harmless beyond a reasonable doubt.
6. **Judges: Recusal.** In evaluating a trial judge's alleged bias, the question is whether a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.
7. **Courts.** Vertical stare decisis compels lower courts to follow strictly the decisions rendered by higher courts within the same judicial system.
8. **Courts: Judges.** A judge who disagrees with a statute or a decision of a higher court may express that disagreement, but must do so in a way that is consistent with his or her obligation to do what the law requires.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

Jon Bruning, Attorney General, and Erin E. Leuenberger for appellee.

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

GERRARD, J.

Nebraska law provides that in a criminal case, "[w]hen a case is finally submitted to the jury, they must be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court."[1] Although this provision can be waived by agreement of the defendant and the State, it is otherwise mandatory.[2]

In this case, the district court indicated that although the defendant had not waived sequestration, the court intended to allow the jury to separate if a verdict had not been reached by the end of the day. But the jury actually reached a guilty verdict the same morning the case was submitted, so it never separated. Nonetheless, the defendant appeals, claiming the court erred. Because the law was actually complied with in this case, we find no reversible error. Therefore, we affirm.

BACKGROUND

Luis O. Barranco was charged by information with one count of strangulation and one count of domestic assault in the third degree.[3] The matter proceeded to a jury trial in the district court. Evidence was adduced by the State and Barranco, and the parties rested.

At the jury instruction conference, Barranco objected to the court's proposed jury instruction No. 14, which provided in

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[1] Neb. Rev. Stat. § 29-2022 (Reissue 2008).

[2] See *State v. Robbins*, 205 Neb. 226, 287 N.W.2d 55 (1980).

[3] See Neb. Rev. Stat. §§ 28-310.01 and 28-323 (Reissue 2008).

relevant part that "[i]f you do not agree on a verdict by 5:00 o'clock p.m. each evening, you may recess your deliberations until 9:00 o'clock a.m. the following working day morning. When you do separate, during that time, you are not allowed to discuss this case with anyone, even another juror." Barranco objected on the ground that "the law in the State of Nebraska is the jury is to be kept together until they reach a verdict so I would object to the jury being allowed to separate." The court overruled the objection.

Because the court's explanation of its decision is important to understanding Barranco's appellate argument, we quote the judge's discussion of the subject at some length:

> Well, I've given this a great deal of thought and the one thing I noted is that the applicable statute, Section 29-2022 appears to have not been amended since before 1929 and perhaps it hasn't been amended since sometime in the 19th century. And arguably when perhaps only men served as jurors, we are all aware that sequestration can cause undue hardship to people such as single parents or parents who are both employed.
>
> Although I don't think it is up to me to change the statute and all of us have certain quarrels with statutory schemes of various types, it is up to the Legislature to change those. But it seems to me that the statute is not compatible with modern society and if we excused everyone from jury service that sequestration could cause a hardship for, the result certainly would be a jury that's not representative of the community. Sequestration results in hardship and inconvenience to court personnel and increases dramatically the costs of trials, since our experience has been that hotels often charge for the rooms even when they are cancelled.
>
> I've been on the district court bench in excess of 24 years and I'm generally familiar with the rare sequestration of juries in other districts in the state and the fact that private practice criminal defense attorneys in this county rarely, if ever, request the jury be sequestered except in the most serious type of cases and even then it is sometimes not done.

> This is a simple case. It involves a Class IV felony and a Class I misdemeanor.[4] There has been no publicity and it is safe to conclude there will be none. There is absolutely no reasonable reason to require that the jur[ors] be sequestered, which would be a hardship on them.
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> I am aware of the **Robbins** case at 205 Neb. 226,[5] which was decided in 1980 which was over 27 years ago, and although I don't think the Supreme Court would rule otherwise, they perhaps should be given an opportunity to revisit the case in view of modern society or if the court concludes that any change must come from the Legislature, perhaps the decision of the Supreme Court denying the trial judge's discretion to not order sequestration would serve as an impetus for legislative action.
>
> As stated in **Robbins**, the statute is aimed to protect the defendant's right to a fair trial. Considering the nature of the charges and the complete lack of publicity or public interest in this case, I have concluded that sequestration is not necessary to preserve . . . Barranco's right to a fair trial particularly if appropriate, supplemental, cautionary instructions are given to the jur[ors] if they do not reach a verdict by the end of the day tomorrow.
>
> So the objection to Instruction 14 will be overruled.

At 8:55 a.m. the following day, before the jury was instructed, Barranco again objected to the court's decision not to sequester the jurors. The court conceded that Barranco's understanding of the law was correct, but said that "the court has made a decision and the court is going to stay with that decision." The judge explained:

> I don't know what goes on in the minds of people out in the state or in other districts. It may be that there is an undercurrent or a subtle understanding in those districts that if the defendant does not waive sequestration, that if the defendant is convicted then when it comes time for sentencing it would be an adverse situation for the defendant. I have never thought that way. I don't think I've ever

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[4] See *id.*

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

> let it be known that I would do that and the judges of this district certainly would never take basically, if you want to put it that way, take it out on the defendant. . . .
>
> But in any event, I'm not going to send the jury home to get overnight things right now so your request will be denied.

Barranco moved for a mistrial and asked the judge to recuse himself and assign the matter to a different judge. The court overruled the motions for mistrial and recusal.

Following those rulings, closing arguments were had and the jury was instructed. Instruction No. 14 was given as quoted above. The case was submitted to the jury at 10:04 a.m. Court resumed at 11:20 a.m., at which time the jury returned a verdict of guilty on the assault charge, but not guilty on the strangulation charge.

The court accepted the verdicts and entered judgment accordingly. Barranco filed a motion for new trial alleging that the court's refusal to sequester the jurors violated his constitutional rights. The court found that because the jury had never separated, Barranco had not been prejudiced, and overruled the motion for new trial. Barranco was sentenced to 180 days' imprisonment. He appeals.

ASSIGNMENT OF ERROR

Barranco assigns that the district court erred in refusing to sequester the jury during deliberations.

ANALYSIS

[1] As briefly mentioned above, § 29-2022 provides that in a criminal case,

> [w]hen a case is finally submitted to the jury, they must be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court. The officer having them in charge shall not suffer any communication to be made to them, or make any himself, except to ask them whether they have agreed upon a verdict, unless by order of the court; nor shall he communicate to anyone, before the verdict is delivered, any matter in relation to the state of their deliberations. If the jury are permitted to separate during

> the trial, they shall be admonished by the court that it is their duty not to converse with or suffer themselves to be addressed by any other person on the subject of the trial, nor to listen to any conversation on the subject; and it is their duty not to form or express an opinion thereon until the cause is finally submitted to them.

We have explained that under § 29-2022, the defendant has the right to have the jury kept together until the jury agrees upon a verdict or is discharged by the court.[6]

[2,3] The basic purpose of § 29-2022 is to preserve the right to a fair trial by shielding the jury from improper contact by others and restricting the opportunities for improper conduct by jurors during the course of their deliberations.[7] In the absence of express agreement or consent by the defendant, a failure to comply with § 29-2022 by permitting the jurors to separate after submission of the case is erroneous, creates a rebuttable presumption of prejudice, and places the burden upon the prosecution to show that no injury resulted.[8] Consequently, the issue is whether there was improper contact or communication with or by the jurors during separation which resulted in prejudice to the defendant.[9]

Obviously, there was no prejudice in this case. More fundamentally, the court did not fail to comply with § 29-2022. The record establishes that after the case was submitted, the jurors were kept together until they agreed upon a verdict. Whatever the district court's intentions might have been, the requirements of § 29-2022 were met in this case. Barranco does not argue otherwise—he does not argue that the jury actually separated after the case was submitted or that the giving of instruction No. 14 was somehow prejudicial. Nor is any prejudice from the giving of instruction No. 14 apparent, given that it is substantially the same as the pattern instruction that is given in cases where sequestration is waived.[10]

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[6] See *State v. Bao*, 263 Neb. 439, 640 N.W.2d 405 (2002).

[7] *Robbins, supra* note 2.

[8] *Bao, supra* note 6; *Robbins, supra* note 2.

[9] *Id.*

[10] See NJI2d Crim. 9.0.

[4,5] Instead, Barranco argues that the court's *intended* refusal to sequester the jury constitutes structural error, requiring reversal. Structural errors are errors so affecting the framework within which the trial proceeds that they demand automatic reversal.[11] They are distinguished from trial errors, which generally occur during the presentation of the case to the jury and may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether they were harmless beyond a reasonable doubt.[12]

We have clearly established that failure to comply with § 29-2022 does not demand reversal if the defendant was not prejudiced.[13] As we understand Barranco's argument, he is trying to distinguish between simple failure to comply with § 29-2022 and deliberate refusal to do so. There is no basis for such a distinction, but more importantly, as explained above, § 29-2022 was actually complied with in this case. The court may have intended to disobey § 29-2022, but it never actually happened. The distinction between structural and trial error is not implicated when no error is actually committed.

Barranco also argues that trial before a judge who is not impartial constitutes structural error. We agree.[14] But Barranco has not assigned error to the court's denial of his motion to recuse, nor does he direct us to anything in the record reflecting an actual bias against him. In fact, he concedes that this case involves neither a personal animosity toward the defendant or his attorney nor any conflict of interest; instead, he asserts that "this case involves judicial bias which is based upon the judge's personal disagreement with the law he is charged with enforcing."[15]

[6] But under the standard we have articulated for evaluating a trial judge's alleged bias, the question is whether a

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[11] See *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007), *cert. denied* 552 U.S. 1065, 128 S. Ct. 715, 169 L. Ed. 2d 560.

[12] *See id.*

[13] See, *Bao, supra* note 6; *Robbins, supra* note 2.

[14] See *McKinney, supra* note 11.

[15] Brief for appellant at 29.

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.[16] The court's disagreement with § 29-2022 and our application of it does not suggest that the court was not impartial toward the parties. The court's reasoning, although inconsistent with precedent, clearly articulated the court's belief that strict enforcement of § 29-2022 was not essential to Barranco's right to a fair trial. And there is no basis on this record to conclude that he actually received anything less than a fair trial.

[7,8] Obviously, we cannot countenance the court's conduct. Some of the court's concerns about whether § 29-2022 remains sound policy in the context of modern trial practice may certainly be worthy of further debate. Nonetheless, this is fundamentally a question of public policy, and it is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state.[17] Our decisions applying § 29-2022 are grounded in the plain language of the statute,[18] which we are not at liberty to change.[19] Vertical stare decisis compels lower courts to follow strictly the decisions rendered by higher courts within the same judicial system,[20] and the most fundamental underpinning of our judicial system is the law, not the personal beliefs of the men and women who are privileged to serve as judges.[21] A judge who disagrees with a statute or a decision of a higher court may express that disagreement, but must do so in a way that is consistent with his or her obligation to do what the law requires.

But in this case, regardless of the district court's intentions, no error actually occurred. And the court's expression of its

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[16] See *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998).

[17] See *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

[18] See, *Bao, supra* note 6; *Robbins, supra* note 2.

[19] See *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004).

[20] *State v. Hausmann*, 277 Neb. 819, 765 N.W.2d 219 (2009).

[21] *State v. Nichols*, 8 Neb. App. 654, 600 N.W.2d 484 (1999).

disagreement with § 29-2022 neither harmed Barranco nor suggested any bias against him. Therefore, we find Barranco's sole assignment of error to be without merit.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
MICHAEL J. GUNTHER, APPELLANT.
768 N.W.2d 453

Filed July 24, 2009. No. S-08-631.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the district court's findings will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief under the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 through 29-3004 (Reissue 2008), the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
3. **Right to Counsel: Effectiveness of Counsel.** A defendant who elects to represent himself or herself cannot thereafter complain that the quality of his or her own defense amounted to a denial of effective assistance of counsel.
4. **Constitutional Law: Right to Counsel.** There is no federal Sixth Amendment constitutional right to effective assistance of standby counsel, and there is no right to effective assistance of standby counsel under Neb. Const. art. I, § 11.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

Donald L. Schense, of Law Office of Donald L. Schense, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Michael J. Gunther appeals the denial of his motion for postconviction relief without an evidentiary hearing. On appeal, Gunther claims that he received ineffective assistance of standby counsel at his trial, entitling him to postconviction relief. Because we conclude that the standby counsel issue does not raise a constitutional claim, we affirm the denial of postconviction relief without an evidentiary hearing.

STATEMENT OF FACTS

At his trial in 2005, Gunther waived his right to counsel and elected to represent himself. The district court for Sarpy County ordered standby counsel to be available to assist him. Gunther was convicted by a jury of first degree murder and use of a firearm to commit a felony. The court sentenced Gunther to life imprisonment without parole on the murder conviction and to imprisonment for 10 to 20 years on the firearm conviction and ordered the sentences to be served consecutively.

Gunther was represented by counsel on direct appeal to this court. On appeal, Gunther asserted, inter alia, that the district court erred in allowing him to waive his right to counsel and to proceed to trial on his own. We rejected his assignments of error and affirmed his convictions and his sentence on the firearm conviction, but we found error in his sentence of life imprisonment without parole on the murder conviction, and we remanded the cause with directions to sentence Gunther to life imprisonment on the murder conviction. *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006).

On April 22, 2008, Gunther filed a pro se motion for postconviction relief. Gunther alleged four grounds for relief: (1) that he was denied a meaningful direct appeal, (2) that the trial court conducted an improper competency evaluation, (3) that he was provided ineffective assistance of standby counsel at trial, and (4) that the trial court committed judicial misconduct in various respects. Gunther requested an evidentiary hearing and appointment of postconviction counsel.

The district court denied Gunther's motion for postconviction relief without an evidentiary hearing and did not appoint

postconviction counsel. Regarding Gunther's first ground for relief, the court found that Gunther had had his direct appeal to this court. Regarding Gunther's second ground for relief, the court found that issues regarding the competency evaluation were discussed in this court's opinion on direct appeal and that the procedure was "approved" by this court. The court also found that even if the specific competency evaluation issue raised by Gunther was not addressed in the opinion, the issue could have and should have been raised in the direct appeal and was therefore procedurally barred in this postconviction action. Regarding Gunther's third ground for relief, the court found that Gunther elected to represent himself at trial; that on direct appeal, this court found his waiver of counsel to be valid and noted no plain error with respect to standby counsel; and that Gunther elected to bear the risks inherent in choosing to represent himself. Regarding Gunther's final ground for relief, the court found that all the issues raised by Gunther regarding alleged judicial misconduct could have been raised on direct appeal and that this court found those issues that were raised on direct appeal lacked merit. The court concluded that the judicial misconduct issues were procedurally barred in this postconviction action.

Gunther appeals the denial of his motion for postconviction relief. Gunther is represented by counsel in this appeal.

ASSIGNMENT OF ERROR

Gunther asserts that the district court erred in failing to find that he received ineffective assistance of standby counsel at trial and in therefore denying his motion for postconviction relief without an evidentiary hearing.

STANDARDS OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the district court's findings will not be disturbed unless they are clearly erroneous. *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

ANALYSIS

We note first that although Gunther makes the global assertion that the court erred in denying his motion for postconviction

relief without an evidentiary hearing, Gunther's arguments in his brief are limited to only one of his claims for relief: that he was provided ineffective assistance of standby counsel at trial. Gunther made no argument either in his brief or at oral argument with regard to the direct appeal and judicial misconduct issues. At oral argument, Gunther made arguments with regard to the competency evaluation issue but he did not specifically assign error or specifically argue the issue in his brief. To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Malchow v. Doyle*, 275 Neb. 530, 748 N.W.2d 28 (2008). We therefore do not address the other claims for postconviction relief which Gunther alleged in his petition.

Gunther argues that the district court erred when it rejected his claim that he received ineffective assistance of standby counsel at trial. As explained below, we conclude that Gunther's claim of ineffective assistance of standby counsel as alleged in this case does not assert a constitutional ground for postconviction relief and that therefore, the district court did not err when it denied relief without an evidentiary hearing.

In his motion for postconviction relief, Gunther asserted that he was denied effective assistance of counsel due to the failings of his standby trial counsel. Gunther generally asserted that standby counsel was ineffective for failing to make objections or advise Gunther to make objections at appropriate times. Gunther's allegations of ineffective assistance of counsel are limited to allegations regarding the performance of counsel as standby counsel; Gunther did not allege ineffective assistance of counsel prior to the time he waived his right to counsel.

[2] In a motion for postconviction relief under the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 through 29-3004 (Reissue 2008), the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008). The question therefore is whether Gunther's allegations that standby counsel provided

ineffective assistance, if proved, would constitute a denial or violation of his constitutional rights. We conclude that Gunther's allegations would not constitute the denial or violation of his constitutional rights entitling him to postconviction relief.

[3] A claim for ineffective assistance of counsel in a postconviction action generally arises from the right to counsel secured by the 6th and 14th amendments to the U.S. Constitution and Neb. Const. art. I, § 11. However, we noted in Gunther's direct appeal that a "defendant who elects to represent himself or herself cannot thereafter complain that the quality of his or her own defense amounted to a denial of effective assistance of counsel." *State v. Gunther*, 271 Neb. 874, 888, 716 N.W.2d 691, 704 (2006) (citing *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)). See, *Wilson v. Parker*, 515 F.3d 682, 696 (6th Cir. 2008) ("[l]ogically, a defendant cannot waive his right to counsel and then complain about the quality of his own defense"); *Williams v. Stewart*, 441 F.3d 1030, 1047 n.6 (9th Cir. 2006) ("[h]aving failed to show that his decision to represent himself was involuntary, [defendant] cannot claim that he was denied the effective assistance of counsel at trial"). When one validly waives one's constitutional right to counsel, he or she cannot thereafter seek postconviction relief based on the denial or violation of that constitutional right.

In this case, Gunther's request to represent himself was granted. The decision to represent oneself is a choice exercised by a defendant, and the appointment of standby counsel to assist a pro se defendant is within the discretion of the trial court. *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997); *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991). It has been stated and we agree that "a *pro se* defendant does not enjoy an absolute right to standby counsel" and "a defendant does not have a right to standby counsel of his own choosing." *U.S. v. Webster*, 84 F.3d 1056, 1063 (8th Cir. 1996). See, also, *U.S. v. Einfeldt*, 138 F.3d 373, 378 (8th Cir. 1998) ("[t]here is no constitutional right to hybrid representation" in which defendant represents himself or herself but is assisted by standby counsel on technical aspects of trial such as objections).

[4] Relief afforded under the Nebraska Postconviction Act, §§ 29-3001 through 29-3004, is limited to the denial or violation of constitutional rights. Although we have not previously analyzed it, the issue of whether standby counsel's performance is subject to the constitutional right to effective assistance of counsel has been considered by other courts. In this regard, we note that various federal courts have reasoned that a defendant cannot assert a federal constitutional violation based on ineffective assistance of standby counsel. E.g., *Simpson v. Battaglia*, 458 F.3d 585, 597 (7th Cir. 2006) ("inadequacy of standby counsel's performance, without the defendant's relinquishment of his [right to self-representation], cannot give rise to an ineffective assistance of counsel claim under the Sixth Amendment"); *U.S. v. Schmidt*, 105 F.3d 82, 90 (2d Cir. 1997) ("[a]bsent a constitutional right to standby counsel, a defendant generally cannot prove standby counsel was ineffective"); *Johnson v. Quarterman*, 595 F. Supp. 2d 735, 750 (S.D. Tex. 2009) ("[a]lthough the court may appoint standby counsel to assist a *pro se* defendant, there is no constitutional right to the effective assistance of such counsel"). We agree with the reasoning of the foregoing federal authorities and numerous similar cases not cited here which conclude that there is no federal Sixth Amendment constitutional right to effective assistance of standby counsel. We adopt such reasoning and, by extension, now hold that there is no right to effective assistance of standby counsel under Neb. Const. art. I, § 11.

For completeness, we note that the Court of Appeals for the Second Circuit recognized a possible exception to the general rule that there is no constitutional claim for ineffective assistance of standby counsel. The court stated, "Perhaps in a case where standby counsel held that title in name only and, in fact, acted as the defendant's lawyer throughout the proceedings, we would consider a claim of ineffective assistance of standby counsel." *U.S. v. Schmidt*, 105 F.3d at 90. Gunther, however, makes no allegation or argument that standby trial counsel effectively acted as his lawyer after he waived his right to counsel. In Gunther's direct appeal, we noted that

> the record clearly demonstrates that although standby counsel was present and advised Gunther at times during the trial, Gunther was allowed to control the organization and content of his own defense, make his own motions, argue points of law, participate in voir dire, question witnesses, and address the court and the jury at appropriate points in the trial.

State v. Gunther, 271 Neb. 874, 890, 716 N.W.2d 691, 704 (2006). Therefore, in this case, we are not required to determine whether the potential exception mentioned by the Second Circuit exists for cases where standby counsel effectively acted as counsel.

Because Gunther elected to represent himself and waived his constitutional right to counsel, Gunther's allegations of ineffective assistance of counsel serving only as standby counsel would not constitute an infringement of his constitutional rights to effective assistance of counsel under the U.S. or Nebraska Constitution. Under the Nebraska Postconviction Act, §§ 29-3001 through 29-3004, an evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the U.S. or Nebraska Constitution. *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008). However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required. *Id*. Gunther alleges only conclusions that standby counsel, who is not alleged to have in fact served as trial counsel, provided ineffective assistance of standby counsel. Such allegations, if proved, would not entitle Gunther to postconviction relief, and the district court did not err in rejecting such claims without an evidentiary hearing.

CONCLUSION

We conclude that the district court did not err when it concluded that Gunther's claims of ineffective assistance of standby counsel do not constitute a denial or violation of

constitutional rights and would not entitle him to postconviction relief. We therefore affirm the court's denial of postconviction relief without an evidentiary hearing.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V.
JAMES A. LASU, APPELLEE.
768 N.W.2d 447

Filed July 24, 2009. No. S-08-841.

1. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Plea in Abatement.** A plea in abatement can be made when there is a defect in the record which can be established only by extrinsic evidence.
3. **Preliminary Hearings: Plea in Abatement.** A plea in abatement is used to challenge the sufficiency of the evidence at a preliminary hearing.
4. **Plea in Abatement: Probable Cause: Evidence: Verdicts.** To resist a challenge by a plea in abatement, the evidence received by the committing magistrate need show only that a crime was committed and that there is probable cause to believe that the accused committed it. The evidence need not be sufficient to sustain a verdict of guilty beyond a reasonable doubt.
5. **Criminal Law: Evidence: Police Officers and Sheriffs.** The crime of tampering with physical evidence, as defined by Neb. Rev. Stat. § 28-922(1)(a) (Reissue 2008), does not include mere abandonment of physical evidence in the presence of law enforcement.
6. **Criminal Law: Statutes.** A fundamental principle of statutory construction requires that penal statutes be strictly construed.
7. **Statutes: Legislature: Appeal and Error.** In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
8. **Criminal Law: Evidence.** To "conceal" or "remove" physical evidence, within the meaning of Neb. Rev. Stat. § 28-922(1)(a) (Reissue 2008), is to act in a way that will prevent it from being disclosed or recognized.

Appeal from the District Court for Hall County: WILLIAM T. WRIGHT, Judge. Exception overruled.

Gail A. VerMaas and Lynelle D. Homolka, Deputy Hall County Attorneys, for appellant.

Gerard A. Piccolo, Hall County Public Defender, for appellee.

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

GERRARD, J.

James A. Lasu was charged with tampering with physical evidence[1] after he attempted to discard a bag of marijuana, in an apparent attempt to prevent a police officer from finding it on his person. The question presented in this case is whether an individual commits the offense of tampering with physical evidence if he discards contraband without making an active attempt to conceal or destroy it.

BACKGROUND

Eric Olsen, a patrol officer with the Grand Island Police Department, testified that on November 24, 2007, he and another officer responded to a report of an assault in the parking lot of a gas station. After Olsen had been there for about 10 minutes, Lasu and another person arrived. Lasu had a laceration on his face and said he had been assaulted. The other officer asked Lasu about a plastic bag that was sticking out of Lasu's pocket. Lasu removed the bag from his pocket, and it contained a small amount of marijuana. Lasu gave Olsen the small bag of marijuana, then said he wanted to go to the bathroom and also buy a pack of cigarettes. Lasu went into the store, with Olsen following.

Olsen testified that as Lasu rounded the corner toward the cigarettes, Lasu reached into his right cargo pocket and removed another, larger bag of marijuana, which had not been visible before. Lasu threw the bag into a large cardboard bin of snack foods, and it landed on top. Lasu did not attempt to conceal the bag in the bin. Olsen immediately retrieved the bag and arrested Lasu.

Lasu was charged by information with one count of possession of more than an ounce but less than a pound of marijuana

[1] See Neb. Rev. Stat. § 28-922(1)(a) (Reissue 2008).

and one count of tampering with physical evidence. Section 28-922(1)(a) provides that a person commits the offense of tampering with physical evidence if, believing that an official proceeding is pending or about to be instituted, he "[d]estroys, mutilates, conceals, removes, or alters physical evidence with the intent to impair its verity or availability in the pending or prospective official proceeding."

Lasu filed a plea in abatement, which was submitted to the district court on the record that had been made at a preliminary hearing. The court found that Lasu did not "conceal" the marijuana, because he made no attempt to hide it in the bin into which it had been thrown. The court also found that while Lasu arguably "removed" the marijuana, the removal did not impair its verity or availability. And the court reasoned that while Lasu might have believed that an official proceeding was pending or about to be instituted with respect to the assault or the small bag of marijuana, he had no knowledge of any potential proceeding relating to the large bag of marijuana, because it had not yet been discovered.

Finding the evidence insufficient to show that an offense had been committed, the court sustained Lasu's plea in abatement and discharged him on the count of tampering with physical evidence. The State filed notice of its intent to appeal, and this error proceeding was docketed in the Nebraska Court of Appeals.[2] We moved the error proceeding to our docket pursuant to our authority to regulate the dockets of this court and the Court of Appeals.[3]

ASSIGNMENTS OF ERROR

The State assigns that the district court erred in sustaining Lasu's plea in abatement and discharging him on the charge of tampering with physical evidence.

STANDARD OF REVIEW

[1] This case turns on the meaning of § 28-922(1)(a). The meaning of a statute is a question of law, on which an appellate

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[2] See Neb. Rev. Stat. § 29-2315.01 (Reissue 2008).

[3] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[4]

ANALYSIS

[2-4] This error proceeding arises from a plea in abatement. A plea in abatement can be made when there is a defect in the record which can be established only by extrinsic evidence.[5] A plea in abatement is used to challenge the sufficiency of the evidence at a preliminary hearing.[6] To resist a challenge by a plea in abatement, the evidence received by the committing magistrate need show only that a crime was committed and that there is probable cause to believe that the accused committed it.[7] The evidence need not be sufficient to sustain a verdict of guilty beyond a reasonable doubt.[8]

In this case, there is no question that Lasu was the individual who committed the allegedly criminal act. Therefore, the issue is simply whether the evidence was sufficient to show that Lasu committed the crime of tampering with physical evidence. Section 28-922(1) provides:

> A person commits the offense of tampering with physical evidence if, believing that an official proceeding is pending or about to be instituted and acting without legal right or authority, he:
>
> (a) Destroys, mutilates, conceals, removes, or alters physical evidence with the intent to impair its verity or availability in the pending or prospective official proceeding . . . .

It is not disputed that Lasu was without legal right or authority to dispose of physical evidence and that the marijuana

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[4] See *State v. Arterburn*, 276 Neb. 47, 751 N.W.2d 157 (2008).

[5] See, Neb. Rev. Stat. § 29-1809 (Reissue 2008); *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

[6] See, *State v. Hill*, 255 Neb. 173, 583 N.W.2d 20 (1998); *State v. Lehman*, 203 Neb. 341, 278 N.W.2d 610 (1979); *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975).

[7] See *State v. Bottolfson*, 259 Neb. 470, 610 N.W.2d 378 (2000).

[8] *Id.*

was "physical evidence" within the meaning of the statute.[9] And we do not agree with the district court's conclusion that the evidence was insufficient to show that Lasu believed an official proceeding was about to be instituted. It is reasonable to infer that Lasu threw away his marijuana because he was afraid of being arrested and searched—in fact, it is hard to imagine another reasonable explanation for his actions.[10] It is also apparent that Lasu did not destroy, mutilate, or alter the evidence when he discarded it, or do anything that would affect its verity.

The remaining question is whether, when Lasu discarded the evidence, he concealed or removed it with the intent to impair its availability. In that regard, courts considering effectively identical statutory language have uniformly concluded that when a defendant merely drops, throws down, or abandons evidence in the presence of law enforcement, such conduct will not sustain a conviction for tampering with physical evidence.[11] Those courts have drawn a distinction between concealing evidence and merely abandoning it.[12] It has also been noted that if the felony offense of tampering with evidence is extended to circumstances such as these, it would apply to practically any person in possession of contraband who took steps to prevent it from being discovered.[13] This would have the effect of

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[9] See § 28-922(2).

[10] See, e.g., *Timberlake v. U.S.*, 758 A.2d 978 (D.C. 2000); *Lumpkin v. State*, 129 S.W.3d 659 (Tex. App. 2004).

[11] See, *In re Juvenile 2003-187*, 151 N.H. 14, 846 A.2d 1207 (2004); *Com. v. Delgado*, 544 Pa. 591, 679 A.2d 223 (1996); *Evans v. State*, 997 So. 2d 1281 (Fla. App. 2009); *In re M.F.*, 315 Ill. App. 3d 641, 734 N.E.2d 171, 248 Ill. Dec. 463 (2000); *Hollingsworth v. State*, 15 S.W.3d 586 (Tex. App. 2000); *Vigue v. State*, 987 P.2d 204 (Alaska App. 1999); *State v. Sharpless*, 314 N.J. Super. 440, 715 A.2d 333 (1998); *State v. Patton*, 898 S.W.2d 732 (Tenn. Crim. App. 1994). See, also, *State v. Jones*, 983 So. 2d 95 (La. 2008) (collecting cases).

[12] See, *Delgado, supra* note 11; *Evans, supra* note 11; *Patton, supra* note 11.

[13] See, e.g., *Delgado, supra* note 11; *Vigue, supra* note 11; *Sharpless, supra* note 11; *Patton, supra* note 11.

converting misdemeanor possession crimes into felonies, without a clear legislative directive to do so.[14]

[5-8] We find those courts' reasoning to be persuasive, and likewise hold that the crime of tampering with physical evidence, as defined by § 28-922(1)(a), does not include mere abandonment of physical evidence in the presence of law enforcement. In reaching that conclusion, we are mindful of the "fundamental principle" of statutory construction that requires penal statutes to be strictly construed.[15] And in reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[16] To "conceal" or "remove" physical evidence, in this context, is to act in a way that will prevent it from being disclosed or recognized.[17] We decline to extend that statutory language to cover circumstances in which the evidence at issue was made more apparent, not less.

In that respect, this situation is easily distinguishable from cases in which a defendant's method of disposing of evidence would also have the effect of making its recovery impossible—for instance, swallowing drugs,[18] throwing them into a drain,[19] or scattering powder cocaine out the window of a speeding car.[20] Nor is this a case in which the defendant placed evidence where it was unlikely to be discovered.[21]

Instead, Lasu placed the evidence where it was quite likely to be discovered, even if he hoped that it might be less associated with him. It is important not to confuse his intentions with his physical actions.[22] Even if Lasu meant to make it more

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[14] See *id.*

[15] *State v. Hamik*, 262 Neb. 761, 769, 635 N.W.2d 123, 130 (2001).

[16] *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006).

[17] See *In re Juvenile 2003-187, supra* note 11.

[18] See, *Timberlake, supra* note 10; *Lumpkin, supra* note 10.

[19] See *Hayes v. State*, 634 So. 2d 1153 (Fla. App. 1994).

[20] See *State v. Mendez*, 175 N.J. 201, 814 A.2d 1043 (2002).

[21] See *State v. Daoud*, 158 N.H. 334, 965 A.2d 1136 (2009).

[22] See, *In re Juvenile 2003-187, supra* note 11; *In re M.F., supra* note 11.

difficult to find the contraband and connect it to him, he did not remove it from the scene of the possessory offense, nor did he actually conceal it when he abandoned it.[23] He made the evidence easier to find, even if it was not found on him. All Lasu attempted to conceal was the fact of his possession of the evidence—not the evidence itself.

And we note that the possessory offense with which Lasu was charged, possession of more than an ounce but less than a pound of marijuana, was at the time of the offense a Class IIIA misdemeanor, punishable by a maximum of 7 days' imprisonment, a $500 fine, or both.[24] Tampering with physical evidence, however, is a Class IV felony, punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both.[25] It would be contrary to our basic principles of statutory construction, and to common sense, to conclude that a misdemeanor possession of marijuana would become a Class IV felony because the defendant drops the contraband in plain view.

In the absence of a clear legislative directive that the crime of tampering with evidence extends to circumstances such as these, we conclude that it does not. Lasu may have abandoned physical evidence, intending to prevent it from being found on his person—but he neither concealed nor removed it from the scene of the crime, nor did he do anything that would prevent its recovery. Therefore, the district court correctly concluded that Lasu did not violate § 28-922(1)(a).

CONCLUSION

The evidence was not sufficient to establish that Lasu committed the crime of tampering with physical evidence, and the district court correctly granted his plea in abatement. The State's exception to that ruling is overruled.

EXCEPTION OVERRULED.

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[23] See *id.*

[24] See Neb. Rev. Stat. §§ 28-416(11) (Cum. Supp. 2006) and 28-106 (Reissue 2008).

[25] See § 28-922(3) and Neb. Rev. Stat. § 28-105 (Cum. Supp. 2002).

CHILDREN'S HOSPITAL, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAID AND LONG-TERM CARE, APPELLEE.

768 N.W.2d 442

Filed July 24, 2009. No. S-08-1173.

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. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
2. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
3. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Reversed and remanded with directions.

James L. Quinlan and Kristin A. Crone, of Fraser Stryker, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Michael J. Rumbaugh for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

This case centers on a dispute between Children's Hospital (Children's), located in Omaha, Nebraska, and the Nebraska Department of Health and Human Services (DHHS) over reimbursements to Children's from the Nebraska Medical Assistance Program, also known as NMAP (Medicaid). The question presented by this appeal is whether the services provided to two Children's patients in the hospital's

hematology/oncology clinic located in the "Scott Pavilion" are "hospital outpatient services," properly billed on "Form CMS-1450," or are physician clinic-type services, which should be billed on "Form CMS-1500." This distinction matters because Medicaid reimburses expenses for hospital services on a cost-to-charge percentage, while expenses for practitioner services are reimbursed via a fixed fee schedule. We conclude the district court employed an incorrect legal test in concluding that the services were physician clinic-type services. Accordingly, we reverse the decision and remand the cause to the district court with directions.

BACKGROUND

Scott Pavilion.

The Scott Pavilion is a four-story building located on the campus of Children's and is connected to the hospital via a lobby and a skywalk. The Scott Pavilion is owned and operated by Children's, and all nonphysician personnel providing treatment or support in this facility are employees of Children's. Children's provides all supplies necessary for treatment and evaluation of patients seen in the Scott Pavilion, and all patient care services delivered there are delivered under license of Children's. In addition, the patient care services delivered in the Scott Pavilion are subject to and governed by the Children's "Quality Assurance and Utilization Review Oversight." All outpatient services provided in the Scott Pavilion are surveyed and reviewed in connection with the accreditation of Children's by the "Joint Commission on Accreditation of Healthcare Organization," a national organization.

Patients and Procedures.

D.P. and E.M. are two pediatric patients who received medically necessary hematology or oncology services in the hematology/oncology clinic at the Scott Pavilion. No doctor was directly involved in the treatment of either D.P. or E.M. with respect to the services relevant to this appeal.

After providing services to D.P. and E.M., Children's billed Medicaid for the services on Form CMS-1450, which provides for the submission of claims for institutional services. With

respect to D.P., certain claims were denied, at least in part, with the notation that "'[p]ayment [was] adjusted due to a submission/billing error(s).'" Other claims for laboratory work were paid as outpatient hospital services.

With respect to E.M., who received chemotherapy, DHHS denied certain claims, at least in part, again noting that "'[p]ayment [was] adjusted due to a submission/billing error(s)'" and further noting that Children's had used an "'[i]ncorrect claim form/format for this service.'" Still other claims were denied with DHHS noting that "'[p]ayment is denied when performed/billed by this type of provider'" and that "'[t]his provider type/provider specialty may not bill this service.'" As with D.P., claims for laboratory work were paid as outpatient hospital services.

Procedural History.

Following the denial of these claims and subsequent negotiations and discussions between the parties, Children's appealed the denials to DHHS under the Administrative Procedure Act. DHHS upheld the denials, and Children's appealed to the district court. The district court affirmed the decision of DHHS, concluding that the Scott Pavilion was properly classified as a "healthcare practitioner facility," which is excluded from the definition of the term "hospital," and that thus, the services delivered were not "hospital outpatient services." Children's appeals.

ASSIGNMENT OF ERROR

Children's assigns, restated and consolidated, that the district court erred in concluding that the hematology/oncology clinic at the Scott Pavilion delivered physician clinic-type, and not institutional/outpatient, services and that accordingly, Children's should have submitted its claims on Form CMS-1500, the form for practitioner services.

STANDARD OF REVIEW

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

errors appearing on the record. 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.[1]

[2] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.[2]

[3] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[3]

ANALYSIS

The issue presented by this appeal is whether services delivered at the Scott Pavilion were outpatient or practitioner services and, accordingly, what form should be used for billing those services. Children's contends that these services were "hospital outpatient services" and billed DHHS for those services on Form CMS-1450, the form used by institutions. However, DHHS argues that the hematology/oncology clinic at the Scott Pavilion was a physician clinic and that Children's should have billed DHHS on Form CMS-1500, the form used by practitioners. The district court concluded that the Scott Pavilion was a "healthcare practitioner facility" and that services provided there should be billed on Form CMS-1500.

Underlying this litigation is a dispute between Children's and DHHS about the use of discretion by DHHS in considering these claims. Under 471 Neb. Admin. Code, ch. 10, § 10.09A (2003), DHHS may "review and reduce or deny payment for covered outpatient or emergency room drugs, supplies, or services which are readily obtainable from another provider . . .

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[1] *Nothnagel v. Neth*, 276 Neb. 95, 752 N.W.2d 149 (2008).

[2] *Id.*

[3] *Upper Big Blue NRD v. State*, 276 Neb. 612, 756 N.W.2d 145 (2008).

to the amount payable at the least expensive appropriate place of service." In its brief, Children's notes that "there may be situations where a service provided in the outpatient setting could have been provided in a physician's office and for which payment should be reduced, but [that] pediatric patients have special concerns, which should be evaluated on a case-by-case basis, as the regulation suggests," and that DHHS was "attempting to arbitrarily implement a blanket approach to classifying these services, an approach that ignores its own regulations and avoids a case-by-case analysis."[4]

We agree with Children's. As noted, we conclude that the district court employed an incorrect legal test in connection with its determination that the Scott Pavilion was a "healthcare practitioner facility" and that services there should be billed on Form CMS-1500.

Our analysis begins with the question of whether, in the cases of D.P. and E.M., Children's provided "hospital outpatient services." "Hospital outpatient services" are defined by Medicaid regulations as "[p]reventive, diagnostic, therapeutic, rehabilitative, or palliative services that are provided to outpatients under the direction of a physician or dentist in an institution that meets the standards for participation in 471 NAC 10-001."[5] These "standards for participation" are as follows:

> To participate in [Medicaid], a hospital that provides hospital inpatient and/or outpatient/emergency room services must
>
> 1. Be maintained primarily for the care and treatment of patients with disorders other than mental disease;
>
> 2. Be licensed as a hospital by [DHHS] Regulation and Licensure or the officially designated authority for state standard-setting in the state where the hospital is located;
>
> 3. Have licensed and certified hospital beds; and
>
> 4. Meet the requirements for participation in Medicare and Medicaid.[6]

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[4] Brief for appellant at 9.

[5] 471 Neb. Admin. Code, ch. 10, § 001.03 (2008).

[6] *Id.*, § 001 (2003).

And an "outpatient" is defined as "[a] person who has not been admitted as an inpatient but is registered on the hospital records as an outpatient and receives services."[7]

As an initial matter, we note that there is no dispute that Children's was providing "[p]reventive, diagnostic, therapeutic, rehabilitative, or palliative services . . . under the direction of a physician" at the hematology/oncology clinic at the Scott Pavilion and that Children's met all of the "standards for participation" set forth in the regulations. We note, however, that there is a dispute over whether D.P. and E.M. were outpatients.

The district court found there were "no records of any sort offered to establish that either of these patients w[as] ever registered by Children's as an outpatient." Our review of the record, however, demonstrates that while there was no specific indication on the records generated at the Scott Pavilion that D.P. and E.M. were outpatients, there was nevertheless other evidence to support such a finding. In particular, the records at issue included sections for "Discharge Planning" and "Discharge Orders." Further review of the record suggests that the inclusion of such sections would be indicative of either inpatient or outpatient care, but not necessarily clinic care. Moreover, a Children's official testified at the administrative hearing that both D.P. and E.M. were registered as outpatients. This testimony was uncontroverted. We therefore conclude that the district court's finding that there were no "records" to establish that D.P. and E.M. were outpatients is not supported by competent evidence and was erroneous.

Because Children's met all "standards for participation" and was providing "[p]reventive, diagnostic, therapeutic, rehabilitative, or palliative services" that are provided to outpatients under "the direction of a physician" at the hematology/oncology clinic at the Scott Pavilion, we conclude that Children's was providing "hospital outpatient services." We note that other than its finding that D.P. and E.M. were not outpatients, which we have concluded was erroneous, the district court found that the services provided at the Scott

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[7] *Id.*, § 001.03.

Pavilion met all the elements of the definition of "hospital outpatient services."

The district court further erred in its interpretation of the applicable regulations, specifically in the legal test it utilized. Instead of focusing on the question of whether the services provided by Children's met the definition of "hospital outpatient services," the district court focused on whether the services in question were actually being provided in a "healthcare practitioner facility." The district court considered the appearance of the facility and its medical records and concluded that it was a "healthcare practitioner facility."

We conclude that the district court erred as a matter of law by framing the issue presented in such a manner. In this instance, we are not concerned with the appearance of the facility or the nature of its medical records. The issue presented in this case is what form Children's should have utilized when billing Medicaid and, by extension, the exercise of discretion, or lack thereof, by DHHS in determining coverage for the services at issue. Thus, our concern is not with *where* the services were provided, but, instead, our concern lies with the *nature* of the services actually provided. And we have concluded that those services met the definition of "hospital outpatient services." Whether those services could have been delivered by a practitioner and thus properly billed on the practitioner form is a separate question.

Because the services in question met the definition of "hospital outpatient services," it was entirely appropriate for Children's to bill Medicaid for those services on Form CMS-1450. We note again that DHHS retains discretion under Medicaid regulations to "review and reduce or deny payment for covered outpatient or emergency room drugs, supplies, or services which are readily obtainable from another provider . . . to the amount payable at the least expensive appropriate place of service."[8] In this case, the claims were, at least in part, denied because they were filed on an incorrect form and not due to the exercise of any discretion on the part of DHHS. We therefore remand this cause to the district court

[8] 471 Neb. Admin. Code, ch. 10, § 10.09A.

with directions to remand to DHHS for a reconsideration of these claims.

CONCLUSION

We reverse the district court's decision and remand this cause to the district court with directions to remand to DHHS for a reconsideration of the claims.

REVERSED AND REMANDED WITH DIRECTIONS.

SUSAN J. SCHINNERER, APPELLEE, V. NEBRASKA DIAMOND SALES COMPANY, INC., APPELLANT.

769 N.W.2d 350

Filed July 24, 2009. No. S-08-1251.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Courts: Appeal and Error.** The district court and higher appellate courts generally review appeals from the county court for error appearing on the record.
4. **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.
5. ____: ____. In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
6. **Statutes.** Statutory interpretation is a question of law.
7. **Employer and Employee: Wages.** The Nebraska Wage Payment and Collection Act permits an employee to sue his or her employer if the employer fails to pay the employee's wages as they become due.
8. **Damages: Proof.** Damages need not be proved with mathematical certainty; however, damages cannot be established by evidence which is speculative and conjectural.

Appeal from the District Court for Lancaster County, PAUL D. MERRITT, JR., Judge, on appeal thereto from the County

Court for Lancaster County, SUSAN I. STRONG, Judge. Judgment of District Court affirmed.

David R. Buntain, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., and John Tavlin for appellant.

John M. Boehm and Paul L. Douglas for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Appellee, Susan J. Schinnerer, brought this action in the county court for Lancaster County under the Nebraska Wage Payment and Collection Act (Wage Payment Act), Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 2004), seeking payment of commissions which she alleged were owed to her by appellant, Nebraska Diamond Sales Company, Inc. (Nebraska Diamond). Upon a finding that Schinnerer was entitled to commissions, the county court granted partial summary judgment in favor of Schinnerer and held a bench trial on the factual issue of the amount of commissions that were owed. Following trial, judgment was entered against Nebraska Diamond in which Nebraska Diamond was ordered to pay Schinnerer commissions on certain accounts. Nebraska Diamond appealed these orders to the district court for Lancaster County, which affirmed the orders of the county court. Nebraska Diamond appeals. We affirm.

STATEMENT OF FACTS

Schinnerer worked for Nebraska Diamond from November 2001 through February 2004 as a sales associate. Schinnerer was paid entirely on a commission basis. Schinnerer was entitled to 19 percent of the profit from a sale. Profit from a sale was the invoice price minus the cost of the ring and diamond, which the parties referred to as the "board totals." Schinnerer stated that her position involved meeting with a customer, determining what he or she wanted, showing the customer the merchandise, assisting the customer in making

a choice, executing the sales contract, approving financing, placing the diamond purchased and the ordering instructions for the ring into a job order envelope, accepting any downpayment, and placing the diamond purchased and the job order in the safe. Once the job envelope was placed in the safe, other employees were involved in preparing the ring for delivery to the customer. When the final purchase price was paid and the ring was assembled, it was retained in the safe for delivery. At the time of Schinnerer's termination from employment with Nebraska Diamond, she had completed 38 job orders, which are the subject of this case.

At the commencement of each calendar year, Schinnerer received a document titled "Rules Regulating Sales Staff Commissions," which stated that to earn commissions on an account, the proceeds of the account must be received in full by Nebraska Diamond. Further, the document stated that to receive commissions on a sale, Schinnerer must still be employed by Nebraska Diamond at the time the full purchase price was paid. Nebraska Diamond's employment policies stated the same policy.

On January 13, 2005, Schinnerer brought this action in the county court for Lancaster County, claiming that based on the definition of commissions in the Wage Payment Act, she was entitled to commissions on the orders completed at the time of her termination of employment. Nebraska Diamond denied that Schinnerer was entitled to the commissions. Nebraska Diamond countered that at the time of Schinnerer's termination of employment, it had not received the full sale price of any of the 38 accounts on which Schinnerer claimed commissions, and that therefore, Schinnerer was not eligible to earn, or entitled to receive, commissions on any of the disputed orders.

On October 20, 2006, the county court entered an order denying Nebraska Diamond's motion for summary judgment and granting Schinnerer's partial motion for summary judgment. The county court concluded that Nebraska Diamond's claim that Schinnerer was not entitled to any commissions based on the language of the agreement between the parties titled "Rules Regulating Sales Staff Commissions" constituted a

> violation of the Nebraska Wage Payment and Collection Act and [was] void in so far as it circumvent[ed] the statutory definition of wages found in the Act by disallowing the payment of any commission on an account which has not been paid in full by the close of business on the last day of a salesperson's employment.

The county court then held a bench trial on the factual issue of the amount of commissions Schinnerer was actually owed on the 38 orders in dispute. Schinnerer was ultimately awarded $4,878.15 in commissions. The county court also awarded Schinnerer attorney fees and ordered Nebraska Diamond to pay the costs of the action.

Nebraska Diamond appealed these orders to the district court for Lancaster County. The district court affirmed. The district court concluded that the language of the Wage Payment Act, at the time of Schinnerer's termination of employment, was clear and that wages included commissions due to Schinnerer on her orders on file with Nebraska Diamond at the time of her termination. The district court then concluded that the amount due Schinnerer was a question of fact, and after reviewing the record, the district court determined that the decisions of the county court conformed to the law, were supported by competent evidence, and were neither arbitrary, capricious, nor unreasonable. The district court also awarded Schinnerer attorney fees on appeal. Nebraska Diamond appeals.

ASSIGNMENTS OF ERROR

Nebraska Diamond argues, summarized and rephrased, that the district court erred by (1) concluding that the employment agreement between the parties was in violation of the Wage Payment Act and void and interpreting the Wage Payment Act to provide Schinnerer with a right to the commissions sought; (2) awarding damages to Schinnerer based on the county court's order, which was insufficient, speculative, and conjectural and did not reasonably calculate the damages; and (3) awarding Schinnerer attorney fees.

STANDARDS OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue

regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *OMNI v. Nebraska Foster Care Review Bd.*, 277 Neb. 641, 764 N.W.2d 398 (2009). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3,4] The district court and higher appellate courts generally review appeals from the county court for error appearing on the record. *First Nat. Bank of Unadilla v. Betts*, 275 Neb. 665, 748 N.W.2d 76 (2008). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[5,6] However, in instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record. *Id.* Statutory interpretation is a question of law. *In re Estate of Chrisp*, 276 Neb. 966, 759 N.W.2d 87 (2009).

ANALYSIS

The Rulings on the Motion for Summary Judgment Were Correct: Commissions Are Due Under the Wage Payment Act in Effect at the Time of Schinnerer's Employment.

Nebraska Diamond's first assignment of error claims, condensed and summarized, that the district court erred by affirming the county court's grant of partial summary judgment in favor of Schinnerer. In its order, the county court concluded that the agreement between Nebraska Diamond and Schinnerer was void because it circumvented the statutory language of the Wage Payment Act. Nebraska Diamond argues that it did not owe Schinnerer commissions at the time of her termination. Nebraska Diamond relies on the language in the employment agreement and its employment policies and claims that Schinnerer was not eligible to earn commissions; therefore, no commissions were subject to the definition of wages in the Wage Payment Act.

[7] The Wage Payment Act permits an employee to sue his or her employer if the employer fails to pay the employee's wages as they become due. See § 48-1231. At the times relevant to this case, § 48-1229(4) defined commissions as wages in the following respect:

> Wages means compensation for labor or services rendered by an employee . . . 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. Wages includes commissions on all orders delivered and all orders on file with the employer at the time of termination of employment less any orders returned or canceled at the time suit is filed.

This section was amended in 2007, but the parties agree that the above-quoted statutory language is the operative language in this case.

In *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997), we considered a case under the version of the Wage Payment Act which controls this case. In *Moore*, we addressed the issue of when commissions are owed to an employee who is subject to an employment agreement that conflicts with the language of the Wage Payment Act. In *Moore*, Brad J. Moore's job title was personnel recruiter, and his duties included solicitation of, consultation with, and placement of employee prospects. Moore filed suit seeking commissions on accounts he placed prior to terminating his employment with Eggers Consulting Company (Eggers). Eggers argued that it did not owe Moore the commissions he sought, based on an employment agreement which stated:

> "Employee shall be entitled only to those commissions which are due and payable on the final day of employment. A commission is due and payable upon collection of the fee from the client. No commission shall be paid to the Employee until such time as the client pays the commission and the [client] begins employment."

Id. at 405, 562 N.W.2d at 541.

In addressing Eggers' argument, this court observed that the statute clearly stated that wages include commissions on all orders "on file" with the employer at the time of termination.

Id. The statute did not require that orders on file be fully paid at the time of termination. Based on this statutory language, this court concluded that the employment agreement at issue was an attempt to circumvent the statutory language requiring payment of commissions and was therefore void. *Id.*

Our reasoning in *Moore* is applicable to this case. The evidence in this case includes two documents relevant to our analysis. The first, entitled "Rules Regulating Sales Staff Commissions," states:

> A salesperson is eligible to earn a commission on an account, business or sale written only when the account, business or sale generating the commission is paid in full and only if the salesperson is employed by the company at the time the account, business or sale generating the commission is paid in full.

The second document, entitled "Nebraska Diamond Employment Policies," includes similar language.

Based on the language quoted above and the facts of this case, Nebraska Diamond attempts to distinguish the present appeal from *Moore*. Nebraska Diamond contends that under the language in its documents, Schinnerer was not eligible to earn a commission until the sale was paid in full, and that therefore, where Schinnerer was ineligible to earn a commission, it follows that she could never earn a commission on a sale which was not completely paid at the time of termination of employment. According to Nebraska Diamond's argument, because Schinnerer was not eligible to earn the commissions, and because Schinnerer never earned the commissions, the commissions at issue were effectively not "on file" at the time of termination of employment and were not wages under the Wage Payment Act.

We are not persuaded by Nebraska Diamond's argument and conclude that the language upon which it relies is inconsistent with, and merely a device to avoid the payment of wages due under, the applicable Wage Payment Act. We are aware of the difference in the language of the agreement in *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997), and the documents in the present case; however, the distinction is of no legal consequence. We recognize

Nebraska Diamond's efforts to deem its employees ineligible for commissions; however, the facts remain that the orders generated by Schinnerer at issue were "on file" at the time of Schinnerer's termination of employment and that commissions thereon were owed to Schinnerer as wages under § 48-1229(4) of the Wage Payment Act. We will not honor Nebraska Diamond's attempt to avoid the Wage Payment Act. The language of the agreement upon which Nebraska Diamond relies is void as a violation of the Wage Payment Act. See *Moore, supra*.

We conclude that based on the clear language of the Wage Payment Act and our holding in *Moore*, the county and district courts properly concluded that Nebraska Diamond's employment agreement and policies containing the challenged language are void. Therefore, we affirm the grant of partial summary judgment in favor of Schinnerer and the denial of summary judgment in favor of Nebraska Diamond.

The District Court Properly Affirmed the County Court's Damages Award.

Nebraska Diamond assigns as error the district court's affirmance of the county court's calculations of the amount of commissions actually owed Schinnerer. Nebraska Diamond claims that the calculations are too speculative for an award of damages.

[8] In a case brought under the Wage Payment Act, we stated that damages need not be proved with mathematical certainty; however, damages cannot be established by evidence which is speculative and conjectural. *Gagne v. Severa*, 259 Neb. 884, 612 N.W.2d 500 (2000).

In this case, the county court held a bench trial to determine the amount of commissions owed to Schinnerer under the definition of commissions in the Wage Payment Act. At trial, Schinnerer introduced the actual invoices of the 38 accounts for which she claimed commission. Nebraska Diamond claimed that 19 of the 38 "invoices" were canceled prior to January 13, 2005, the date Schinnerer filed suit. However, Nebraska Diamond's store manager testified that the remaining 19 contracts were not canceled as of January 13.

As to the 19 invoices that Nebraska Diamond alleged were canceled, Schinnerer presented evidence at trial that Nebraska Diamond collected and retained money on 17 of those contracts. The evidence showed that on 7 of the alleged canceled accounts, the full purchase price was recovered and that on the 10 remaining contracts, Nebraska Diamond retained some of the purchase price on those accounts. Therefore, following the bench trial, the county court entered its order finding that Schinnerer was entitled to a full commission on the 19 orders on file when she was terminated as a sales associate for Nebraska Diamond and on the 7 alleged canceled accounts for which the full purchase price was ultimately recovered. Of the 10 remaining contracts that Nebraska Diamond alleged were canceled, the court concluded that Schinnerer was due commissions on the amount recovered and retained by Nebraska Diamond. Based on these findings, the county court found that Schinnerer was due $4,878.15 in commissions. The district court affirmed the award.

The record shows that the county court's findings were not based on speculation and conjecture, but, rather, were supported by competent evidence presented at trial and were neither arbitrary, capricious, nor unreasonable. The district court reviewed the county court's decision for error on the record pursuant to Neb. Rev. Stat. § 25-2733(1) (Cum. Supp. 2006) and issued its eight-page opinion. Upon our review, we conclude that the district court's affirmance of the award was not in error.

Schinnerer Was Properly Awarded Attorney Fees.

Finally, Nebraska Diamond argues that the awards of attorney fees by the county and district courts were excessive. The county court awarded $9,255, and the district court awarded $3,000. We find no error in the awards of these attorney fees.

Section 48-1231 of the Wage Payment Act states in part:

> If an employee establishes a claim and secures judgment on the claim, such employee shall be entitled to recover (1) the full amount of the judgment and all costs of such suit and (2) if such employee has employed an attorney in the case, an amount for attorney's fees assessed by the

> court, which fees shall not be less than twenty-five percent of the unpaid wages.

Schinnerer established a claim for unpaid wages and was entitled to attorney fees of not less than 25 percent of the unpaid wages under § 48-1231.

The county court explained that its award of attorney fees was based on the nature of the proceedings, 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 at trial, the results obtained in the suit, the character and standing of Schinnerer's attorney, and the customary charges by attorneys for similar services. The district court reviewed the proceedings in the county court, considered the 16 assignments of error and issued its opinion affirming the order of the county court in all respects, and awarded attorney fees.

While Nebraska Diamond points us to other cases under the Wage Payment Act where the plaintiffs were awarded a lower percentage of fees than were awarded in this case, it does not otherwise indicate how the attorney fees awarded in this case were in error. There is nothing in the record to indicate that the county court or the district court abused its discretion in awarding a fee greater than the minimum 25 percent of the judgment, and we therefore affirm the awards of attorney fees in the county and district courts.

CONCLUSION

For the reasons recited above, we conclude that Nebraska Diamond's policies regarding paying commissions upon termination of employment were void because they circumvented the statutory language of the Wage Payment Act in effect during the relevant timeframe. The district court was not in error when it affirmed the county court's findings with respect to the amount of the commissions actually owed Schinnerer, and the county and district courts properly awarded Schinnerer attorney fees and costs. Therefore, we affirm.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. LYLE J. KOENIG, RESPONDENT.

769 N.W.2d 378

Filed July 31, 2009. No. S-08-128.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee.
2. ____: ____. When credible evidence is in conflict on material issues of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Disciplinary Proceedings: Proof.** In order to sustain a charge in a lawyer discipline proceeding, the charge must be established by clear and convincing evidence.
4. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
5. ____. With respect to the imposition of attorney discipline, the Nebraska Supreme Court evaluates each attorney discipline case in light of its particular facts and circumstances.
6. ____. In a disciplinary action against an attorney, the Nebraska Supreme Court will consider the attorney's acts both underlying the alleged misconduct and throughout the proceeding.
7. ____. In a disciplinary action against an attorney, the determination of an appropriate penalty to be imposed requires the consideration of any aggravating or mitigating factors.

Original action. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Clinton J. Gatz for respondent.

Lyle J. Koenig, pro se.

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

PER CURIAM.

The office of the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent, Lyle J.

Koenig. Following a hearing, the referee concluded that Koenig had violated the Nebraska Rules of Professional Conduct and Neb. Rev. Stat. § 7-104 (Reissue 2007). The referee recommended suspension from the practice of law for 1 year. Koenig takes exception to the referee's findings and recommended discipline.

We conclude there is clear and convincing evidence that Koenig violated the rules of professional conduct and, for the reasons set forth, suspend him from the practice of law for 120 days.

FACTS

Koenig was admitted to the practice of law in the State of Nebraska on February 28, 1972, and, at all relevant times, was engaged in the private practice of law in Beatrice, Nebraska. At his law office in Beatrice, Koenig employed a paralegal, who later became an associate in his practice, named Dustin A. Garrison. Garrison was cited by the Nebraska State Patrol for driving without a valid registration or proper proof of insurance. Following a 10-day grace period, a criminal complaint was filed against Garrison in county court, alleging that Garrison was operating his motor vehicle without proper registration and proof of insurance. Koenig agreed to represent Garrison and entered an appearance in the case.

Rick Schreiner, the chief deputy county attorney at the time, was assigned to Garrison's case. Koenig sent a letter to Schreiner regarding Garrison's case stating that the newly elected Gage County Attorney was in violation of the same registration law with which Garrison had been charged.

In his letter, Koenig included a photograph of the allegedly expired license plate and a copy of a "Motion to Appoint Special Prosecutor," which he said he would file if Garrison's case was not dismissed. The motion alleged that the "county attorney is presently in violation of the law, in that his personal vehicle is not properly registered in Gage County, Nebraska." Koenig concluded his letter by stating, "Obviously, these motions are only proposed. Can't you dismiss [this case]? Our lips, of course, are forever sealed if [Garrison's] case gets dismissed."

Four days later, Koenig sent a second letter to Schreiner, asking, "Does this case have any settlement possibility before we file the enclosures?" Enclosed with the letter was a motion to dismiss for selective prosecution which alleged that the county attorney, "at least until recently, was operating his motor vehicle without valid registration in Gage County, Nebraska."

Koenig admitted that he hoped the information regarding the county attorney's alleged violation would persuade Schreiner to dismiss the charges against Garrison. Koenig also stated that he meant the sealed lips remark only as a joke and thought Schreiner would realize that Koenig "was trying to inject a little humor into this [situation]."

The State of Nebraska filed a motion for the appointment of a special prosecutor in Garrison's case. The motion was granted, and a special prosecutor completed the case. Garrison pled no contest to the expired plate charge, and the no proof of insurance charge was dismissed. Koenig never filed any of the motions and never published any information regarding the county attorney's vehicle registration.

Three months after the case was closed, formal charges were filed against Koenig. The formal charges alleged violations of § 7-104 and Neb. Ct. R. of Prof. Cond. §§ 3-503.5(a)(1), 3-504.4(a), and 3-508.4(a), (b), (d), and (e). A referee was appointed, and a disciplinary hearing was held. The referee found by clear and convincing evidence that Koenig violated his oath of office as an attorney as set forth in § 7-104 and §§ 3-503.5(a)(1) and 3-508.4(a), (b), (d), and (e). The referee made no finding with respect to § 3-504.4(a), and no exceptions were filed in that regard. The referee recommended that Koenig be suspended from the practice of law for 1 year.

Koenig has been disciplined on two previous occasions. In 1998, Koenig was privately reprimanded for false allegations and assertions made in the district court for Gage County, Nebraska. In 2002, we suspended Koenig from the practice of law for 90 days after he misrepresented the status of estate proceedings and the legal status of real property.[1]

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[1] *State ex rel. Counsel for Dis. v. Koenig*, 264 Neb. 474, 647 N.W.2d 653 (2002).

ASSIGNMENTS OF ERROR

Koenig makes five separate assignments of error which can generally be stated as two: (1) The referee erred in finding that Koenig violated the Nebraska Rules of Professional Conduct and § 7-104 and (2) the referee erred in his recommended sanction of a 1-year suspension.

STANDARD OF REVIEW

[1,2] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee.[2] When credible evidence is in conflict on material issues of fact, however, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.[3]

ANALYSIS

Violations of Rules of Professional Conduct

[3] We begin our analysis with whether there is clear and convincing evidence that Koenig's actions violated § 3-508.4(a), (d), or (e). In order to sustain a charge in a lawyer discipline proceeding, we must find the charge to be established by clear and convincing evidence.[4] Section 3-508.4 deals with attorney misconduct and provides, in relevant part:

> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct[,] knowingly assist or induce another to do so or do so through the acts of another;
>
> . . . .
>
> (d) engage in conduct that is prejudicial to the administration of justice. . . .
>
> (e) state or imply an ability to influence improperly a government agency or official or to achieve results by

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[2] *State ex rel. Counsel for Dis. v. Wintroub*, 277 Neb. 787, 765 N.W.2d 482 (2009).

[3] *Id.*

[4] See *id.*

means that violate the Rules of Professional Conduct or other law.

With regard to § 3-508.4(d), we conclude that there is clear and convincing evidence that Koenig's conduct was prejudicial to the administration of justice. Koenig contends that the letters he sent to Schreiner, threatening to reveal the county attorney's alleged violation of the law, were an attempt to negotiate a plea agreement on behalf of his client. We agree with Koenig that attorneys have the right to negotiate on behalf of their clients and are even charged by the Nebraska Rules of Professional Conduct to zealously assert their client's position.[5] A lawyer must zealously advocate, however, "under the rules of the adversary system."[6] While Koenig's conduct might be considered zealous advocating of his client's position, it does not fall within the ethical bounds of our adversary system.

A lawyer, for example, can argue to a prosecutor that his or her client should not be prosecuted for an offense because "everybody else is doing the same behavior" and no other prosecutions are occurring. Or, it is even within the bounds of our ethical rules to argue, that a client should not be prosecuted for something because the prosecutor is allegedly doing the same prohibited behavior. But it is altogether different—and a violation of the rules of professional conduct—to offer to a prosecutor to stay quiet about something the prosecutor has done (or is doing) in exchange for dismissing a charge that has been lodged against one's client. It does not take a great deal of imagination to see how this type of behavior taints the adversary system and prejudices the administration of justice.

In this instance, Koenig offered to keep mum about what he believed to be illegal conduct by the county attorney in exchange for the dismissal of the charges against Garrison. Koenig's actions were, in effect, a conditional threat to disclose the county attorney's alleged violation. This a lawyer

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[5] Nebraska Rules of Professional Conduct, Preamble ¶ 2.

[6] *Id.*

cannot do. And this conduct is not any less egregious because it occurred in the context of plea negotiations.

Koenig also argues that the letters, at least in part, were an attempt to "inject a little humor" into the case. In particular, Koenig points to his statement at the end of his first letter, "[c]an't you dismiss [this case]? Our lips, of course, are forever sealed if [Garrison's] case gets dismissed." Koenig contends that the statement was meant as a joke and was used in a "lighthearted, jesting, humorous way."[7] Koenig states that he "misjudged" Schreiner by attributing to him "more understanding about the nuances of the English language than [Schreiner] apparently possesses."[8]

We do not find Koenig's claim to be credible. Nor did the referee, who heard and observed the witnesses. Koenig's purported "joke" resulted in the appointment of a special prosecutor, consistent with the motion Koenig threatened to file. Perhaps Koenig did not actually intend to file any of the motions he prepared. But a reasonable person in Schreiner's position could not help but take Koenig's threats seriously. No one—not the county attorney or the Counsel for Discipline or the referee or the members of this court—has believed Koenig's claim that he was only joking. There is clear and convincing evidence that Koenig's conduct was prejudicial to the administration of justice, and we therefore conclude that Koenig violated § 3-508.4(d).

For similar reasons, we find clear and convincing evidence that Koenig violated § 3-508.4(e). Section 3-508.4(e) prohibits the mere suggestion that a lawyer can or will act to exert improper influence on a public official through unethical or unlawful means. Based on the record before us, we conclude that there is clear and convincing evidence that Koenig stated or implied an ability to improperly influence Schreiner, a public official, through unethical means. Inherent in drafting and sending the letters at issue is the suggestion that Koenig would act to exert improper influence on Schreiner and the county

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[7] Reply brief for respondent at 3.

[8] *Id.* at 4.

attorney through unethical means. Accordingly, we conclude that Koenig violated § 3-508.4(e). And as for § 3-508.4(a), we conclude that Koenig violated it by virtue of his violation of § 3-508.4(d) and (e).

In addition to our determination that Koenig violated the Nebraska Rules of Professional Conduct, we also conclude that Koenig's misconduct reflects adversely upon his fitness to practice law. We therefore determine that there is clear and convincing evidence that Koenig violated his oath of office as an attorney under § 7-104.

Finally, we turn to § 3-508.4(b) and whether Koenig committed a criminal act. Section 3-508.4(b) deals with criminal acts and provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." The referee concluded that there was clear and convincing evidence that Koenig committed attempted bribery and consequently violated § 3-508.4(b). We conclude, however, in our review of this particular case, that there was insufficient evidence to determine whether Koenig committed a criminal act.

In this case, the State of Nebraska has not brought a charge of bribery or attempted bribery against Koenig. There has been no trial or finding by any court that Koenig was guilty of any crime associated with the misconduct at issue. We decline to determine or hypothesize whether Koenig's misconduct in this case would constitute a criminal act—i.e., an act that is deemed criminal, beyond a reasonable doubt. For similar reasons, we also conclude that there is insufficient evidence to show that Koenig violated § 3-503.5(a) which provides that "[a] lawyer shall not: (1) seek to influence a judge, juror, prospective juror or other official by means prohibited by law." We therefore conclude that Koenig did not violate §§ 3-503.5(a)(1) and 3-508.4(b).

Although there is not clear and convincing evidence to show that Koenig violated §§ 3-503.5(a)(1) or 3-508.4(b), we nevertheless conclude that Koenig's conduct adversely reflects on his fitness to practice law and is subject to discipline under the Nebraska Rules of Professional Conduct.

Discipline Imposed

[4] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.[9]

[5-7] With respect to the imposition of attorney discipline in an individual case, we evaluate each attorney discipline case in light of its particular facts and circumstances.[10] This court will consider the attorney's acts both underlying the alleged misconduct and throughout the proceeding.[11] The determination of an appropriate penalty to be imposed also requires the consideration of any aggravating or mitigating factors.[12]

In the present case, we conclude that Koenig's conduct with respect to these matters violated several disciplinary rules and his oath of office as an attorney. As an aggravating factor, we note that Koenig has been disciplined on two previous occasions. In 1998, Koenig was privately reprimanded for false allegations and assertions made in the district court for Gage County. And in 2002, we suspended Koenig from the practice of law for 90 days after he misrepresented the status of estate proceedings and the legal status of real property.[13] Another factor weighing against Koenig is his lack of willingness to take responsibility for his conduct, which he characterizes as a "joke." Koenig's failure to take responsibility for his conduct shows not only his disregard for the seriousness of his

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[9] *State ex rel. Counsel for Dis. v. Wickenkamp*, 277 Neb. 16, 759 N.W.2d 492 (2009).

[10] See *State ex rel. Counsel for Dis. v. Riskowski*, 272 Neb. 781, 724 N.W.2d 813 (2006).

[11] See *State ex rel. Counsel for Dis. v. Orr*, 277 Neb. 102, 759 N.W.2d 702 (2009).

[12] See *id.*

[13] *Koenig, supra* note 1.

behavior, but also a failure to understand and appreciate the legal import of his actions.

Finally, we note that mitigating circumstances do exist. The record shows Koenig's cooperation during the disciplinary proceeding, his continuing commitment to the legal profession, and the lack of evidence of any harm to clients.

Based upon a consideration of all of the aggravating and mitigating circumstances in the present case, we conclude that Koenig should be and hereby is suspended from the practice of law for 120 days, effective immediately.

CONCLUSION

It is the judgment of this court that Koenig be suspended from the practice of law for a period of 120 days, effective immediately. Koenig shall comply with Neb. Ct. R. § 3-316 and, upon failure to do so, shall be subject to a punishment for contempt of this court. At the end of the 120-day suspension period, Koenig may apply to be reinstated to the practice of law, provided that he has demonstrated his compliance with § 3-316 and further provided that the Counsel for Discipline has not notified this court that Koenig has violated any disciplinary rule during his suspension.

JUDGMENT OF SUSPENSION.

CONNOLLY, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
ANDRE D. ROBINSON, APPELLANT.
769 N.W.2d 366

Filed July 31, 2009. No. S-08-433.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in

reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.

3. **Effectiveness of Counsel: Records: Trial: Evidence: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.
4. **Trial: Evidence: Appeal and Error.** If a matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal.
5. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
6. **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.
7. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
8. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
9. **Witnesses: Juries: Appeal and Error.** The credibility and weight of witness testimony are for the jury to determine, and witness credibility is not to be reassessed on appellate review.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

Thomas J. Garvey for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Andre D. Robinson appeals his conviction and sentence for knowing or intentional child abuse resulting in death. Robinson asserts primarily that there was insufficient evidence to support his conviction and that his sentence of life imprisonment imposed by the district court for Douglas County is excessive. We affirm Robinson's conviction and sentence.

STATEMENT OF FACTS

Late in the afternoon of November 24, 2006, 22-month-old Branesha Thomas was brought into a hospital emergency room in Omaha, Nebraska, by her mother, Tanisha Turner, and Robinson. Turner was a girlfriend of Robinson's, but Robinson was not Branesha's father. When Branesha was brought into the emergency room, she was not breathing and she had multiple bruises on her head, face, and chest. Robinson told emergency room personnel that Branesha had fallen off her bed earlier in the day and seemed to be doing fine but that later that afternoon, she stopped breathing. Lifesaving measures were attempted, but Branesha could not be revived.

Police detective Marlene Novotny arrived at the hospital to investigate the circumstances of Branesha's death. Robinson had left the hospital by the time Novotny arrived, but Novotny spoke to Turner. Novotny asked Turner what had happened during the day, and Turner provided little detail other than to say that she had spent the day with a person named "Eric" and that they had gone to the Chuck E. Cheese's and Burger King restaurants. Novotny continued her investigation by obtaining security video from the hospital to determine who brought Branesha to the hospital.

Novotny interviewed Turner again the next day. Turner told Novotny that she had lied about her whereabouts on the previous day; that she had actually spent the afternoon with her friend, Raeven Ammons; and that she had left Branesha with Robinson during that time. Turner identified Robinson as the man in photographs taken from the hospital security video that showed Robinson carrying Branesha into the hospital. Turner agreed to make a recorded telephone call to Robinson to discuss the events of the previous day.

In the call, Turner asked Robinson what had happened to Branesha. Robinson told Turner that Branesha fell off a bed on which she had been jumping. He denied that he hit her or otherwise caused the bruising. Robinson said that Branesha threw up after she fell but that she later went with Robinson and his daughter to Chuck E. Cheese's and to Burger King and that she ate some food. Robinson said that Branesha appeared to be fine until she fell asleep in Robinson's car on the way to

pick up Turner. Robinson asked Turner whether she told her mother and police investigators that she had been with him or whether she told them she was with "Eric," as they had agreed. Robinson indicated concern that there might be child abuse charges and that he did not want to say that Turner was not with Branesha during the day; instead, he wanted to say that both he and Turner were with her when she fell.

Robinson was later arrested and charged with knowing or intentional child abuse resulting in death, a Class IB felony under Neb. Rev. Stat. § 28-707(6) (Reissue 2008).

At trial, Turner testified as follows: On November 24, 2006, Robinson called her and said that he wanted to take Branesha and his daughter to Chuck E. Cheese's. Robinson picked up Turner and Branesha at around 1:30 p.m. He dropped Turner off at her friend Ammons' home, and Branesha stayed with Robinson. Turner spent the afternoon with Ammons. During that time, Turner received three telephone calls from Robinson. In the first call, Robinson told Turner that Branesha had been jumping on the bed and fell off the bed but that she was doing fine. In the second call, Robinson told Turner that Branesha had thrown up but that she was still doing fine. In the final call, Robinson told Turner that he was coming to Ammons' house to pick her up.

Turner further testified that Robinson arrived to pick her up at around 5:30 p.m. When Turner went to the car, Ammons came with her to see Branesha. Branesha appeared to be sleeping; Ammons tried to wake her but could not. Ammons went back into her house, and Robinson and Turner drove away. Turner noticed that Branesha still appeared to be sleeping, and Robinson told her that she had been sleeping and would not wake up since they had set out to pick Turner up. Turner tried to wake Branesha, but she did not respond. Turner realized that something was wrong with Branesha when she felt that her hand was cold, and she asked Robinson what had happened. He responded that nothing had happened and that Branesha was fine and was just sleeping. Turner told Robinson to take her to the hospital; when they arrived, Robinson carried Branesha into the emergency room. Robinson stayed with Turner at the hospital for about 30 minutes but left before Turner's mother

and grandmother arrived. After being at the hospital for a while longer, Turner was informed that Branesha had died.

Turner testified that when she was questioned by police at the hospital, she had lied when she told them that she and "Eric" had been with Branesha all day, because she did not want her mother, who did not approve of her relationship with Robinson, to know that she had left Branesha with Robinson. When she talked with police the next day, she decided to tell the truth, because she realized that something had happened while Branesha was with Robinson.

Ammons testified at trial that around 1 or 2 p.m. on November 24, 2006, she received a call from Turner, who wanted to come for a visit. Robinson dropped Turner off about a half hour later. Turner spent the afternoon with Ammons and received some telephone calls during that time. When Robinson came to pick Turner up later in the afternoon, Ammons went to the car to see Branesha and noticed that although Branesha's eyes were open, "her face was just blank." Ammons shook Branesha, but she did not respond. Ammons told Turner and Robinson that something was wrong with Branesha.

Turner's mother, Wanda Wilson, testified at trial that Turner and Branesha lived with her and that on the morning of November 24, 2006, she saw Branesha and did not observe any injuries. Wilson went shopping at around 1 p.m., and at around 2 p.m., she received a call from Turner saying that she and a friend were taking Branesha to Chuck E. Cheese's. Wilson did not hear from Turner again until around 6 p.m. when she was called to the hospital, where Wilson later learned that Branesha had died. Wilson was allowed to see Branesha's body, and she observed bruises on Branesha's head and chest that had not been there that morning.

Novotny, the police detective who questioned Turner on November 24 and 25, 2006, testified at trial regarding her investigation. During her testimony, the State offered into evidence the tape recording and a transcript of the November 25 telephone conversation between Turner and Robinson. The tape recording was played for the jury, and jurors were provided a transcript and allowed to read along as the tape recording was played.

Other witnesses called by the State included a nurse and a paramedic who were on duty when Branesha was brought into the emergency room. The State also presented the testimony of a forensic pathologist who performed an autopsy on Branesha's body. The pathologist observed multiple bruises, abrasions, and contusions on her head, chest, and abdomen, as well as a fractured rib and a fractured humerus bone. The pathologist opined that the injuries were caused by blunt force trauma. The pathologist also observed that there had been significant hemorrhaging in the brain and opined that the hemorrhage was caused by recent severe head trauma. The pathologist observed hemorrhaging in other internal organs, including the liver, pancreas, and heart. The pathologist noted that the stomach was empty, which would be inconsistent with her having eaten food a couple hours earlier unless she had vomited after eating such food. The pathologist opined in conclusion that the cause of Branesha's death was trauma to the head and abdomen and the resulting loss of blood and, further, that the injuries could not have been the result of a single fall from a bed.

Finally, the State presented the testimony of a pediatric physician who reviewed photographs and the post mortem examination report on Branesha. The pediatric physician opined that her injuries were nonaccidental; that immediately after sustaining such injuries, a "child would be inconsolable, would be screaming, crying," and "as a caregiver, you would be panicked to witness this child"; and that a child would have gone unconscious "at the most 15 to 20 minutes" after sustaining such injuries. The physician further opined that the injuries could not have been the result of a single fall from a bed and instead were caused by multiple instances of blunt trauma such as punching or kicking. The physician opined in conclusion that after a child received such injuries, a reasonable caregiver would not be able to say that the child was in a normal condition and that if the child had received medical attention immediately after receiving the injuries, the child's life could possibly have been saved.

After the State rested its case, Robinson moved for dismissal on the basis that the State failed to prove its case. The court denied the motion.

Robinson testified in his own defense. He testified that on the morning of November 24, 2006, he spoke with Turner and that she stated she planned to have Ammons babysit Branesha and then would spend the night with Robinson. Robinson next spoke with Turner shortly after noon, and she told him that he could pick her up because her mother had left. Robinson picked up Turner around 1:30 p.m., and Turner brought Branesha with her. The three went to Robinson's apartment, where Robinson allowed Branesha to play with some of his daughter's toys. Robinson testified that Turner was with him and that he was never alone with Branesha. At one point, Turner called to Robinson from another room and told him to bring in some paper towels because Branesha had thrown up. Around 3 p.m., Robinson took Turner and Branesha to Ammons' house and left them both there. Robinson testified that there was no plan for him to take Branesha to Chuck E. Cheese's and that instead, the plan was that Turner would spend time at Ammons' house before returning to his apartment for the night, leaving Branesha with Ammons. Robinson testified that he and Turner did not want her mother to know that she was with him, because Turner's mother did not approve of him.

Robinson testified that he next spoke to Turner when he called after 5 p.m. to see if she was ready for him to pick her up. She was, and he went to Ammons' house to pick her up. When he arrived, Turner and Ammons both came out and Ammons was carrying Branesha, who appeared to be sleeping. Turner told Robinson that Ammons would not be able to watch Branesha and that she would try to find another babysitter. As they drove to Robinson's home, Turner stated that Branesha was not breathing. Robinson attempted to wake her, but she did not respond, and so he drove her to the hospital. On the way to the hospital, he asked Turner what had happened and she said that Branesha had fallen and hit her head at Ammons' house. Robinson testified that Turner asked him to say that he had taken Branesha and his daughter to Chuck E. Cheese's, because Turner was worried that she would be in trouble if it was learned that she allowed Branesha to fall and hit her head.

Robinson testified that at the hospital, he decided that Turner's mother should be called. Turner asked him not to identify himself to her mother because of her mother's dislike for him and instead to say that his name was "Eric." Robinson testified that Turner asked him to leave the hospital before her mother arrived and that he complied. Turner called him the night of November 24, 2006, and told him that Branesha had died and that the police were investigating her for child neglect. Turner asked him to tell anyone who questioned him that Branesha was with him and not with Turner when she fell. Robinson agreed to tell the police whatever Turner wanted him to say. Robinson testified that Turner asked him to stick with that story the next time she called him and that that was the reason he said the things he did during the telephone conversation on November 25.

Robinson also presented the testimony of Robert Louis Butler, a police officer who took part in the investigation of Branesha's death. Robinson questioned Butler regarding, inter alia, an interview Butler conducted of Robinson during the investigation. Butler testified, inter alia, that during the interview, Robinson admitted that he had accidentally kicked Branesha.

At the jury instruction conference, the State objected "to giving the instruction on the jury making a finding of free and voluntariness" because the State "did not offer the statement; the defense did." Robinson's counsel stated that he did not object, and the court therefore stated that the instruction would be removed. The record on appeal does not contain instructions that were proposed but not given, and there is no other indication in the record of the content of the instruction referred to above or of the specific statement or statements to which it pertained.

During jury deliberations, the jury foreperson sent a question to the court regarding instruction No. 4, which set forth the elements of the crime of knowing or intentional child abuse resulting in death. Paragraph A(1) of the instruction required that in order for the jury to find Robinson guilty, the State must prove, inter alia, that Robinson "did cause or permitted Branesha . . . to be placed in a situation that endangered her

life or health or to be deprived of necessary care." The jury foreperson asked, "Can we conclude that the insertion of 'or' in the second to last line of the statement indicates that only depriving of necessary care is needed to meet the criteria of (1)?" The court held a hearing with counsel for the State and Robinson present and stated on the record that counsel for both parties "agreed that the question should be answered with the word 'yes.'" Counsel for both parties agreed on the record that such statement was accurate, and the court stated that the jury would be given a supplemental instruction that the answer to the question was "yes." The supplemental instruction does not appear to have been given orally to the jury on the record; instead, it appears that the supplemental instruction was given to the jury in written form.

Shortly thereafter, the jury indicated that it had reached a verdict. The jury entered a unanimous verdict that Robinson was guilty of knowing and intentional child abuse resulting in death. The court subsequently imposed a sentence of imprisonment for life.

Robinson filed a notice of appeal. The district court granted Robinson's request for new counsel on appeal.

ASSIGNMENTS OF ERROR

Robinson asserts that (1) there was not sufficient evidence to support his conviction, (2) he received ineffective assistance of counsel because trial counsel failed to object to the removal of the instruction regarding voluntariness of statements, (3) the district court erred in giving the supplemental instruction in response to the jury's question, and (4) the district court imposed a sentence that was excessive and disproportionate to the crime and that constituted cruel and unusual punishment.

STANDARDS OF REVIEW

[1,2] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Branch*, 277 Neb. 738,

764 N.W.2d 867 (2009). Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. *Id.*

[3,4] A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question. *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008). If a matter has not been raised or ruled on at the trial level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal. *Id.*

[5-7] Whether jury instructions given by a trial court are correct is a question of law. *State v. Welch*, 275 Neb. 517, 747 N.W.2d 613 (2008). 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. *Id.* In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Id.*

[8] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Branch, supra*.

ANALYSIS

There Was Sufficient Evidence to Support Robinson's Conviction for Knowing or Intentional Child Abuse Resulting in Death.

Robinson first asserts that the evidence was not sufficient to support his conviction for knowing or intentional child abuse resulting in death. We conclude that the evidence was sufficient.

Robinson was convicted of a violation of § 28-707, which provides that a person is guilty of child abuse "if he or she knowingly, intentionally, or negligently causes or permits a minor child to be . . . [p]laced in a situation that endangers his or her life or physical or mental health [or to be d]eprived of necessary . . . care." Subsection (6) of the statute provides that

child abuse is a Class IB felony "if the offense is committed knowingly and intentionally and results in the death of such child." In this case, the State charged in the information that Robinson committed the offense knowingly and intentionally and that the offense resulted in Branesha's death.

Through the testimonies of Turner, Turner's mother, and Ammons, the State presented evidence that Branesha was in Robinson's sole care on the afternoon of November 24, 2006, that she showed no sign of injury prior to the time she was in his sole care, and that Branesha suffered injuries during the time she was in his sole care. Through the testimonies of medical personnel who treated or examined Branesha, the State also presented evidence that Branesha suffered injuries such that it would have been obvious to any person caring for her that she needed immediate medical attention, that such injuries were not incurred as a result of a fall from a bed but instead as a result of multiple instances of blunt trauma such as kicking or punching, and that Branesha was denied medical care long enough that she died when, if timely treatment had been provided, she might have survived.

There was evidence that Robinson admitted to Butler that he accidentally kicked Branesha. In addition, evidence that Branesha was in Robinson's sole care during the time she suffered injuries was circumstantial evidence from which the jury could have inferred that he caused the injuries. See *State v. Leibhart*, 266 Neb. 133, 662 N.W.2d 618 (2003) (evidence that defendant was sole adult in child's presence at time child sustained injuries was sufficient circumstantial evidence supporting finding that defendant caused injuries). The jury could have inferred that Robinson placed Branesha in a situation that endangered her life or health when he either inflicted the injuries or allowed the injuries to be inflicted on her, or the jury could have found that Robinson deprived Branesha of necessary care based on evidence that her injuries were such that a reasonable person would have known she needed immediate medical attention. Either finding would support a conviction for child abuse under § 28-707. The evidence, including the pediatric physician's testimony that Branesha's injuries were nonaccidental, also supported findings that the

abuse was knowing or intentional and that the abuse resulted in Branesha's death, making the offense a Class IB felony under § 28-707(6). Because there was evidence to support such findings, the evidence presented by the State supports Robinson's conviction for knowing or intentional child abuse resulting in death.

Robinson argues that the evidence was not sufficient, because the strongest evidence against him was faulty in certain respects. He asserts that the most important pieces of evidence against him were his two "confessions"—his admission to Butler that he accidentally kicked Branesha and his statements in the recorded telephone call with Turner in which he admitted that Branesha was alone with him during the afternoon of November 24, 2006. These statements support a finding of guilt. Robinson does not argue that these statements do not support his conviction but instead argues that the court should have instructed the jury to consider whether such statements were voluntary. This argument is considered below in connection with Robinson's second assignment of error claiming ineffective assistance of counsel wherein we conclude the record on direct appeal is not sufficient to evaluate the claim.

Robinson further argues that other than his own statements, the main evidence against him was the testimony of Turner and Ammons, and he asserts both were "admitted liar[s]." Brief for appellant at 19. He notes that Turner admitted that she lied in her first statements to police after Branesha's death and that she lied to her mother by denying that she was spending time with Robinson. Robinson notes that Ammons admitted that at times she had lied by providing an alibi for Turner when Turner was spending time with Robinson. Robinson urges this court to "simply admit the incredulity of [Turner's] and [Ammons'] stor[ies]." *Id.*

[9] We have stated that the credibility and weight of witness testimony are for the jury to determine, and witness credibility is not to be reassessed on appellate review. *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007). If the jury believed Turner's and Ammons' testimony, such evidence supported Robinson's conviction. Although there was also evidence which might have called each witness' credibility into

question, that assessment was for the jury. Viewing the evidence in the light most favorable to the State, it is clear that the jury believed Turner's and Ammons' testimony and did not believe Robinson's testimony on matters where their testimonies were in conflict. When reviewing a criminal conviction for sufficiency of the evidence, we, as an appellate court, do not pass on the credibility of witnesses, see *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009). Including the testimonies of Turner and Ammons, the jury, as the trier of fact, could reasonably have found the essential elements of knowing or intentional child abuse resulting in death beyond a reasonable doubt based on the evidence.

We conclude that the evidence was sufficient to support Robinson's conviction for knowing or intentional child abuse resulting in death.

The Record on Direct Appeal Is Not Sufficient to Review Robinson's Claim of Ineffective Assistance of Counsel.

Robinson next asserts that he received ineffective assistance of counsel. Robinson argues that he was provided ineffective assistance when his trial counsel failed to object after the State asked the court not to give a proposed instruction that the jury should decide whether any confession Robinson made was made knowingly and voluntarily. Because the proposed instruction is not included in the record on appeal, we conclude that we cannot review Robinson's claim of ineffective assistance of counsel in this direct appeal.

We have stated that we need not dismiss an ineffective assistance of counsel claim merely because a defendant raises it on direct appeal. *State v. Wabashaw*, 274 Neb. 394, 740 N.W.2d 583 (2007). The determining factor is whether the record is sufficient to adequately review the question. *Id.* If it requires an evidentiary hearing, we will not address the matter on direct appeal. *Id.*

We note that the proposed instruction that is the subject of Robinson's claim of ineffective assistance of counsel is not included in the record on appeal. The only indication in the record suggesting the content of the instruction is a statement

at the instruction conference made by the prosecutor that the State objected "to giving the instruction on the jury making a finding of free and voluntariness." Robinson concedes on appeal that the proposed instruction is not in the record but argues that we must assume that the proposed instruction was based on the standard jury instruction on voluntary statements (NJI2d Crim. 6.0). We are not prepared to make this assumption. Further, because the proposed instruction is not included in the record, we cannot be certain what statement or statements by Robinson were the subject of the instruction, and we therefore cannot determine whether Robinson was prejudiced by his counsel's purported failure to object to the removal of the instruction. Finally, it is possible that defense counsel had a strategic reason for not objecting to removal of the instruction and such reasoning cannot be evaluated without an evidentiary hearing.

We conclude that the record on direct appeal is not sufficient to adequately review Robinson's claim of ineffective assistance of counsel.

The Supplemental Jury Instruction Was a Correct Statement of Law, and Robinson Was Not Prejudiced by the Giving of the Instruction.

Robinson next asserts that the district court erred in giving a supplemental instruction in response to the jury's question regarding the instruction on the elements of the crime charged. We conclude that the instruction was a correct statement of the law and that Robinson was not prejudiced by the giving of the instruction.

During jury deliberations, the jury foreperson sent a question to the court regarding the instruction that set forth the elements of knowing or intentional child abuse resulting in death. The instruction stated that in order for the jury to find Robinson guilty, the State must prove, inter alia, that Robinson "did cause or permitted Branesha . . . to be placed in a situation that endangered her life or health or to be deprived of necessary care." The jury foreperson asked, "Can we conclude that the insertion of '<u>or</u>' in the second to last line of the statement indicates that <u>only</u> depriving of necessary care is needed

to meet the criteria of (1)?" After consulting with counsel for both the State and Robinson, the court provided a supplemental instruction to the jury stating that the answer to the question was "Yes."

Robinson argues on appeal that the court should have refused to give a supplemental instruction, because the original instruction was a correct and adequate statement of law and did not need expansion. Robinson also argues that under Neb. Rev. Stat. § 25-1116 (Reissue 2008), the proper procedure would have been to call the jury into open court and to tell it that it had been given all the law necessary and that it should base its decision on that law.

In *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), the trial court informed the State and the defendant in a telephonic hearing of questions asked by the jury and of the court's proposed responses. On appeal, we noted that the defendant in *Gutierrez* failed to show how he was prejudiced by the procedure used by the court for responding to the jury's question. With regard to the defendant's objection to the substance of the supplemental instruction, we noted in *Gutierrez* that the same standards regarding an alleged erroneous jury instruction apply to a supplemental instruction. That is, "the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant." 272 Neb. at 1024, 726 N.W.2d at 569.

We note in this case that Robinson's counsel did not object to the procedure and that counsel did not object to the content of the instruction, but instead agreed that it was correct. Robinson does not frame this assignment of error as ineffective assistance of counsel, and he does not appear to argue that the supplemental instruction misstated the law. Instead, he argues that the supplemental instruction was unnecessary because the original instruction adequately stated the law. He argues that he was prejudiced because the jury reached its verdict shortly after it received the supplemental instruction; therefore, he argues, the supplemental instruction prompted the jury to reach a verdict to convict.

Even though the supplemental instruction may have assisted the jury in reaching its decision, Robinson has not shown that the instruction was prejudicial or otherwise adversely affected his substantial rights. The supplemental instruction, when read with the other jury instructions as a whole, was a correct statement of law and was not misleading, and the fact that it assisted the jury in reaching its verdict does not mean that it caused the jury to reach its finding of guilt. The instruction was not prejudicial.

Robinson has not shown that he was prejudiced by the supplemental instruction or by the procedure used by the court to respond to the jury's question. We therefore conclude that the court did not err in giving the supplemental instruction.

The Sentence Imposed by the District Court Was Not Excessive and Was Not Cruel and Unusual Punishment.

Finally, Robinson challenges his sentence in four assignments of error that he argues as two and that we consider together. He asserts that (1) the court imposed an excessive sentence because it did not properly consider factors set forth in case law and (2) the sentence constituted cruel and unusual punishment because it was disproportionate to the crime. We conclude that the sentence was not excessive and that it did not constitute cruel and unusual punishment.

Robinson argues first that his sentence of life imprisonment is excessive because he is a young man and the sentence imposed on him gives him no opportunity to rehabilitate himself. He notes that his criminal history was not extensive and included no prior felony convictions. He also argues that the court should have given him favorable consideration because although he had a difficult childhood, he avoided joining a gang or becoming involved in chemical dependency.

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Kinkennon*, 275 Neb. 570, 747 N.W.2d 437 (2008). Robinson was convicted of knowing or intentional child abuse resulting in death, which is a Class IB felony under

§ 28-707(6). A Class IB felony is punishable by a sentence of imprisonment for a minimum of 20 years to a maximum of life. Neb. Rev. Stat. § 28-105 (Reissue 2008). Therefore, Robinson's sentence is within statutory limits.

The State argues that although Robinson's criminal history did not include prior felonies, it is a lengthy history and shows "a pattern of utter disregard for the law." Brief for appellee at 28. The State also notes that although Robinson did not test high for susceptibility to drugs and alcohol, he tested in the high to very high risk category for criminal behavior, antisocial behavior, and procriminal attitude. The State also emphasizes the nature of the crime for which Robinson was convicted—the beating and brutalization of a small child—and argues that any redeeming qualities Robinson may have pale in comparison to such a crime.

At the sentencing hearing, the court also focused on the nature of the crime. The court noted that the testimony of the pathologists regarding the nature and extent of Branesha's injuries indicated that she suffered and that the injuries were not the result of an accident or a single blow, but instead "several strikes" involving "a horrific amount of force consistent with kicks or punches as if the baby were stomped on." The court also noted that Robinson accepted no responsibility for the crime and concluded that any sentence "less than the maximum allowed by law would promote disrespect for the law and depreciate the seriousness of the offense."

Given the reasons set forth by the State and by the district court, we conclude that the sentence of life imprisonment was not an abuse of discretion.

Robinson separately argues that his sentence is disproportionate to the crime and therefore violates federal and state constitutional prohibitions against cruel and unusual punishment. Robinson compares his case to other cases that he argues involved similar crimes but in which the defendant was given a less severe sentence. Although Robinson casts his arguments in constitutional terms of cruel and unusual punishment, we find that the arguments are in substance the same as his claims of an excessive sentence.

Robinson does not attack the facial validity of § 28-707(6), which designates that the crime of knowing or intentional child abuse resulting in death is a Class IB felony, or of § 28-105, which provides that a Class IB felony is punishable by a sentence of imprisonment for a minimum of 20 years to a maximum of life. He makes no substantive argument that the designated range of punishment, including the maximum punishment of life imprisonment, is so disproportionate to the crime of knowing and intentional child abuse resulting in death that the statutes on their face violate the constitutional prohibitions against cruel and unusual punishment. Because Robinson does not make a facial challenge to the statute, his argument must be understood as a challenge to the statutes "as applied" to him.

In a facial challenge, the defendant would argue that the range of punishments assigned to a particular crime is disproportionate to the range of actions that would meet the statutory definition of the crime. However, in an "as applied" challenge, like that advanced by Robinson in this case, the defendant does not argue that the range of punishment is disproportionate to the crime in general, but instead argues that his or her specific punishment is disproportionate to his or her specific crime. See *State v. Brand*, 219 Neb. 402, 404, 363 N.W.2d 516, 518 (1985) (distinguishing between cruel and unusual punishment challenge "directed to the claim that the statute is unconstitutional by its terms" and argument that "as applied in this particular case," sentence violates cruel and unusual punishment clauses of U.S. and Nebraska Constitutions). We conclude that Robinson's "as applied" challenge based on the cruel and unusual punishment clauses involves the same considerations as his excessive claim. In both challenges, he argues that his specific sentence is disproportionate to the specific circumstances of his crime. For reasons discussed above, wherein we concluded that Robinson's sentence was not excessive, we also conclude that his sentence was not so disproportionate to his crime as to constitute cruel and unusual punishment.

We conclude that the sentence imposed by the district court was not excessive and did not constitute cruel and unusual punishment.

CONCLUSION

We conclude that the evidence was sufficient to support Robinson's conviction for knowing or intentional child abuse resulting in death, that the record on direct appeal is not sufficient to review Robinson's claim of ineffective assistance of counsel, that Robinson was not prejudiced by the supplemental instruction to the jury, and that the sentence imposed by the district court was not excessive and did not constitute cruel and unusual punishment. We therefore affirm Robinson's conviction and sentence.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DAUNTE L. GOYNES, APPELLANT.
768 N.W.2d 458

Filed July 31, 2009. No. S-08-810.

1. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
2. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court, and an appellate court will not disturb the ruling on appeal in the absence of an abuse of discretion.
3. **Self-Defense.** To successfully assert a claim of self-defense as justification for the use of force, the defendant must have a reasonable and good faith belief in the necessity of such force and the force used must be immediately necessary and must be justified under the circumstances.
4. **Motions for Mistrial.** The decision to grant a motion for mistrial is within the trial court's discretion.
5. **Motions for Mistrial: Prosecuting Attorneys: Proof.** Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.
6. **Prosecuting Attorneys.** When a prosecutor persists in questioning after the court advises that the questions are not permitted, the prosecutor commits misconduct.
7. **Prosecuting Attorneys: Motions for Mistrial.** A prosecutor's conduct does not require a mistrial if it does not mislead or unduly influence the jury.

8. ____: ____. When a prosecutor's conduct is so inflammatory that an admonition to the jury cannot remove the contamination, a mistrial is warranted.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Affirmed.

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

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

CONNOLLY, J.

I. SUMMARY

A jury convicted the appellant, Daunte L. Goynes, of murder in the second degree and use of a deadly weapon to commit a felony. The district court sentenced him to a term of 60 years' to life imprisonment for the murder conviction and a consecutive term of 10 to 20 years' imprisonment for the weapon conviction. He appeals the district court's exclusion of purported threats made against him by the victim's fellow gang members. He also appeals the court's denial of his motion for a mistrial for prosecutorial misconduct. We affirm.

II. BACKGROUND

1. THE SHOOTING

The State charged 18-year-old Goynes with second degree murder and use of a deadly weapon to commit a felony. Goynes admitted shooting 18-year-old Aaron Lofton but claimed self-defense.

The shooting occurred during a fight between Lofton and Goynes near 40th and Hamilton Streets in Omaha, Nebraska. Lofton and his mother were walking on Hamilton Street about 1 o'clock in the afternoon. Lofton's mother testified that as they walked past Goynes and another male, Lofton turned and punched Goynes in the face and a fight ensued. Lofton's mother ran to a nearby store for help. When she exited the store, she heard several shots. She did not see the first shot but claimed

that she saw Goynes standing in the middle of the street, firing at Lofton as he ran away from Goynes.

Another witness, a cabdriver, was driving west on Hamilton Street when the shooting occurred. He testified that he saw a fight between two young black males. He saw Lofton throw the first punch and, as the fight escalated, heard shots. He did not see the first shot, but testified that he saw Lofton running away. As Lofton continued running, the cabdriver saw Goynes leaning over a parked car, firing with his hand extended across the hood. Lofton later died at a hospital.

Goynes and the other male fled from the scene. The cabdriver followed them to a house a few blocks away, where police arrested Goynes. At the house, the police found a .38-caliber revolver. The gun, a five-shot revolver, had one empty cell and four spent casings in the other cells. Ballistics tests later confirmed that the fatal bullet was fired from the gun. An autopsy determined that a single shot entered Lofton's left side under his armpit and travelled left to right at a slight upward angle. The autopsy also showed the bullet lodged in the right side of Lofton's upper chest area. The parties stipulated that Goynes fired the shot from a distance of at least 12 inches.

Goynes testified that he did not seek out Lofton on the day of the shooting, but that Goynes recognized him as a member of the "Murdertown" gang. Goynes also testified that he was losing the fight with Lofton; that Lofton had him in a headlock; and that because Goynes suffers from asthma, the exertion and pressure were making it difficult for him to breathe. He began to panic and reached for the gun hidden in his pants. Goynes testified that he believed the only way to get free from Lofton was to shoot him. He testified that he fired several shots while he was on the ground but never shot at Lofton once he was free from him.

Goynes said that the fight was part of an ongoing dispute between himself and members of the Murdertown gang. He stated that a month before the shooting, Lofton shot at him and several friends while they were in Kountze Park in Omaha, and that later that same night at a local fast-food restaurant, a Murdertown gang member was murdered. Goynes testified that he was not responsible for the death but that he began carrying

a gun because the Murdertown gang members blamed him for the shooting. He believed that his fight with Lofton resulted from the Murdertown gang's belief that he was involved in the fast-food restaurant shooting.

2. The Trial

(a) Evidence of Alleged Third-Party Threats

During the trial, Goynes argued that he shot Lofton in self-defense. To establish that defense, Goynes attempted to introduce evidence of threats made against him by Lofton's fellow gang members. The court excluded this evidence. The first incident Goynes proffered as evidence involved a driveby shooting at Goynes' mother's residence allegedly committed by Murdertown gang members. The second incident involved an alleged threat made by the Murdertown gang on the "MySpace" Web page, an online social networking site. Goynes argued that the threats showed he reasonably feared Lofton because Lofton was a member of the Murdertown gang.

Regarding the first incident, the district court allowed Goynes to testify that after the fast-food restaurant murder, he saw a car drive by his mother's house and he believed a Murdertown gang member owned it. But the court did not allow him to testify that someone fired shots from the car at his mother's house. The court ruled that unless Goynes could testify that Lofton was in the car, he could not testify about the shots' being fired from the car. In an offer of proof, Goynes argued that a jury could find—because of the firing of shots at his mother's house by Murdertown gang members—that he reasonably feared he would be killed or seriously injured by a Murdertown gang member.

Regarding the second incident, the court did not allow Goynes to introduce testimony regarding an alleged threat against Goynes and his family on Murdertown's Web page on "MySpace." In his offer of proof, Goynes alleged that he had "heard" that there was an alleged threat to kill him and his family on Murdertown's "MySpace" Web page. Goynes could not, however, link Lofton with the Web page or testify that Lofton was the one who put the threat on the Web page.

Goynes also could not testify that he actually saw the purported threat, and the offer of proof did not contain a printout of the actual Web page. Moreover, Goynes could not explain how he became aware of the alleged threat or why he had a reasonable basis to believe the purported threat or that it was connected to Lofton.

The court held that the testimony was not admissible unless Goynes could connect Lofton with the Web page. The court did allow Goynes to testify that there was "something out there" on "MySpace" with Lofton's name, but that he did not know if Lofton was responsible for the information. Goynes argued the testimony regarding the "MySpace" threat would show the reasonableness of his fear of Murdertown gang members and that Lofton was the first aggressor.

(b) Goynes' Motion for Mistrial

The court denied Goynes' motion for a mistrial because of alleged prosecutorial misconduct. Goynes moved for a mistrial during the State's cross-examination of him while he was testifying about the gun used in the shooting.

On direct examination, he testified that he bought the gun only after Lofton shot at him at Kountze Park. On cross-examination, the prosecutor attempted to elicit testimony from Goynes about his previous gun ownership. The prosecutor asked him twice whether he was familiar with guns or whether he had previously owned a gun. After each question, defense counsel objected to the question as irrelevant and as inadmissible evidence of Goynes' previous criminal conduct. The court sustained both objections. The prosecutor then asked a third time whether Goynes had previously owned a gun. Defense counsel objected and moved for a mistrial. The court denied the motion, stating, "Let's move on."

III. ASSIGNMENTS OF ERROR

Goynes assigns the following errors:

(1) The court erred in excluding evidence that third parties associated with Lofton had made threats and committed acts of violence against Goynes.

(2) The court erred in denying his motion for a mistrial because of alleged prosecutorial misconduct.

IV. STANDARD OF REVIEW

[1] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, we review the admissibility of evidence for an abuse of discretion.[1]

[2] The decision whether to grant a motion for mistrial is within the discretion of the trial court, and we will not disturb the ruling on appeal in the absence of an abuse of discretion.[2]

V. ANALYSIS

1. Evidence of Third-Party Threats

Goynes claims that the court erred in excluding evidence of alleged third-party threats. Specifically, he contends that the court should have allowed him to introduce evidence of the driveby shooting at his mother's residence and the alleged threat against him and his family on Murdertown's "MySpace" Web page. He argues that both pieces of evidence support his self-defense claim because they show why he reasonably feared Murdertown gang members and Lofton in particular as a member of the gang. He also argues the evidence demonstrates two additional points: why he was carrying a gun on the day of the shooting and that Lofton was the first aggressor.

[3] To successfully assert a claim of self-defense as justification for the use of force, the defendant must have a reasonable and good faith belief in the necessity of such force.[3] The force used must be immediately necessary and must be justified under the circumstances.[4] This necessarily means that the defendant asserting a claim of self-defense may introduce evidence why he or she was justified in being fearful of the alleged victim or that the alleged victim was the first aggressor.[5] Here, however, Goynes is not attempting to introduce

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

[2] See *State v. Gresham*, 276 Neb. 187, 752 N.W.2d 571 (2008).

[3] See *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

[4] See *id.*

[5] See *State v. Lewchuk*, 4 Neb. App. 165, 539 N.W.2d 847 (1995).

evidence of threats made by Lofton. Instead, he is attempting to introduce evidence of third-party threats made by Lofton's fellow gang members.

We have not addressed the admissibility of threats which were made not by a victim, but by third parties associated with the victim. Other courts have held that evidence of third-party threats are admissible to support a claim of self-defense if there is also evidence from which the fact finder may find that the defendant reasonably connected the victim with those threats.[6] Assuming without deciding that third-party threats would be admissible in cases of self-defense, the district court did not err in excluding the testimony of the third-party threats.

Goynes claims that the evidence of the alleged third-party threats shows that he reasonably feared for his life. We understand this argument to be that because Lofton's gang members had threatened Goynes' life, he was reasonable in using deadly force against Lofton. Goynes' testimony, however, does not support that conclusion.

Goynes testified that he was not afraid of Lofton even though Lofton was a member of the Murdertown gang. And what most undermines Goynes' self-defense claim is his testimony that he shot Lofton not because he thought Lofton would kill him, but because he believed he was having a potentially lethal asthma attack while Lofton had him in a headlock. And remember, Goynes fired not one but four shots at Lofton as he was running away.

Goynes makes two other arguments: (1) The threats also show that Lofton was the first aggressor and (2) they explain why Goynes was carrying a gun on the day of the shooting. But this evidence was before the jury even without evidence of these specific threats. First, the court allowed Goynes to testify that Lofton started the fight. And second, the court allowed him to testify that "bad blood" existed between Goynes' and Lofton's gangs and that Goynes had purchased the gun for his protection. So, even if Goynes had linked this evidence to Lofton, his argument fails to persuade us that he was

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[6] *People v. Minifie*, 13 Cal. 4th 1055, 920 P.2d 1337, 56 Cal. Rptr. 2d 133 (1996).

prejudiced by the exclusion of these threats. We conclude that the district court did not abuse its discretion in excluding the evidence relating to the alleged driveby shooting and the alleged "MySpace" threat.

2. Prosecutorial Misconduct

Goynes testified that he purchased the gun only after the Kountze Park incident. On cross-examination, the prosecutor attempted to impeach his credibility by trying to elicit testimony that Goynes had in fact owned other guns before the incident. Goynes claims that because the court sustained his objections twice regarding his prior gun ownership, the prosecutor engaged in misconduct sufficient to support a mistrial when he asked a third time.

[4,5] The decision to grant a motion for mistrial is within the trial court's discretion.[7] Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.[8]

Goynes argues that the conduct was prejudicial because his credibility was critical to the issue of self-defense and that by seeking to impeach his credibility through improper questioning, the prosecutor deprived him of a fair trial. Of course, the State sees it differently. The State claims the prosecutor's questions were not inflammatory, but reflected a good faith effort to impeach Goynes' testimony.

[6-8] When a prosecutor persists in questioning after the court advises that the questions are not permitted, the prosecutor commits misconduct.[9] But the prosecutor's conduct does not require a mistrial if it does not mislead or unduly influence the jury.[10] Here, the question is whether the prosecutor's conduct is

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[7] See *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007).

[8] *Id.*

[9] 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. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998) (citing *State v. Gurule*, 194 Neb. 618, 234 N.W.2d 603 (1975)).

[10] See *id.* See, also, *Gutierrez, supra* note 7.

so inflammatory that an admonition to the jury cannot remove the contamination.[11]

The prosecutor's questions regarding Goynes' prior gun ownership came after the State had called 14 witnesses and rested. In addition, the court instructed the jury not to speculate on answers to questions that the court had overruled. But more important, the jury was aware from other testimony that through his gang, Goynes had previously been associated with guns. After the prosecutor's cross-examination of Goynes, in rebuttal, a police officer testified that Goynes told him that he was a member of the "38th Street Bloods" gang, that he associated with other gangs, and that he and other gang members "hang out" in Kountze Park, where "they hide their firearms in the trash can." Thus, the jury was aware that Goynes had contact with guns before the Lofton shooting.

Although the prosecutor should have retreated from his questioning sooner, in the grand scheme of things, we believe the jury would have little noted or long remembered the exchange. In sum, the prosecutor's conduct did not infect the jury. And so, despite the court's sustaining all objections to the State's questions regarding Goynes' previous gun ownership, the jury knew that Goynes had a gun before the Lofton shooting.

We conclude that the district court did not err in denying Goynes' motion for a mistrial.

AFFIRMED.

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[11] See *Beeder, supra* note 9. See, also, *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989).

STATE OF NEBRASKA, APPELLEE, V.
RICKEY L. JIM, APPELLANT.
768 N.W.2d 464
Filed July 31, 2009. No. S-08-953.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the district court's findings will not be disturbed unless they are clearly erroneous.

2. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
3. **Effectiveness of Counsel: Appeal and Error.** An appellate court reviews ineffective assistance of counsel claims under the two-prong inquiry mandated by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
4. ____: ____. In applying the two-prong test for ineffective assistance of counsel claims, an appellate court reviews the lower court's factual findings for clear error.
5. ____: ____. Whether counsel's performance was deficient and whether that deficiency prejudiced the defendant are legal determinations that an appellate court resolves independently of the lower court's decision.
6. ____: ____. When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel failed to bring a claim on appeal that actually prejudiced the defendant.
7. ____: ____. Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.
8. ____: ____. When a case presents layered ineffectiveness claims, an appellate court determines the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
9. ____: ____. Under the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a court determines (1) whether counsel's performance was deficient and (2) whether the deficient performance actually prejudiced the defendant in making his or her defense.
10. ____: ____. If trial counsel was not ineffective, then the defendant suffered no prejudice when appellate counsel purportedly failed to bring an ineffective assistance of trial counsel claim.
11. **Effectiveness of Counsel: Proof.** In demonstrating prejudice, a defendant claiming ineffective assistance of counsel must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
12. **Effectiveness of Counsel: Presumptions.** When considering whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.
13. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** Trial counsel is afforded due deference to formulate trial strategy and tactics. When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed.

Deborah D. Cunningham for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

MILLER-LERMAN, J.

NATURE OF THE CASE

Appellant, Rickey L. Jim, appeals the decision of the district court for Douglas County which denied postconviction relief. Because we find no error in the district court's conclusion that Jim was not denied effective assistance of appellate counsel, we affirm.

STATEMENT OF FACTS

Jim was convicted by a jury in the district court for Douglas County of the crime of child abuse resulting in death and sentenced to 40 to 50 years in prison. Jim's conviction was affirmed by the Court of Appeals on direct appeal in *State v. Jim*, 13 Neb. App. 112, 688 N.W.2d 895 (2004) (*Jim I*).

At trial, Jim was represented by the public defender, and on direct appeal, Jim was represented by different counsel. In *Jim I*, we recited the evidence at trial. The evidence showed that on the evening of May 7, 2001, Candice Bryan left for work and left her son, Layne Bryan Banik, and daughter, Sara Bryan Banik, in the care of Jim. Bryan returned from work around 11 p.m. but did not check on Layne or Sara, because the doors to their rooms were closed. The next morning, Bryan found Layne in his bed with his face completely in the pillow. When she turned Layne over, his face was blue and he was stiff. After attempting to perform mouth-to-mouth resuscitation on Layne, Bryan called the 911 emergency dispatch service. After being told by the 911 operator to place Layne on a flat surface, Bryan moved him to the floor, placing him on his back, and she again attempted to resuscitate Layne. Her efforts were unsuccessful. An autopsy indicated that Layne had been dead for many hours.

During the trial, portions of a 3½-hour videotaped interview that the police conducted with Jim were presented to the jury. Trial counsel and the prosecutor had agreed to redact portions

of the interview in which Jim mentioned bone fractures that Layne had sustained prior to the incident which caused his death. However, when the videotaped testimony was presented to the jury, it included the following statement by Jim to police officers: "Well now that you guys tell me his arm is broke, it's something you know, maybe I did pull his arm too hard or you know, I've, if, if something like that happened, I didn't mean for it to happen you know." The remainder of the statements by Jim concerning the three previous bone fractures were properly redacted.

Defense counsel objected to the introduction into evidence of the above-quoted portion of the videotape and moved for a mistrial. The district court denied the motion for mistrial but agreed to give the following statement instructing the jury with respect to the evidence:

> During the course of the interrogation you heard statements made by the police officers to the defendant, including statements attributed to third parties. These statements are not offered for the truth of the matter contained in those statements and shall not be considered by you for that purpose. They're admitted solely to demonstrate the method of interrogation of the defendant and to put his statements in context.

Defense counsel did not request additional admonishment regarding the statements.

At trial, there was also testimony by the doctor who conducted Layne's autopsy. He testified that during the external examination, he observed blunt force trauma injuries in the form of abrasions and contusions on the lower part of Layne's nose, the upper and lower lips, the gums, both sides of the neck, the back of the scalp, and the back of the left shoulder.

Further, the doctor testified that in the examination of Layne's body cavity organs, there were focal areas of small pinpoint hemorrhages present on the lining of Layne's heart and both lungs, which hemorrhages are often seen in deaths caused by asphyxiation.

The doctor testified that based upon his experience and training, and his post mortem examination of Layne's body, his opinion to a reasonable degree of medical certainty regarding

the cause of death was "asphyxiation secondary to smothering." The doctor testified that in his opinion based on a reasonable degree of medical certainty, the abrasions to Layne's nose, lips, and gums were caused by his neck's being forced into a pillow or bedding until he died, and that the injuries were consistent with those produced by a struggling child who is having his face and mouth covered by being pushed into a pillow or bedding.

On appeal, Jim assigned as error, inter alia, that the district court erred in overruling his motion for mistrial based on the inadvertent admission of the unredacted comment in the videotaped testimony. In addressing this issue, the Court of Appeals reviewed the statement and concluded that "[a]lthough the objectionable testimony should have been redacted along with the other portions of Jim's interview with police relating to long bone fractures, . . . no substantial miscarriage of justice actually occurred in this case, nor was a fair trial prevented." *Jim I*, 13 Neb. App. at 131, 688 N.W.2d at 912. A petition for further review to this court was denied.

Jim filed a verified motion for postconviction relief on April 7, 2006. In his motion, Jim alleged that his appellate counsel was ineffective for failing to raise on appeal that his trial counsel was ineffective for (1) failing to file certain motions, (2) failing to call an expert witness, (3) failing to file a motion to withdraw as requested by defendant, and (4) allowing into evidence the unredacted comment in the videotaped testimony. Without conducting an evidentiary hearing, the district court ordered a new direct appeal on the issue of the admission of the unredacted portion of the videotaped testimony.

On appeal, this court reversed that order and remanded the cause for further proceedings, stating that on remand, the district court should determine the sufficiency of Jim's factual allegations in his postconviction motion and whether the files and records of the case affirmatively show that he is entitled to no relief. *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008). We stated that if the factual allegations are sufficient and are not refuted by the files and records, the court should conduct an evidentiary hearing and make findings of fact and

conclusions of law with respect to the merits of Jim's postconviction claims. *Id.*

On July 17, 2008, the district court held an evidentiary hearing on Jim's motion for postconviction relief. At the evidentiary hearing, the district court received into evidence Jim's deposition testimony, trial counsel's deposition testimony, appellate counsel's deposition testimony, and the bill of exceptions of the trial.

Trial counsel testified that the parties agreed that they would not introduce evidence of Layne's three older fractures. Trial counsel testified that he had received a copy of Jim's 3½-hour videotaped statement, and the transcription of the videotape, and had marked the portions that needed to be redacted based on this agreement. Trial counsel testified that he had reviewed his copy of the redacted tape before it was played and that he did not know whether the one statement remained unredacted because he missed it or because a different copy was played to the jury.

Trial counsel testified that his initial response to the playing of the tape was to move for a mistrial. He stated that when the motion was overruled, in considering what cautionary instruction should be given, he concluded that because the tape would not go to the jury room, he would request a "rather bland" instruction. He testified that he believed it unwise to request a limiting instruction which would highlight the unredacted statement and that he thought a general instruction would cover the statement without drawing further attention to the statement.

Appellate counsel stated in his deposition testimony that in bringing the appeal, he ruled out assigning as error ineffective assistance of counsel based on the inadvertent playing of the unredacted comment in the videotape. Appellate counsel stated that he did not feel trial counsel's performance was ineffective and that assigning error on those grounds would have been a frivolous issue. Appellate counsel testified that he talked with Jim and informed him that in all likelihood, he would not raise any issue of ineffective assistance of trial counsel in connection with the inadvertent playing of the videotaped comment, and that Jim did not request that he raise the issue.

On August 8, 2008, the district court entered an order rejecting Jim's ineffective assistance of counsel claim and denying Jim's motion for postconviction relief. The district court concluded that Jim's appellate counsel was not ineffective for not raising an ineffective assistance of trial counsel claim on direct appeal, because counsel's decision not to request a more specific admonishment after the inadvertent playing of the comment was trial strategy, and that Jim had not demonstrated that there was a reasonable probability that but for the damaging statement made in the videotape, the result of the proceeding would have been different. Jim appeals.

ASSIGNMENT OF ERROR

In his brief, Jim asserts his sole assignment of error as follows: "The District Court erred in finding that Jim had not demonstrated that there was a reasonable probability but for the admission of [the] damaging statement in the video that the result would have been different and that other questioned actions by counsel were reasonable, strategic decisions."

STANDARDS OF REVIEW

[1-5] A defendant requesting postconviction relief must establish the basis for such relief, and the district court's findings will not be disturbed unless they are clearly erroneous. *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008). A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *Id*. We review ineffective assistance of counsel claims under the two-prong inquiry mandated by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under this inquiry, we review the lower court's factual findings for clear error. *State v. Jackson, supra*. Whether counsel's performance was deficient and whether that deficiency prejudiced the defendant are legal determinations that we resolve independently of the lower court's decision. *Id*.

ANALYSIS

Upon synthesizing Jim's assignment of error and the arguments in his brief, we understand Jim claims that trial counsel's failure to ensure the objectionable comment was excluded

from the videotape, and his actions taken in response to the inadvertent playing of the comment, amounted to ineffective assistance of counsel and that appellate counsel was ineffective when he did not assign these purported errors in Jim's direct appeal. Jim's assignment of error to this court is that the district court erred when it concluded Jim did not receive ineffective appellate counsel and, therefore, denied postconviction relief.

[6-10] When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel failed to bring a claim on appeal that actually prejudiced the defendant. *State v. Jackson, supra*. In doing so, courts begin by assessing the strength of the claim appellate counsel purportedly failed to raise. Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal. *Id*. When, as here, the case presents layered ineffectiveness claims, we determine the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under the *Strickland* test. *State v. Jackson, supra*. Under the *Strickland* test, a court determines (1) whether counsel's performance was deficient and (2) whether the deficient performance actually prejudiced the defendant in making his or her defense. See *State v. Jackson, supra*. If trial counsel was not ineffective, then the defendant suffered no prejudice when appellate counsel purportedly failed to bring an ineffective assistance of trial counsel claim. *Id*.

As an initial matter, the State directs our attention to the Court of Appeals' opinion on direct appeal in which the substance of many of Jim's current claims was considered and rejected. The State urges us to affirm, suggesting that certain claims are not properly before this court. While we do not agree with the State's analysis, we agree that Jim's claims are without merit.

Jim now claims that trial counsel was deficient when he failed to ensure all matter intended to be excluded from the videotape was in fact excluded and that Jim was prejudiced thereby. As the State notes, the Court of Appeals considered

the playing of the unredacted comment in connection with its consideration of Jim's unsuccessful argument on direct appeal wherein he claimed that the trial court had erred when it denied his motion for mistrial based on the inadvertent playing of the objectionable comment. In *Jim I*, the Court of Appeals acknowledged that "the objectionable testimony should have been redacted," 13 Neb. App. at 131, 688 N.W.2d at 912, but after the examination of the entire cause, concluded that no substantial miscarriage of justice occurred and that a mistrial was not indicated.

Unlike his focus in his direct appeal on the trial court's ruling on the motion for mistrial, as rephrased in the current appeal, Jim claims that trial counsel's failure to ensure that the objectionable comment was excluded was deficient and prejudicial, thus amounting to ineffective assistance of counsel, and that direct appeal counsel was ineffective for failing to raise this issue. In the present context, we observe that under the two-prong test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), Jim must establish both a deficiency and prejudice in order to succeed on his ineffective assistance of counsel claim. As explained below, we conclude that there was no prejudice at trial, and because trial counsel was not ineffective, we agree with the district court that appellate counsel was not ineffective. Our determination that no prejudice resulted from the playing of the objectionable testimony is consistent with the Court of Appeals' opinion noted above.

[11] In demonstrating prejudice, a defendant claiming ineffective assistance of counsel must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. See *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004). We have repeatedly observed that it is unlikely that the outcome of the proceedings would have been different where properly introduced evidence against a defendant is overwhelming. See, e.g., *State v. Hunt*, 254 Neb. 865, 580 N.W.2d 110 (1998).

In this case, the record, recited in greater detail above, established that Jim was the sole caregiver at the time of Layne's death, that Layne struggled and was injured thereby,

and that Layne's death was caused by "asphyxiation secondary to smothering." The inadvertent reference to one of Layne's three prior injuries was incidental compared to the properly received evidence at trial regarding the event causing Layne's death. Because the properly introduced evidence against Jim was overwhelming, he failed to demonstrate a reasonable probability that but for the performance by his trial counsel, the outcome of his trial would have been different. Jim has not established the prejudice prong of his ineffective assistance of counsel claim, and we find no merit to his argument regarding the inadvertent playing of the remark in the videotape. There is no reasonable probability that inclusion of this issue would have changed the result of the appeal. See *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008). Appellate counsel was therefore not ineffective when he did not raise this issue.

[12,13] With respect to Jim's claim that trial counsel failed to take the required steps after the objectionable comment was admitted, based on reasonable trial strategy, we find no deficiency, and therefore, trial counsel's actions in this regard were not ineffective. When considering whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably. See *State v. Hudson*, 277 Neb. 182, 761 N.W.2d 536 (2009). Furthermore, trial counsel is afforded due deference to formulate trial strategy and tactics. When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003).

In this case, the district court found that trial counsel's decisions after the inadvertent playing of the unredacted videotaped testimony involved reasonable trial strategy and were not ineffective. The record shows that in response to the playing of the testimony, trial counsel's immediate reaction was to ask for a mistrial. Trial counsel testified in this postconviction case that after the motion was denied, in requesting an admonishment, he attempted to address the objectionable testimony without highlighting the testimony. Based on this record, the district court's finding that trial counsel's actions were "reasonable, strategic decisions" was not clearly erroneous. The district

court did not err when it concluded that trial counsel's actions did not constitute deficient performance, and therefore, appellate counsel was not ineffective when he did not raise this purported error on direct appeal.

CONCLUSION

Because Jim did not establish that his trial counsel was ineffective, he failed to establish that his appellate counsel was ineffective. The district court did not err when it denied Jim's motion for postconviction relief based on the claim that he was denied effective assistance of appellate counsel. We therefore affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
L.T. THOMAS, APPELLANT.
769 N.W.2d 357

Filed July 31, 2009. No. S-08-1177.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Constitutional Law: Proof.** A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution.
3. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
4. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
5. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to 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.
6. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues that were known to the defendant and could have been litigated on direct appeal.

7. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** In order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.
8. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, 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 in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. In order 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. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
9. **Effectiveness of Counsel: Presumptions.** In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.
10. **Trial: Effectiveness of Counsel: Witnesses.** The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves unproductive, will not, without more, sustain a finding of ineffectiveness of counsel.

Appeal from the District Court for Douglas County: W. Russell Bowie III, Judge. Affirmed.

James E. Schaefer and Jill A. Podraza, of Gallup & Schaefer, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, and Miller-Lerman, JJ.

Heavican, C.J.

I. INTRODUCTION

L.T. Thomas appeals the denial of his motion for postconviction relief by the Douglas County District Court. Thomas was convicted in 1995 of murder in the second degree, first degree assault, and two counts of use of a firearm to commit a felony. Afterward, Thomas was found to be a habitual criminal and his

sentences were enhanced. In 2002, Thomas appealed, and in *State v. Thomas* (*Thomas I*),[1] we affirmed Thomas' convictions but found there was insufficient evidence to sentence Thomas as a habitual criminal and remanded the cause for resentencing. Thomas was found to be a habitual criminal at his resentencing, and, on appeal in 2004, in *State v. Thomas* (*Thomas II*),[2] we affirmed his sentences. Thomas filed this postconviction motion, alleging ineffective assistance of trial and appellate counsel. Thomas' motion was denied, and he appealed. We affirm the decision of the district court.

II. FACTS

A more detailed recitation of facts can be found in *Thomas I*. But in summary, Thomas was convicted of second degree murder, first degree assault, and two counts of use of a firearm to commit a felony. In June 1994, Thomas shot at two men who were in a vehicle in Omaha, Nebraska. Thomas claimed that he shot the men in self-defense after being threatened with a gun. The driver of the vehicle was shot in the left leg and crashed into a building while attempting to drive to a hospital at a high rate of speed. The driver later died of the injuries he received in the crash. The passenger was shot three times but survived.

Thomas' first direct appeal failed because his attorney, rather than Thomas, signed the poverty affidavit, but we granted Thomas a new direct appeal. Among the claims raised in *Thomas I* was a claim that his trial counsel was ineffective for failing to call a witness who would have impeached the testimony of certain witnesses for the prosecution and for failing to object to testimony regarding the speed of the vehicle driven by one of the victims. As noted, we affirmed Thomas' convictions but found insufficient evidence to sentence him as a habitual criminal. We therefore vacated Thomas' sentences and remanded the cause for a new enhancement hearing and for resentencing.[3]

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[1] *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002).

[2] *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

[3] *Thomas I, supra* note 1.

On rehearing, Thomas filed a motion to quash the information charging him with second degree murder, on the ground that it was based on an unconstitutional statute, and filed a motion to arrest judgment on the same ground.[4] The district court denied his motions and resentenced Thomas as a habitual criminal. Thomas appealed from his resentencing, and in *Thomas II*, we affirmed.[5] Thomas then filed this postconviction appeal. After hearing arguments and receiving evidence, the district court denied Thomas' motion for postconviction relief.

III. ASSIGNMENTS OF ERROR

Thomas assigns as error that his trial counsel was ineffective for failing to (1) object to second degree murder as a lesser-included offense of first degree murder, (2) request a jury instruction for manslaughter, (3) call a necessary witness, and (4) object to testimony regarding the speed of the victim's vehicle at impact. Thomas also assigns as error that his appellate counsel was ineffective for failing to (1) assign as error trial counsel's failure to object to second degree murder as a lesser-included offense and (2) provide an adequate record regarding the fact that a necessary witness was not called.

IV. STANDARD OF REVIEW

[1,2] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.[6] A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution.[7]

[3] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.[8]

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[4] *Thomas II, supra* note 2.

[5] *Id.*

[6] *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001).

[7] *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

[8] *Caddy, supra* note 6.

[4,5] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[9] 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*,[10] an appellate court reviews such legal determinations independently of the lower court's decision.[11]

V. ANALYSIS

[6,7] We first note that three of Thomas' four allegations of ineffective assistance of trial counsel are procedurally barred. These include failing to (1) object to second degree murder as a lesser-included offense of first degree murder, (2) request a jury instruction for manslaughter, and (3) object to testimony regarding the speed of the vehicle at impact. A motion for postconviction relief cannot be used to secure review of issues that were known to the defendant and could have been litigated on direct appeal.[12] In order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.[13]

Thomas' appellate counsel was different from his trial counsel. Thomas was aware of those alleged issues of ineffective assistance of trial counsel on his direct appeal, and even if Thomas was not aware of those issues, they are apparent from the record. The only ineffective assistance of trial counsel claim preserved from Thomas' direct appeal is his trial counsel's failure to call a witness he claims would have impeached

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[9] *State v. Hudson*, 277 Neb. 182, 761 N.W.2d 536 (2009).

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

[11] *Hudson, supra* note 9.

[12] *Burlison, supra* note 7.

[13] *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008).

the testimony of other prosecution witnesses.[14] In *Thomas I*, we found the record was insufficient to properly consider that assignment of error. Therefore, the ineffective assistance of trial counsel claim is the only one not barred on postconviction review.

1. Thomas' Counsel Was Not Ineffective for Failing to Call Witness

[8,9] Thomas contends that his trial counsel was ineffective for failing to call a certain police officer as a witness to testify during his trial. In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland*,[15] 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 in the area.[16] Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. In order 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. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.[17] In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.[18]

Thomas claims the officer's testimony would have impeached the testimony of certain witnesses for the prosecution. Thomas states that if the officer had been called to testify, "his testimony could have impeached the testimony of . . . a witness offered by the State, as to who was present the evening the alleged events took place."[19] Thomas is referring to an eyewitness who testified for the State during Thomas' trial as to those

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[14] *Thomas I, supra* note 1.

[15] *Strickland, supra* note 10.

[16] *State v. Lopez*, 274 Neb. 756, 743 N.W.2d 351 (2008).

[17] *Id.*

[18] *Id.*

[19] Brief for appellant at 32.

present at the scene.[20] Trial counsel was deposed regarding the testimony of the police officer. During that testimony, counsel could not remember that particular officer. He further testified that it was his regular practice to call police officers when their testimony was inconsistent with that of other witnesses.

[10] The district court found that trial counsel's decision not to call the police officer was a matter of trial strategy. "The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves unproductive, will not, without more, sustain a finding of ineffectiveness of counsel."[21]

Other than the assertion that his attorney was ineffective for failing to call the police officer, Thomas has given us no reason to believe that his counsel's performance was deficient or that Thomas was prejudiced. Thomas' claim at trial was that he had acted in self-defense. There was never any dispute as to whether Thomas or the two victims were at the scene. Even if the officer's testimony had impeached testimony from other witnesses as to who was present at the scene, Thomas cannot maintain a claim of prejudice, as he never denied that he and the victims were present.

2. Thomas' Claim of Ineffective Assistance of Appellate Counsel is Without Merit

(a) Thomas' Appellate Counsel Was Not Ineffective for Failing to Create Record

Thomas alleges that his appellate counsel was ineffective for failing to create a sufficient record regarding trial counsel's failure to call the police officer as a witness. In *Thomas I*, we stated that only the trial record was properly before us and that the testimony of trial counsel was not part of that record.[22] Even if the performance of Thomas' appellate counsel was deficient for failing to ensure that we had a complete record in *Thomas I*, Thomas cannot show prejudice. Thomas' appellate

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[20] *Thomas I, supra* note 1.

[21] *State v. Lindsay*, 246 Neb. 101, 108, 517 N.W.2d 102, 107 (1994).

[22] *Thomas I, supra* note 1. See, also, *Lindsay, supra* note 21.

counsel deposed trial counsel regarding his failure to call the police officer, and the issue was raised on direct appeal. As already discussed, Thomas could not show any prejudice from his trial counsel's failure to call the officer. The record is properly before us now, and we find that Thomas suffered no prejudice from our inability to reach the issue in *Thomas I*.

(b) Thomas' Appellate Counsel Was Not Ineffective for Failing to Raise Issue of Second Degree Murder Instruction

Thomas also claims his appellate counsel was ineffective for failing to allege that his trial counsel was ineffective for not objecting to the lesser-included second degree murder instruction. Essentially, Thomas contends that the lesser-included second degree murder jury instruction was given in error, because there was a requirement of malice in the jury instruction not present in the statute defining second degree murder.

Neb. Rev. Stat. § 28-304 (Reissue 2008) has not contained language regarding malice for second degree murder since 1979. Malice was read into the statute by prior decisions of this court, and hence used in pattern jury instructions until our decision in *State v. Burlison*,[23] decided 3 years after Thomas' convictions. In *Burlison*, we determined that malice was no longer a required element of second degree murder.[24] We later determined that our decision in *Burlison* could be applied retroactively.[25]

Thomas alleges that because the statutory language relied upon in *Burlison* was in place at the time of his jury trial, his appellate counsel was ineffective for failing to allege ineffective assistance of trial counsel on this matter in his direct appeal. In essence, appellate counsel should have considered Thomas' trial counsel's failure to anticipate *Burlison* to be deficient performance. We conclude that Thomas is unable to demonstrate that he was prejudiced by any alleged deficiency in appellate counsel's performance.

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[23] *Burlison, supra* note 7.

[24] *Id.*

[25] *State v. Redmond*, 262 Neb. 411, 631 N.W.2d 501 (2001).

We held in *State v. Davis*[26] that a defendant convicted of second degree murder was not prejudiced when a jury instruction required a finding of malice. We determined that proving malice "created a greater burden on the State regarding intent."[27] The prosecution in this case likewise bore a greater burden to prove the additional element of malice, and therefore, Thomas cannot demonstrate prejudice.

3. § 28-304 Is Not Unconstitutional

Finally, Thomas argues that removing the malice requirement from the second degree murder statute renders § 28-304 unconstitutional. The State contends that Thomas argued this claim but did not assign it as error. We agree with the State that Thomas did not technically assign this issue as error. We nevertheless conclude that Thomas' assignment of error with respect to the ineffectiveness of appellate counsel on the second degree murder instruction encompassed his argument regarding the constitutionality of § 28-304 and is therefore preserved on appeal. We conclude, however, that this issue is procedurally barred.

Thomas raised this issue in *Thomas II*, having filed both a motion to quash and a motion in arrest of judgment after his first appeal, arguing that § 28-304 was unconstitutionally vague.[28] At that time, we concluded that Thomas' claim was waived because he did not raise it in his first direct appeal.[29] In order to preserve this issue for review now, Thomas should have argued that his appellate counsel was ineffective for failing to timely raise the constitutional issue in his first direct appeal, which he did not do. Even if the issue had been properly raised, however, Thomas cannot show that he was prejudiced, because we addressed the issue of whether § 28-304 was unconstitutionally vague in *State v. Caddy*.[30]

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[26] *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008).

[27] *Id.* at 761, 757 N.W.2d at 373.

[28] *Thomas II, supra* note 2.

[29] *Id.*

[30] *Caddy, supra* note 6.

In *Caddy*, the defendant sought postconviction relief for his second degree murder conviction, arguing that § 28-304 was unconstitutionally vague. The defendant's argument was that § 28-304 was void for vagueness because it was indistinguishable from the crime of manslaughter as defined by Neb. Rev. Stat. § 28-305 (Reissue 2008). We stated that while there may be some ambiguity between §§ 28-304 and 28-305, "there is still little question whether § 28-304 provides with reasonable clarity that the intentional killing of another may be criminal."[31] We went on to conclude that

> provided that conduct is of a sort known among the lay public to be criminal, a person is not entitled to clear notice that the conduct violates a *particular* criminal statute. It is enough that he or she knows that what he or she is about to do is probably or certainly criminal.[32]

Furthermore, the language of the two statutes makes the differences between manslaughter and second degree murder clear. Section 28-305 states that "[a] person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act." Section 28-304, in contrast, states in part that "[a] person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." The differences between manslaughter and second degree murder are apparent from the plain language of the statutes.

VI. CONCLUSION

In order to prevail on a motion for postconviction relief, a defendant must demonstrate that his or her constitutional rights were violated. And, in order to prevail on an ineffective assistance of counsel claim, a defendant must show that his or her counsel's performance was deficient and that he or she was prejudiced by that deficient performance. Thomas has not been able to show that his constitutional rights were violated, that either his trial counsel's or appellate counsel's performance was deficient, or

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[31] *Id.* at 45, 628 N.W.2d at 258.

[32] *Id.* at 46, 628 N.W.2d at 259 (emphasis in original).

that he was prejudiced by either of his counsel's alleged deficient performance. Thomas' request for postconviction relief was therefore properly denied by the district court.

AFFIRMED.

McCORMACK, J., participating on briefs.

KENNETH ROSS METCALF, APPELLANT, V.
RITA JO METCALF, APPELLEE.
769 N.W.2d 386

Filed August 7, 2009. No. S-07-1346.

1. **Modification of Decree: Appeal and Error.** Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.
2. **Modification of Decree: Alimony: Good Cause: Words and Phrases.** Pursuant to Neb. Rev. Stat. § 42-365 (Reissue 2008), alimony orders may be modified or revoked for good cause shown. Good cause means a material and substantial change in circumstances and depends upon the circumstances of each case.
3. **Modification of Decree: Alimony: Good Cause.** Good cause is demonstrated by a material change in circumstances, but any changes in circumstances which were within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not justify a change or modification of an alimony order.
4. **Modification of Decree: Alimony: Proof.** The moving party has the burden of demonstrating a material and substantial change in circumstances which would justify the modification of an alimony award.
5. **Modification of Decree.** To determine whether there has been a material and substantial change in circumstances warranting modification of a divorce decree, a trial court should compare the financial circumstances of the parties at the time of the divorce decree, or last modification of the decree, with their circumstances at the time the modification at issue was sought.
6. **Modification of Decree: Alimony.** In cases where there has been a previous attempt to modify support, the court must first consider whether circumstances have changed since the most recent request for modification. But when considering whether there has been a material and substantial change in circumstances justifying modification, the court will consider the change in circumstances since the date of the last order establishing or modifying alimony.

Petition for further review from the Court of Appeals, IRWIN, MOORE, and CASSEL, Judges, on appeal thereto from the

District Court for Lancaster County, JEFFRE CHEUVRONT, Judge. Judgment of Court of Appeals affirmed.

Paul E. Galter, of Butler, Galter, O'Brien & Boehm, for appellant.

Kristina M. Teague and Donald H. Bowman, of Bowman & Krieger, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, and MCCORMACK, JJ.

MCCORMACK, J.

NATURE OF CASE

Kenneth Ross Metcalf filed a complaint to modify, seeking a reduction in his alimony obligation. The district court denied his complaint, and a few months later, Kenneth filed a second complaint to modify, again seeking a reduction in his alimony obligation. The district court denied the second complaint, concluding that since the denial of Kenneth's first complaint, he failed to show that there had been a material change in circumstances warranting a reduction in his alimony. Kenneth appealed, and the Nebraska Court of Appeals affirmed. We granted Kenneth's petition for further review.

BACKGROUND

Kenneth and Rita Jo Metcalf were divorced in 1999, and in the decree of dissolution entered on March 18, 1999, the district court ordered Kenneth to pay Rita alimony of $2,000 per month for a period of 120 months beginning April 1. In the original dissolution decree, Kenneth's monthly gross income was determined to be $8,211 per month, or $98,532 per year. Rita's income was determined to be $1,337 per month, or $16,044 per year.

On March 31, 2005, Kenneth filed a complaint seeking a reduction of his alimony obligation, alleging that since 1999, his income decreased and Rita's income increased. The court held a hearing on the matter on December 20, 2005, and on January 26, 2006, the court entered an order denying modification. The court concluded that Kenneth failed to prove a

material and substantial change in circumstances had occurred to warrant modification. Kenneth did not appeal this order, but instead, on March 15, he filed a second complaint for modification of alimony.

The district court held an evidentiary hearing regarding Kenneth's second complaint to modify alimony. Rita filed a motion in limine asking the court to exclude any evidence presented at the first modification hearing that would show that there had been a material change in circumstances warranting a reduction in alimony. Rita asserted that any such evidence was barred by collateral estoppel. The court limited the evidence at the second hearing, allowing only evidence of changes which occurred after December 20, 2005, the date the first hearing was held.

An evidentiary hearing was held before the district court in the current modification proceedings on October 15, 2007. Kenneth has worked as a chiropractic physician for 23 years. Kenneth is currently married, and his wife is employed as a nurse. Kenneth testified with respect to his current health, indicating that he has issues with "arthritic changes" in his knees and hands which limit him to a degree in his work as a chiropractor and that he has recently experienced problems with dizziness. While Kenneth had health insurance at the time of the divorce in 1999, he did not have health insurance at the time of the second modification hearing, because he does not have funds to pay for insurance.

Before becoming a chiropractor, Kenneth was a licensed funeral director and embalmer. At the time of the second modification hearing, Kenneth had investigated other employment with three local funeral firms because of the diminishing income in his current profession. Kenneth hoped to find employment within the limitations of his current physical issues, but he has not been able to find employment with a funeral firm that would eliminate the need for lifting and carrying associated with that business.

At the second modification hearing, the court took judicial notice of the original divorce decree and certain other exhibits, which were received into evidence at the first modification hearing. These exhibits show that Kenneth's average yearly

income for 1996 through 2004 was $112,703 ($114,918 in 1996, $98,533 in 1997, $95,000 in 1998, $99,787 in 1999, $140,981 in 2001, $159,091 in 2002, $44,070 in 2003, and $149,244 in 2004; no income for 2000 was shown on the exhibit). The court also took judicial notice of Kenneth's 2004 tax return, showing income of $149,244, and a financial statement Kenneth submitted to his bank dated May 24, 2005, which showed that Kenneth's income was $80,000.

At the second modification hearing, Kenneth introduced his 2005 and 2006 tax returns into evidence. The returns show that his net income from self-employment was $50,047 in 2005 and $50,293 in 2006. Kenneth admitted that his 2005 and 2006 tax returns did not show a change in his income, but Kenneth testified that he discovered some accounting errors which affected his 2005 income and expense figures.

According to Kenneth, his 2005 income was less than what his income tax return showed, because he incurred $20,000 in unpaid business debts in 2005. Kenneth testified that he did not have the money to pay those expenses but had he been able to, his income would have been less than what his 2005 return showed. Kenneth, however, was unable to produce any receipts proving that such unpaid debts existed. These debts were ultimately discharged in bankruptcy.

Kenneth also testified that his employee made a billing error in 2004 and 2005, the result of which was that Kenneth's computer erroneously showed that billings were sent when in fact they were not. According to Kenneth, his 2006 income included money not earned in 2006 but received as a result of sending out bills that should have been sent out in 2004 or 2005. Kenneth testified that approximately half of his 2006 income was income that was actually earned in 2004 or 2005.

Kenneth also explained how his financial state had changed since the first modification proceeding. Kenneth had a retirement account of approximately $35,000, but he cashed it in incrementally starting in 2003, attempting to avoid bankruptcy. Kenneth eventually filed a chapter 7 bankruptcy petition and received a discharge. However, Kenneth still owes $21,000 to the Internal Revenue Service that was not

discharged, and he is making payments of $250 per month to pay off that debt.

Additionally, Kenneth deeded his home back to the mortgage lender after foreclosure proceedings were initiated, and he gave back the 2004 Dodge Durango he was leasing. He now drives a 1996 Toyota Camry with approximately 140,000 miles on it. Because of Kenneth's alleged decrease in income, Kenneth no longer has health insurance. Kenneth also had to eliminate his full-time employee position in 2006. Further, Kenneth testified that he has continued to experience a gradual decline in new patients and services rendered, but Kenneth provided no explanation as to why he was losing patients. At the time of the second hearing, Kenneth testified that his net income was about $3,000 per month.

Kenneth was also questioned about his criminal history. In 1995, Kenneth was found guilty of debauching a minor, a Class I misdemeanor. Rita argues that if Kenneth's income has decreased, it is likely a result of his criminal history, which is a result of his own wrongdoing, and that therefore, modification is not warranted.

At the second modification hearing, Rita testified about her financial situation, and the court took judicial notice of Rita's income tax returns for 2003 and 2004. Her tax returns show income of $39,267 for 2003 and $64,708 for 2004. These amounts do not include the $24,000 in alimony Rita received in each of those years. Rita's net income in 2005 was $9,408, and in 2006, Rita suffered a net loss of $37,867. In the first 8 months of 2007, Rita's net income was $10,708. Rita cashed in her IRA in the amount of $23,800 to meet her monthly living expenses of $3,633.

At the time of the parties' divorce, Rita owned a beauty salon. Thereafter, Rita owned a drycleaning business, and in 2005, she and her son opened a coffee shop. Since then, they opened another coffee shop. Rita and her son also acquired some investment property which cost $195,000. Rita testified that she relied upon her alimony award when she purchased the investment property and that without the alimony, she would not be able to make payments of both interest and principal. A few years before the second modification hearing, Rita

refinanced her home to obtain part of the money for the land purchase, borrowing $110,000 against her house.

After considering the evidence, the court entered an order dismissing Kenneth's second complaint to modify alimony. The court concluded that because Kenneth failed to appeal the January 2006 order, which dismissed his first complaint for modification, Kenneth was required to show a material change in circumstances since January 26, 2006. The court also concluded that Kenneth failed to show a material change in circumstances in the 2 to 3 months between January and March 2006. Kenneth appealed, and the Court of Appeals affirmed, concluding that the district court was correct to require Kenneth to show a material change in circumstances since the time his prior request for modification was denied.[1]

The Court of Appeals concluded that the district court was correct to require Kenneth to show a material change in circumstances since the time his prior request for modification was denied. To determine whether there has been a material and substantial change in circumstances warranting modification of a divorce decree, a trial court should compare the financial circumstances of the parties at the time of the divorce decree, or last modification of the decree, with their circumstances at the time the modification at issue was sought.[2] The Court of Appeals, in denying Kenneth's second request for modification, relied in part on this court's decision in *Simpson v. Simpson*.[3] In *Simpson*, the former wife sought, on two occasions, to increase her former husband's alimony from that ordered in the decree. Her first attempt was unsuccessful. In the second modification proceeding, the trial court considered whether there had been a change in circumstances since the denial of the first modification attempt. We affirmed.

In this case, the Court of Appeals' dissenting opinion pointed out that the issue of whether there must be a change since the most recent attempted modification was not specifically

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[1] *Metcalf v. Metcalf*, 17 Neb. App. 138, 757 N.W.2d 124 (2008).

[2] *Finney v. Finney*, 273 Neb. 436, 730 N.W.2d 351 (2007).

[3] *Simpson v. Simpson*, 275 Neb. 152, 744 N.W.2d 710 (2008).

addressed by this court in *Simpson*. Moreover, the dissenting opinion stated that a party should be required to show a material change in circumstances since the time of the original decree or since the most recent *successful* modification of the decree.

The Court of Appeals also relied on principles of collateral estoppel. The Court of Appeals noted that under the doctrine of collateral estoppel, when an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot be relitigated between the same parties or their privities in any future litigation. The dissenting opinion disagreed, stating that collateral estoppel did not apply. The dissent stated: "The issue being raised by Kenneth at this time is whether there has been a material change in circumstances between the time of the original decree and the present action, which is not the issue that was litigated and resolved in 2006."[4] Ultimately, the Court of Appeals concluded that the district court did not err in limiting its review to whether a material change in circumstances had occurred since the last modification proceeding.

ASSIGNMENTS OF ERROR

Kenneth argues, restated and consolidated, that the Court of Appeals erred in concluding (1) that there had not been a change in circumstances warranting a reduction in his alimony obligation and (2) that he needed to show a material change in circumstances since January 26, 2006, rather than a material change in circumstances since March 18, 1999, when the decree of dissolution was entered.

STANDARD OF REVIEW

[1] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.[5]

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[4] *Metcalf v. Metcalf, supra* note 1, 17 Neb. App. at 148, 757 N.W.2d at 131 (Irwin, Judge, dissenting).

[5] *Finney v. Finney, supra* note 2.

ANALYSIS

[2-4] Alimony orders may be modified or revoked for good cause shown.[6] Good cause means a material and substantial change in circumstances and depends upon the circumstances of each case.[7] Good cause is demonstrated by a material change in circumstances, but any changes in circumstances which were within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not justify a change or modification of an alimony order.[8] The moving party has the burden of demonstrating a material and substantial change in circumstances which would justify the modification of an alimony award.[9]

[5] To determine whether there has been a material and substantial change in circumstances warranting modification of a divorce decree, a trial court should compare the financial circumstances of the parties at the time of the divorce decree, or last modification of the decree, with their circumstances at the time the modification at issue was sought.[10] However, there is some confusion about the time period that must be considered to determine whether there has been a change in circumstances in cases where there has been a previous attempt to modify alimony prior to the current motion. This is an issue of first impression for this court.

[6] We determine that in cases where there has been a previous attempt to modify support, the court must first consider whether circumstances have changed since the most recent request for modification. But when considering whether there has been a *material and substantial* change in circumstances justifying modification, the court will consider the change in circumstances since the date of the last order establishing or

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[6] *Id.*; Neb. Rev. Stat. § 42-365 (Reissue 2008).

[7] *Finney v. Finney, supra* note 2.

[8] *Marcovitz v. Rogers*, 276 Neb. 199, 752 N.W.2d 605 (2008).

[9] *Finney v. Finney, supra* note 2.

[10] *Simpson v. Simpson, supra* note 3; *Finney v. Finney, supra* note 2.

modifying alimony.[11] In other words, a judgment for alimony may be modified only upon a showing of facts or circumstances that have changed since the last order granting or denying modification was entered. But once some change has been established since the last request, the analysis focuses on the change in circumstances since alimony was originally awarded or last modified. We adopt this rule because it recognizes the force of res judicata; modification will be considered only when there has been a change in circumstances since the last request for modification. But if there has been no change, modification is not justified, because the request is essentially the same as the last request.[12]

In this case, the Court of Appeals' majority concluded that the issue of whether a change in circumstances occurred between the time of the entry of the decree and the modification proceeding was fully litigated. And as such, the Court of Appeals' majority held that the district court did not err in limiting its review to whether a material change in circumstances had occurred since the last modification proceeding. We agree with the Court of Appeals' majority that the district court was correct by limiting its review to only the change in circumstances occurring since the first modification proceeding. However, any change in circumstances occurring since the first modification proceeding should have been compared to the original decree when determining whether the change in circumstances was a material and substantial change warranting modification.

Any changes in Kenneth's circumstances that occurred prior to the first modification proceeding are settled, and the doctrine of res judicata prevents the district court from considering any change based on those circumstances.[13] But the initial alimony award was not affected by the first modification

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[11] See, *Ebach v. Ebach*, 757 N.W.2d 34 (N.D. 2008); *Demartino v. Demartino*, 79 Conn. App. 488, 830 A.2d 394 (2003).

[12] See *Bowe v. Bowe*, 557 So. 2d 793 (Miss. 1990).

[13] See *Walters v. Walters*, 177 Neb. 731, 131 N.W.2d 166 (1964). See, also, *Dunlap v. Dunlap*, 145 Neb. 735, 18 N.W.2d 51 (1945).

proceeding, and Kenneth is currently paying alimony based upon the circumstances as they existed in 1999. As such, the change in circumstances, if any, occurring after the first modification proceeding must be compared to the parties' financial circumstances at the time of the initial divorce decree to determine whether there has been a material and substantial change in circumstances warranting a modification of Kenneth's alimony obligation.

In this case, the district court and the Court of Appeals concluded that the parties' circumstances were about the same as they were at the first modification proceeding, and thus, the Court of Appeals concluded that Kenneth failed to establish that there was any change in circumstances from the first modification to the current modification. The establishment of changed circumstances is necessary in order to modify alimony. Our de novo review of the record reveals that the district court's determination that Kenneth failed to show that his circumstances changed from the previous modification to the current modification proceeding was not an abuse of discretion. As such, we conclude that because nothing has changed since the first modification proceeding, Kenneth's motion to modify alimony was properly denied.

CONCLUSION

We conclude that when there has been one or more previous modification proceedings, the court should first determine whether there has been any change in circumstances arising after the most recent modification proceeding. If circumstances have changed since the time of the most recent request for modification, then the court should consider the change in circumstances since the original decree or order affecting alimony to determine whether there has been a material and substantial change. If there has been no change between the most recent modification request and the current request, the current modification is barred by res judicata. Based on our review of the record, Kenneth has failed to prove that the circumstances have changed since the most recent modification request. Since the circumstances are the same as they were at the prior modification proceeding, Kenneth's request is barred by res judicata.

For different reasons from those stated by the Court of Appeals, we conclude that Kenneth's application to modify alimony was properly denied, and we affirm the judgment of the Court of Appeals to that effect.

AFFIRMED.

MILLER-LERMAN, J., participating on briefs.
GERRARD, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
DAVID L. DUNSTER, APPELLANT.
769 N.W.2d 401

Filed August 7, 2009. No. S-08-227.

1. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion.
2. **Moot Question: Jurisdiction: Appeal and Error.** While mootness does not prevent appellate jurisdiction, because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, an appellate court reviews mootness determinations under the same standard of review as other jurisdictional questions.
3. **Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, an appellate court determines the issue as a matter of law.
4. **Effectiveness of Counsel: Appeal and Error.** A claim that defense counsel provided ineffective assistance presents 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.
5. **Statutes: Time.** While procedural statutes apply to pending litigation, new procedural statutes have no retroactive effect upon any steps that may have been taken in an action before such statutes were effective.
6. **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.
7. **Constitutional Law: Right to Counsel.** There is no constitutional right to effective assistance of standby counsel.

8. **Right to Counsel: Effectiveness of Counsel.** A defendant who elects to proceed pro se cannot thereafter complain that the quality of his or her own defense amounted to a denial of effective assistance of counsel.
9. ____: ____. A defendant who elects to proceed pro se may maintain a claim for ineffective assistance of counsel for any acts or omissions that occurred before the defendant elected to proceed pro se.
10. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, 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 in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. In order 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. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
11. **Postconviction: Pleas: Waiver: Effectiveness of Counsel.** While normally a voluntary guilty plea waives all defenses to a criminal charge, in a postconviction proceeding brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
12. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** In order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.
13. **Postconviction: Appeal and Error.** A defendant cannot secure postconviction review of issues which were or could have been litigated on direct appeal.
14. **Effectiveness of Counsel: Records: Appeal and Error.** Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.
15. **Effectiveness of Counsel: Time: Appeal and Error.** Claims of ineffective assistance of counsel raised on direct appeal by the same counsel who represented the defendant at trial are premature and will not be addressed on direct appeal.
16. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When a defendant was represented both at trial and on direct appeal by lawyers employed by the same office, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Peter K. Blakeslee for appellant.

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

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

GERRARD, J.

David L. Dunster was convicted of murdering his prison cellmate and sentenced to death. His convictions and sentences were affirmed on direct appeal. This appeal is taken from the district court's denial, without an evidentiary hearing, of Dunster's first motion for postconviction relief. Because Dunster was represented by different counsel at trial and on direct appeal, the primary issue in this appeal is whether Dunster's claims are procedurally barred.

BACKGROUND

Dunster was already a convicted murderer when, on May 10, 1997, he strangled his cellmate. Dunster was charged with first degree murder and use of a weapon to commit a felony. He stood mute on the charges, and pleas of not guilty were entered on his behalf. The Lancaster County public defender's office was appointed to represent him. Dunster became dissatisfied with the public defender and sent a letter to the trial judge asking that the public defender be discharged. Dunster asked the trial court to allow him to withdraw his plea and plead guilty, then sentence him to death. Dunster refused to consult with the public defender about his decision to represent himself. The trial court appointed the Nebraska Commission on Public Advocacy (NCPA) for the limited purpose of advising Dunster on his request to proceed pro se. The NCPA's appointment was "to represent [Dunster] solely on [the] issue raised during [the] hearing regarding how [Dunster] wishes to proceed in this matter." After consulting with the NCPA, Dunster withdrew the issues he had raised "without prejudice" and the public defender continued to represent him. Counsel from the NCPA agreed that "the issues that were raised that necessitated the appointment of the [NCPA]" had been concluded, and the NCPA was released from the case.

At a pretrial hearing, Dunster's attorney from the public defender's office informed the court that he would be leaving the public defender's office and would not be available to try the case. Dunster asked for the NCPA to be appointed to represent him. The trial court denied that request and determined that the case would be reassigned to a different public defender. Dunster again moved to discharge the public defender and proceed pro se and moved to withdraw his plea and plead guilty. The trial court granted Dunster's motions and appointed the public defender's office as standby counsel. Dunster's plea was accepted, and he was convicted of first degree murder. Before the sentencing hearing, Dunster indicated to his standby counsel that he would like the public defender's office reappointed. Dunster claimed that his previous decisions to proceed pro se and plead guilty had occurred when he was impaired by medication. The public defender's office was reappointed to represent Dunster.

Dunster, through his counsel, requested a competency hearing. At the outset of the hearing, Dunster again moved to discharge the public defender. The court took the motion under advisement pending the competency hearing. The court determined that Dunster was competent and granted Dunster's motion to discharge the public defender, who was again appointed as standby counsel. Dunster appeared pro se at sentencing, with his standby counsel, and refused to present evidence in his defense. Dunster was sentenced to death.

The NCPA was appointed to represent Dunster on appeal to this court. Through counsel, Dunster argued, among other things, that he was denied effective assistance of counsel from the public defender. This court found the record sufficient to address his arguments, and we rejected them.[1] We affirmed Dunster's convictions and sentences.[2] Dunster, represented by the NCPA, separately filed motions in the trial court for a new trial and to vacate his death sentence as void, citing *Ring v.*

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[1] See *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001), *cert. denied* 535 U.S. 908, 122 S. Ct. 1210, 152 L. Ed. 2d 147 (2002).

[2] See *id.*

Arizona[3] and 2002 Neb. Laws, L.B. 1. Dunster's motions were denied. We affirmed the denial of his motion for new trial and dismissed his arguments with respect to the alleged voidness of his sentence.[4]

Dunster, through new counsel, filed the present motion for postconviction relief. Dunster alleged, among other things, that the trial court had been without authority to make findings of aggravating circumstances and to sentence him to death, because the Nebraska death penalty statutes in effect at the time were unconstitutional. Dunster also raised the constitutionality of electrocution as a means of execution. And Dunster alleged that he was denied effective assistance of trial and direct appeal counsel. Specifically, Dunster contended that direct appeal counsel was ineffective in *raising* ineffective assistance of trial counsel, because the record was insufficient to prove the claim. The postconviction court denied Dunster's motion for postconviction relief without an evidentiary hearing. The court specifically found that each counsel's representation of Dunster had not been deficient and that in any event, Dunster had not been prejudiced. Dunster appeals.

ASSIGNMENTS OF ERROR

Dunster assigns that the postconviction court erred in:

(1) failing to find that it lacked jurisdiction to impose a death sentence, because the Nebraska death penalty statutes were unconstitutional;

(2) failing to find that it lacked jurisdiction to impose a death sentence because it was without authority to make factual findings regarding an aggravating circumstance;

(3) failing to find that the indictment deprived it of jurisdiction to impose a death sentence because the indictment failed to allege an aggravating circumstance;

(4) failing to find that Dunster's sentence is void as a result of 2002 Neb. Laws, L.B. 1;

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[3] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

[4] See *State v. Dunster*, 270 Neb. 773, 707 N.W.2d 412 (2005).

(5) determining that the issue of the constitutionality of electrocution was procedurally barred;

(6) failing to grant an evidentiary hearing on whether Dunster received effective assistance of trial counsel during preparation for trial and at his competency hearing; and

(7) failing to grant an evidentiary hearing on whether Dunster received effective assistance of direct appeal counsel.

STANDARD OF REVIEW

[1-3] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion.[5] And while mootness does not prevent appellate jurisdiction, because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, an appellate court reviews mootness determinations under the same standard of review as other jurisdictional questions.[6] When a jurisdictional question does not involve a factual dispute, an appellate court determines the issue as a matter of law.[7]

[4] A claim that defense counsel provided ineffective assistance presents 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*,[8] an appellate court reviews such legal determinations independently of the lower court's decision.[9]

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[5] *State v. Bazer*, 276 Neb. 7, 751 N.W.2d 619 (2008).

[6] See *In re Interest of Taylor W.*, 276 Neb. 679, 757 N.W.2d 1 (2008).

[7] *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008), *cert. denied* 555 U.S. 901, 129 S. Ct. 228, 172 L. Ed. 2d 175.

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

[9] See *State v. Hudson*, 277 Neb. 182, 761 N.W.2d 536 (2009).

ANALYSIS

Constitutionality of Capital Sentencing Statutes

Dunster's first three assignments of error are predicated on the U.S. Supreme Court's holding in *Ring v. Arizona*,[10] that the Sixth Amendment precludes a sentencing judge sitting without a jury from finding an aggravating circumstance necessary for imposition of the death penalty, and this court's holding in *State v. Gales*[11] that Nebraska's capital sentencing scheme had been invalidated by the *Ring* decision.

But Dunster's conviction was final before the Court's decision in *Ring*, and we held in *State v. Lotter*[12] that the *Ring* decision did not apply retroactively to cases already final on direct appeal. The U.S. Supreme Court later reached the same conclusion in *Schriro v. Summerlin*.[13] Given the Court's decision in *Schriro*, we decline to reconsider our conclusion in *Lotter*, and find Dunster's first three assignments of error to be without merit.

L.B. 1

Dunster's fourth assignment of error is that his sentence is void as a result of the Legislature's enactment of 2002 Neb. Laws, L.B. 1, which amended Nebraska's capital sentencing statutes to comply with *Ring*. Dunster's argument seems to be that his sentence is void because the procedural requirements of L.B. 1 were not complied with when he was convicted and sentenced to death.

[5] But Dunster's conviction and sentence became final well before L.B. 1 was enacted. The new procedural requirements of L.B. 1 are simply not applicable to steps taken before the law was enacted.[14] While procedural statutes apply to pending litigation, new procedural statutes have no retroactive effect

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[10] *Ring, supra* note 3.

[11] *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003).

[12] *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003).

[13] *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004).

[14] See *Gales, supra* note 11.

upon any steps that may have been taken in an action before such statutes were effective.[15] We explained in *State v. Gales* that under such circumstances, "[a]ll things performed and completed under the old law must stand."[16] And in Dunster's case, as in *State v. Russell*,[17] the entire trial had already been completed in the district court—and here, the appeal had also become final—before the amendatory procedural act became effective.

Dunster cites no authority, nor are we aware of any, supporting his assertion that his sentence is void because of procedural requirements that were not imposed until after the judgment in his criminal trial was final. Therefore, we find no merit to this assignment of error.

Electrocution as Means of Execution

Dunster's fifth assignment of error is that the court erred in finding that his challenge to the constitutionality of electrocution, as a means of execution, was procedurally barred. As a technical matter, the district court's conclusion was correct.[18] But as a practical matter, Dunster's argument is moot.

[6] 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.[19] We held in *State v. Mata*[20] that electrocution as a method of execution is cruel and unusual punishment in violation of the Nebraska Constitution. Obviously, the State cannot carry out Dunster's sentence without a constitutionally

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[15] See, *id.*; *State v. Russell*, 194 Neb. 64, 230 N.W.2d 196 (1975).

[16] *Gales, supra* note 11, 265 Neb. at 635, 658 N.W.2d at 631, citing *Russell, supra* note 15.

[17] *Russell, supra* note 15.

[18] See *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006).

[19] See, *State v. Woods*, 255 Neb. 755, 587 N.W.2d 122 (1998); *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997).

[20] *Mata, supra* note 7.

acceptable method of execution.[21] And electrocution is no longer the method of execution under Nebraska law.[22] Stated plainly, Dunster is no longer subject to electrocution. Therefore, we need not consider this assignment of error.

Ineffective Assistance of Trial Counsel

[7-9] Dunster's sixth assignment of error raises the issue of effective assistance of trial counsel. Dunster's allegations appear to be entirely directed at counsel's performance while counsel was appointed to represent him, which is appropriate as we have held that there is no constitutional right to effective assistance of standby counsel.[23] And although a defendant who elects to proceed pro se "cannot thereafter complain that the quality of his [or her] own defense amounted to a denial of 'effective assistance of counsel,'"[24] the defendant may maintain a claim for ineffective assistance of counsel for any acts or omissions that occurred before the defendant elected to proceed pro se.[25] Therefore, the scope of our analysis does not include Dunster's self-representation.

[10,11] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland v. Washington*,[26] 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 in the area.[27] Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.[28] In order to show prejudice, the defendant must

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[21] See *id.*

[22] See L.B. 36, 101st Leg., 1st Sess.

[23] See *State v. Gunther, ante* p. 173, 768 N.W.2d 453 (2009).

[24] *Faretta v. California*, 422 U.S. 806, 834 n.46, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

[25] See, e.g., *Downey v. People*, 25 P.3d 1200 (Colo. 2001); *Hance v. Kemp*, 258 Ga. 649, 373 S.E.2d 184 (1988).

[26] *Strickland, supra* note 8.

[27] *State v. Rhodes*, 277 Neb. 316, 761 N.W.2d 907 (2009).

[28] *Id.*

demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[29] The two prongs of this test, deficient performance and prejudice, may be addressed in either order.[30] And while normally a voluntary guilty plea waives all defenses to a criminal charge, in a postconviction proceeding brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.[31]

[12] But most of Dunster's claims are procedurally barred. Dunster was represented by different counsel at trial and on direct appeal. Under Nebraska law, in order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.[32] As noted above, Dunster's direct appeal counsel *did* raise ineffective assistance of trial counsel as an issue, and we rejected those arguments on the merits. And the record establishes that the allegations of ineffective assistance of counsel that were not raised on direct appeal were known to Dunster at trial, because they formed the basis of many of his disagreements with the public defender's office.

[13] A defendant cannot secure postconviction review of issues which were or could have been litigated on direct appeal.[33] To the extent that Dunster is alleging trial counsel was ineffective in ways that were also raised on direct appeal, we have rejected those arguments and they cannot be relitigated here. And to the extent that Dunster's allegations of ineffective assistance of the public defender at trial were not raised on direct appeal, they are procedurally barred,

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[29] *Id.*

[30] *Id.*

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

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

[33] *Bazer, supra* note 5.

because they were known to the defendant and apparent on the record.[34]

[14] Dunster argues that we erred, on direct appeal, in finding that the record was sufficient to review the claims of ineffective assistance of trial counsel that Dunster actually raised. As Dunster notes, claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.[35] Dunster alleges that we should not have considered ineffective assistance of trial counsel on direct appeal, because contrary to our finding, the record was actually insufficient to adequately review the question.

But Dunster's allegation does not prevent his claims from being procedurally barred. Although Dunster may disagree, we determined in Dunster's direct appeal that the record was sufficient.[36] The remedy provided by the Nebraska Postconviction Act[37] "is cumulative and is not intended to be concurrent with any other remedy existing in the courts of this state."[38] The phrase "any other remedy" encompasses a direct appeal when the issue raised in the postconviction proceeding can be raised in the direct appeal.[39] From that principle is derived the rule that a motion for postconviction relief cannot be used to secure a further review of issues already litigated on direct appeal.[40] Dunster cannot use a motion for postconviction relief to collaterally attack issues that were decided against him on direct appeal.

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[34] See *State v. Thomas, ante* p. 248, 769 N.W.2d 357 (2009).

[35] *State v. Jones*, 274 Neb. 271, 739 N.W.2d 193 (2007).

[36] See *Dunster, supra* note 1.

[37] Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 2008).

[38] § 29-3003.

[39] *Molina, supra* note 32.

[40] See *id.*

[15,16] The only specifications of ineffective assistance of trial counsel that are not procedurally barred are the few allegations that relate to the performance of the NCPA, which represented Dunster in a limited capacity at trial, then represented him fully on direct appeal. Claims of ineffective assistance of counsel raised on direct appeal by the same counsel who represented the defendant at trial are premature and will not be addressed on direct appeal.[41] Therefore, when a defendant was represented both at trial and on direct appeal by lawyers employed by the same office, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.[42]

But Dunster's allegation is that the NCPA should have investigated the performance of the public defender's office and filed a motion to discharge the public defender and that it was ineffective in not doing so. In fact, the NCPA did not act deficiently, as the alleged omissions were outside the limited scope of the NCPA's appointment to advise Dunster.

In that regard, Dunster's argument is somewhat akin to a claim of ineffective assistance of standby counsel. There is no constitutional right to effective assistance of standby counsel.[43] But some courts have held that where counsel is appointed to act in some sort of limited capacity, a defendant can maintain a claim that counsel provided ineffective assistance—*within the limited scope of the duties assigned to or assumed by counsel*.[44] This occurs when, for instance, "standby" counsel ceases to stand by and actually steps in and assumes formal control of some aspect of the defendant's legal representation.[45] But a self-represented defendant may not claim ineffective assistance on account of counsel's failure to perform an act within the

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[41] *State v. Tucker*, 17 Neb. App. 487, 764 N.W.2d 137 (2009).

[42] *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004).

[43] *Gunther, supra* note 23.

[44] See, *People v. Blair*, 36 Cal. 4th 686, 115 P.3d 1145, 31 Cal. Rptr. 3d 485 (2005); *Downey, supra* note 25.

[45] See *id*.

scope of duties the defendant voluntarily undertook to perform personally.[46]

In this case, Dunster elected to proceed pro se, and the district court appointed the NCPA in the limited capacity of advising him with respect to that election. Dunster alleges that the NCPA provided ineffective assistance of counsel, because it did not investigate the representation provided by the public defender to that point or act to remedy the public defender's allegedly deficient representation. But that was beyond the scope of the duties with which the NCPA was charged. Dunster neither alleges nor argues that the NCPA performed deficiently within the limited scope of the duties it was assigned.

Nor was Dunster prejudiced by the alleged failure to investigate the public defender or move that the public defender be discharged. Multiple motions to discharge the public defender were filed and, eventually, sustained. Ineffective assistance of counsel arguments with respect to the public defender were raised and rejected on direct appeal.[47] And the underlying allegation that the public defender failed to investigate Dunster's medical condition at the time of the killing was an aspect of defense strategy that Dunster personally assumed when he undertook to represent himself.[48]

Dunster contended at oral argument that the NCPA was "complicit" in the public defender's alleged ineffectiveness. As we understand Dunster's argument, it is that the NCPA could not raise certain ineffective assistance of trial counsel claims on direct appeal because it would be tantamount to arguing the NCPA's own ineffectiveness, which it could not do. Therefore, Dunster asserted that his claims of ineffective assistance of the public defender are not procedurally barred because the NCPA could not raise them on direct appeal. But this conclusion rests on the claim that the NCPA was ineffective at trial—a claim we have already rejected. In other words, the NCPA's ability to raise issues on appeal was not fettered by

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[46] See *People v. Bloom*, 48 Cal. 3d 1194, 774 P.2d 698, 259 Cal. Rptr. 669 (1989).

[47] See *Dunster, supra* note 1.

[48] See, *Blair, supra* note 44; *Downey, supra* note 25; *Bloom, supra* note 46.

its own ineffectiveness at trial, because it was not ineffective at trial. Because Dunster was not limited in his ability to argue on direct appeal that the public defender had been ineffective, those claims are, as explained above, procedurally barred.

In short, the record from Dunster's direct appeal[49] affirmatively contradicts Dunster's argument that the NCPA should have investigated the public defender's performance or that Dunster was prejudiced by any failure to do so. This is, essentially, a recasting of the ineffective assistance of trial counsel claim that we considered and rejected on direct appeal. Dunster's claims of ineffective assistance of counsel are either procedurally barred or without merit.

Ineffective Assistance of Direct Appeal Counsel

Dunster's seventh and final assignment of error is that he was denied effective assistance of counsel on direct appeal. Dunster generally alleges two ways in which, he claims, direct appeal counsel was ineffective. One of those is that direct appeal counsel was ineffective in failing to challenge the constitutionality of electrocution as a method of execution. As discussed above, Dunster is no longer subject to electrocution. Therefore, Dunster was not prejudiced by his direct appeal counsel's failure to challenge its constitutionality.

Dunster's other argument is that direct appeal counsel was ineffective in *raising*, on direct appeal, the issue of ineffective assistance of trial counsel. But direct appeal counsel's performance was not deficient in that regard. As noted above, where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.[50]

Dunster's claim is that ineffective assistance of trial counsel is now a procedurally barred issue because it was raised on direct appeal. But direct appeal counsel was *required* to raise ineffective assistance of trial counsel in order to preserve it for

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[49] See *Dunster, supra* note 1.

[50] *Molina, supra* note 32.

any postconviction review.[51] As it happened, this court concluded that the record was sufficient to review the issue and found it to be without merit. But because the issue was apparent from the record, it would have been procedurally barred either way. Direct appeal counsel did not act deficiently in raising the issue, nor was Dunster prejudiced as a result. Dunster's final assignment of error is without merit.

CONCLUSION

For the reasons stated above, Dunster's assignments of error are either procedurally barred or without merit. Because the files and records affirmatively show that Dunster is entitled to no relief, there was no need for an evidentiary hearing.[52] The judgment of the district court denying Dunster's motion for postconviction relief is affirmed.

AFFIRMED.

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[51] See, e.g., *Thomas, supra* note 34.

[52] See *Bazer, supra* note 5.

AARON FERER AND ROBIN MONSKY, APPELLANTS, AND SHARON MONSKY, APPELLEE, V. AARON FERER & SONS CO., A NEBRASKA CORPORATION, ET AL., APPELLEES.

770 N.W.2d 608

Filed August 7, 2009. No. S-08-534.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and the court gives that party the benefit of all reasonable inferences deducible from the evidence.
2. **Pleadings: Appeal and Error.** Permission to amend a pleading is addressed to the discretion of the trial court, and the trial court's decision will not be disturbed absent an abuse of discretion.
3. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of a controversy.
4. **Corporations: Actions: Parties.** Generally, a shareholder may not bring an action in his or her own name to recover for wrongs done to the corporation or its property.

5. **Corporations: Derivative Actions: Parties.** The right of a shareholder to sue is derivative in nature and normally can be brought only in a representative capacity for the corporation.
6. **Pleadings.** Amendment of a complaint is not a matter of right.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

James D. Sherrets and Jason M. Bruno, of Sherrets & Boecker, L.L.C., for appellants.

Thomas J. Culhane and Heather B. Veik, of Erickson & Sederstrom, P.C., for appellee Aaron Ferer & Sons Co.

Michael A. Nelsen, of Hillman, Forman, Nelsen, Childers & McCormack, for appellees Matthew Ferer and Whitney Ferer.

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

PER CURIAM.

NATURE OF CASE

Aaron Ferer and Robin Monsky (collectively appellants) are shareholders of Aaron Ferer & Sons Co. (AFS). They initiated an action in 2001 against Matthew Ferer, Whitney Ferer, and AFS (collectively appellees) in Douglas County District Court.

Appellants' fourth amended complaint asserted eight causes of action. The first six were dismissed on summary judgment, and we affirmed the dismissal in *Ferer v. Aaron Ferer & Sons* (*Ferer I*).[1] Following our decision, appellants voluntarily dismissed their seventh cause of action. The district court subsequently denied appellants' motion to amend their fourth amended complaint and granted appellees' motion for summary judgment on the remaining eighth cause of action. The court dismissed appellants' fourth amended complaint, and this appeal followed.

[1] *Ferer v. Aaron Ferer & Sons*, 272 Neb. 770, 725 N.W.2d 168 (2006).

BACKGROUND

The operative complaint at issue in both *Ferer I* and the case at bar is appellants' fourth amended complaint, which set forth eight causes of action: (1) declaratory judgment regarding dissenters' rights, (2) estoppel of AFS from asserting that appellants have no dissenters' rights, (3) statutory claim for a dividend, (4) breach of fiduciary duty and statutory duty by Matthew Ferer and Whitney Ferer, (5) specific performance compelling payments to appellants, (6) involuntary liquidation, (7) violation of applicable state securities laws, and (8) breach of fiduciary duty and theft of a corporate opportunity. The first six causes of action sought to compel appellees to comply with the dissenters' rights provisions of the Business Corporation Act.[2] Appellants sought to receive the value of their shares of stock from AFS, compel appellees to pay appellants their pro rata share of the proceeds from the sale of certain AFS assets, and receive prejudgment interest.[3]

In *Ferer I*, the parties filed cross-motions for partial summary judgment, and the district court sustained appellees' motion and dismissed appellants' first six causes of action. It also sustained in part appellants' motion for partial summary judgment. It ordered AFS to pay appellants for their company shares under a plan of distribution that had been adopted by AFS. This court affirmed the district court's dismissal of appellants' first six causes of action in *Ferer I*.

Following our decision in *Ferer I*, AFS moved for summary judgment on the remaining two causes of action. It argued that appellants lacked standing to assert the remaining causes of action. Appellants then sought leave to file a fifth amended complaint, alleging discovery of new evidence of fraud by Matthew Ferer and Whitney Ferer. The fifth amended complaint attached to the motion alleged causes of action for "Breach of Fiduciary Duty [by] Theft of Corporate Opportunities" and "Involuntary Liquidation."

All parties moved for summary judgment on the remaining two causes of action under the fourth amended complaint. At

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[2] Neb. Rev. Stat. § 21-20,137 et seq. (Reissue 2007).

[3] See *Ferer I, supra* note 1.

a subsequent hearing, appellants claimed they were entitled to pursue their claim for involuntary liquidation under either their fourth or proposed fifth amended complaint.

Appellants claimed that the district court's dismissal of their sixth cause of action was inadvertent and that, therefore, it should not have been treated as dismissed. Appellants also claimed that the court's order of dismissal should have been vacated because of newly discovered evidence, an affidavit from a former AFS employee. In the affidavit, the employee stated that while he worked for AFS, Matthew Ferer engaged in the practice of understating the company's inventory. The court stated that it would consider the motion for summary judgment only as to the eighth cause of action.

Subsequently, appellants filed a motion for an order nunc pro tunc, requesting that the district court reinstate their sixth cause of action. Appellants voluntarily dismissed their seventh cause of action.

After evidentiary hearings on all motions, the district court entered judgment denying appellants' motion for an order nunc pro tunc, because the dismissal of the sixth cause of action was intended and was not inadvertent. It also denied appellants' motion to amend their fourth amended complaint, sustained appellees' motion for summary judgment on the eighth cause of action, and dismissed as moot appellants' motion for summary judgment on their eighth cause of action.

In granting summary judgment, the district court found:

> It is clear from the allegations and prayer for relief in the Eighth Cause of Action, that [appellants] are asserting a claim belonging to [AFS]. [Appellants] are required to bring a derivative claim . . . for [AFS] in the name of [AFS] and not in their own names. In addition, *Neb. Rev. Stat.* §21-2071 provides that a shareholder may not commence or maintain a derivative proceeding unless the shareholder adequately represents the interest of the corporation in enforcing the right of the corporation. It is [sic] already been determined that [appellants'] personal interests are in the forefront of the litigation against [AFS] and that, as a result, cannot properly represent the interest of [AFS] in a derivative action as required by

> *Neb. Rev. Stat.* § 21-2071 ([R]eissue 1997). See *Ferer v. Erickson & Sed*[*er*]*strom, PC.*, 272 Neb. 113, 718 N.W.2d 501 (2006). As noted, the [appellants'] Eighth Cause of Action fails as the [appellants] did not bring this cause of action as representatives of the corporation.

The district court sustained appellees' motions for summary judgment. With the dismissal of the eighth cause of action, all of appellants' causes of action had been dismissed, and the court dismissed the fourth amended complaint.

ASSIGNMENTS OF ERROR

Appellants claim, summarized and restated, that the district court erred in failing to grant their motion for summary judgment, in refusing to grant appellants leave to amend their complaint, in refusing to grant appellants' motion for an order nunc pro tunc, and in granting appellees' motion for summary judgment.

STANDARD OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and the court gives that party the benefit of all reasonable inferences deducible from the evidence.[4]

[2] Permission to amend a pleading is addressed to the discretion of the trial court, and the trial court's decision will not be disturbed absent an abuse of discretion.[5]

ANALYSIS

Appellants claim the district court erred in failing to grant their motion for summary judgment and to grant their request to judicially dissolve the company. This argument is without merit. Appellants sought involuntary liquidation in the sixth cause of action of the complaint in *Ferer I*. That cause of action was dismissed by the district court, and the dismissal was affirmed by this court in *Ferer I*. The issue of involuntary liquidation of AFS has been litigated and decided. The doctrine

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[4] *Jardine v. McVey*, 276 Neb. 1023, 759 N.W.2d 690 (2009).

[5] *Reicheneker v. Reicheneker*, 264 Neb. 682, 651 N.W.2d 224 (2002).

of res judicata bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action.[6]

Appellants next argue that the district court erred in failing to grant their motion for summary judgment on the issue of breach of fiduciary duty. Their cause of action for breach of fiduciary duty by theft of a corporate opportunity alleged that Matthew Ferer and Whitney Ferer purchased company stock from minority shareholders and received consulting fees while acting as directors of AFS. Appellants requested that the consulting fees be considered corporate assets. The court sustained appellees' motion for summary judgment because appellants asserted a claim that belonged to AFS.

[3] The district court also concluded that appellants lacked standing to assert the breach of fiduciary duty claims against Matthew Ferer and Whitney Ferer. The eighth cause of action alleged wrongs committed by Matthew Ferer and Whitney Ferer against AFS. Standing is the legal or equitable right, title, or interest in the subject matter of a controversy. Standing is a jurisdictional component of a party's case, because only a party who has standing may invoke the jurisdiction of a court.[7]

[4,5] The issue is whether appellants or AFS had the right to bring an action for wrongs allegedly done to AFS or its property. Generally, a shareholder may not bring an action in his or her own name to recover for wrongs done to the corporation or its property.[8] Such a cause of action is in the corporation and not the shareholders.[9] The right of a shareholder to sue is derivative in nature and normally can be brought only in a representative capacity for the corporation.[10] Because this cause of action was not brought in the name of AFS, it did not meet the requirements of a derivative action.

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[6] *Jensen v. Jensen*, 275 Neb. 921, 750 N.W.2d 335 (2008).

[7] *Agena v. Lancaster Cty. Bd. of Equal.*, 276 Neb. 851, 758 N.W.2d 363 (2008).

[8] *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004).

[9] *Id.*

[10] *Id.*

Previously, we held that appellants did not represent the interests of AFS. In *Ferer v. Erickson, Sederstrom*,[11] we determined that the personal interests of Aaron Ferer and Robin Monsky were at the forefront of the litigation against AFS and that, as a result, they could not properly represent the interests of AFS in a derivative action, as required by Neb. Rev. Stat. § 21-2071 (Reissue 2007). Therefore, the district court was correct in granting summary judgment on the eighth cause of action.

[6] Appellants argue that the district court erred in refusing to grant them leave to amend their complaint. Permission to amend a pleading is addressed to the discretion of the trial court, and the trial court's decision will not be disturbed absent an abuse of discretion.[12] Amendment of a complaint is not a matter of right.[13]

Appellants' proposed fifth amended complaint attempted to resurrect their sixth cause of action for involuntary liquidation, the dismissal of which was affirmed by this court in *Ferer I*. Appellants now claim new grounds for their cause of action for involuntary liquidation, based upon the affidavit of a company manager who stated that Matthew Ferer and Whitney Ferer undervalued the inventory of the company. The affiant was AFS' general manager during the 18 months that Aaron Ferer served as vice president of AFS. This allegation was not set forth in the fourth amended complaint.

The record indicates that Aaron Ferer made claims to AFS' accountants relating to the company's inventory in 2002, which was well before the fourth amended complaint was filed. In February or March 2002, Aaron Ferer complained that AFS' inventory was being inaccurately recorded. This was more than 5 years before appellants attempted to assert these claims in their proposed fifth amended complaint. We conclude the district court did not abuse its discretion by denying the motion for leave to file a fifth amended complaint.

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[11] *Ferer v. Erickson, Sederstrom*, 272 Neb. 113, 718 N.W.2d 501 (2006).

[12] *Reicheneker v. Reicheneker, supra* note 5.

[13] See *id.*

Appellants also claim the district court erred in denying their motion for an order nunc pro tunc reinstating their sixth cause of action for involuntary liquidation. In its order of April 22, 2008, the court expressly stated that it intended to dismiss the sixth cause of action and that the dismissal was "no mistake." We find that the court has been extremely patient in dealing with appellants' repeated attempts to retry issues that have previously been decided. The court did not abuse its discretion in denying appellants' motion for an order nunc pro tunc.

Having previously decided in *Ferer I* that the district court did not err when it dismissed appellants' first through sixth causes of action, we conclude that the district court did not abuse its discretion in refusing to allow appellants to resurrect causes of action that have merely been repackaged and rewrapped. The case of Aaron Ferer and Robin Monsky versus AFS, Matthew Ferer, and Whitney Ferer is over and done.

CONCLUSION

We find no merit to the assignments of error or arguments made by appellants. The judgment of the district court is affirmed.

AFFIRMED.

WRIGHT, J., participating on briefs.
MCCORMACK, J., not participating.

BRENT E. RASMUSSEN AND KIM RASMUSSEN, APPELLANTS AND CROSS-APPELLEES, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY ET AL., APPELLEES, AND KRISTA LISBON, FORMERLY KNOWN AS KRISTA VAN WYHE, APPELLEE AND CROSS-APPELLANT.

770 N.W.2d 619

Filed August 7, 2009. No. S-08-747.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against

whom the judgment was granted, and the court gives that party the benefit of all reasonable inferences deducible from the evidence.

3. **Insurance: Contracts: Appeal and Error.** The meaning of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.
4. **Rescue Doctrine.** The rescue doctrine contemplates a voluntary act by one who, in an emergency and prompted by spontaneous human motives to save human life, attempts a rescue which he had no duty to attempt by virtue of a legal obligation or duty fastened on him by his employment.
5. **Rescue Doctrine: Negligence.** The rescue doctrine recognizes that those who negligently imperil life or property may be liable not only to their victims, but also to the rescuers.
6. **Rescue Doctrine: Negligence: Public Policy.** The rescue doctrine is shorthand for a public policy that imposes a duty of care owed to rescuers.
7. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
8. **Negligence: Words and Phrases.** A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.
9. **Rescue Doctrine: Negligence.** The rescue doctrine defines a particular standard of conduct and recognizes a duty of the rescued person whose conduct has placed the rescuer in peril.
10. **Negligence.** A person has a duty to exercise ordinary care for his own safety.
11. **Negligence: Motor Vehicles.** The driver of an automobile owes a duty of reasonable care in the operation of the vehicle.
12. **Claims: Marriage: Derivative Actions.** Loss of consortium claims are derivative.
13. **Appeal and Error.** For an appellate court to consider an alleged error, the error must be both specifically assigned and specifically argued in the brief of the party assigning the error.
14. **Negligence: Proof.** The burden of proving negligence is on the party alleging it, and merely establishing that an accident happened does not prove negligence.
15. **Negligence: Motor Vehicles.** The mere skidding of an automobile, without more, does not prove negligence.
16. ____: ____. Skidding, together with evidence of some other facts and circumstances tending to show a failure to exercise reasonable care, may be sufficient to permit an inference of negligent loss of control.
17. **Motor Vehicles.** A motorist is required to maintain reasonable control of the vehicle commensurate with the road conditions then and there existing at the time of the occurrence.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Thomas A. Grennan and Bryan J. Roberts, of Gross & Welch, P.C., L.L.O., for appellants.

Donald R. Witt and Andrea D. Snowden, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee Krista Lisbon.

Russell A. Westerhold, of Fraser Stryker, P.C., L.L.O., for appellee State Farm Mutual Automobile Insurance Company.

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

WRIGHT, J.

NATURE OF CASE

Krista Lisbon, formerly known as Krista Van Wyhe, was driving eastbound on Interstate 80 between Lincoln and Omaha, Nebraska, when her automobile slid off the right side of the Interstate into a ditch. Brent E. Rasmussen, who was also driving eastbound, stopped his vehicle to assist. When attempts to rock Lisbon's vehicle to get it out of the ditch were unsuccessful, Rasmussen decided to retrieve a towrope from his vehicle. As Rasmussen stepped away from Lisbon's vehicle, another car slid off the highway and struck Rasmussen, Lisbon's vehicle, and another motorist who had stopped to help. Rasmussen was severely injured. The district court granted summary judgment against Rasmussen and his wife, and they appeal. Lisbon cross-appeals.

SCOPE OF REVIEW

[1,2] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Jardine v. McVey*, 276 Neb. 1023, 759 N.W.2d 690 (2009). 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 the court gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] The meaning of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *Steffensmeier v. Le Mars Mut. Ins. Co.*, 276 Neb. 86, 752 N.W.2d 155 (2008).

FACTS

While driving eastbound on Interstate 80 between Lincoln and Omaha on February 9, 2002, Lisbon's vehicle slid into the left lane and then veered right and slid off the Interstate into the ditch. Rasmussen saw Lisbon's vehicle slide off the Interstate, and he stopped his vehicle on the right shoulder of the road to offer assistance. He proceeded on foot to Lisbon's vehicle to determine the extent of her injuries, if any. He tried to help Lisbon get the vehicle back onto the road by rocking it back and forth. The attempt was unsuccessful, and Rasmussen turned to go to his vehicle to obtain a towrope that could be used to pull Lisbon's vehicle. Another motorist had stopped his vehicle and was walking down into the ditch to help. A car driven by Marilyn Andersen slid off the Interstate and struck Rasmussen, the other motorist attempting to help, and Lisbon's vehicle. Rasmussen sustained severe injuries that required amputation of his left foot.

Lisbon's vehicle was owned by her stepfather, Gary Bosch, who lived in Michigan. The car was insured by State Farm Mutual Automobile Insurance Company (State Farm). Andersen's vehicle was uninsured. Rasmussen and his wife, Kim Rasmussen, made a claim for uninsured motorist benefits under their insurance policy (Rasmussen policy), which was also issued by State Farm. The Rasmussens were paid $100,000 pursuant to uninsured motorist benefits provided by their policy. They also made a claim against State Farm for uninsured motorist benefits under the policy issued on the Lisbon vehicle (Bosch policy). State Farm denied the claim.

The Rasmussens filed suit in the Douglas County District Court against Lisbon and State Farm. The Rasmussens claimed uninsured motorist benefits under the Bosch policy. Rasmussen alleged that his actions as related to the vehicle driven by Lisbon constituted the operation, maintenance, or use of the

Bosch vehicle and that therefore, Rasmussen was an insured under the Bosch policy. Rasmussen claimed that State Farm acted in bad faith by denying the claim.

Rasmussen also claimed that Lisbon placed him in peril by operating her vehicle in a negligent manner. He claimed that in attempting to rescue Lisbon, he sustained severe and permanent injuries. Rasmussen's wife claimed loss of consortium.

State Farm and Lisbon generally denied the Rasmussens' allegations. State Farm denied coverage under the Bosch policy and alleged that the payment of $100,000 pursuant to the uninsured motorist benefits portion of the Rasmussen policy barred recovery for additional benefits under any policy issued by State Farm.

Lisbon denied liability and alleged she owed no duty to Rasmussen that would create a cause of action for negligence. She further alleged that the "rescue doctrine" did not create a cause of action in favor of Rasmussen and was not applicable to a two-party action where the rescuer sues the person rescued based upon the alleged negligence of the person rescued.

It was not disputed that at the time of the accident, Lisbon's vehicle was insured through State Farm under a policy owned by her parents. The vehicle was licensed and registered in the state of Michigan and was used by Lisbon while attending school at the University of Nebraska-Lincoln. Rasmussen's vehicle was insured by State Farm, and State Farm had paid $100,000 pursuant to the uninsured motorist benefits under the Rasmussen policy. The district court for Douglas County sustained State Farm's motion for summary judgment and dismissed the Rasmussens' complaint with prejudice. Applying Michigan law, the district court concluded that Rasmussen was not an insured under the Bosch policy and that neither Rasmussen nor his wife was entitled to benefits under the provisions of that policy. The district court also found that State Farm did not act in bad faith in refusing to make payments to the Rasmussens based on the Bosch policy.

As to Lisbon's motion for summary judgment, the district court found genuine issues of fact as to whether Lisbon was negligent, whether Rasmussen had a reasonable belief that Lisbon was in peril, and whether the alleged rescue

was reasonable and completed. However, the court sustained Lisbon's summary judgment motion on the grounds that Lisbon did not owe a legal duty to the Rasmussens and that Nebraska did not recognize an independent cause of action based on the rescue doctrine where the rescuer sues the person rescued. It denied the Rasmussens' motion to reconsider. The Rasmussens timely appealed, and Lisbon cross-appealed.

ASSIGNMENTS OF ERROR

The Rasmussens claim, summarized and restated, that the district court erred in sustaining Lisbon's motion for summary judgment, in concluding that a cause of action under the rescue doctrine did not exist under these circumstances, and in concluding that Lisbon owed Rasmussen no duty. The Rasmussens also claim the court erred in denying their motion for summary judgment against State Farm, in granting State Farm's motion for summary judgment, and in applying Michigan law in interpreting the Bosch policy to find that they were not insureds and were not entitled to benefits under the policy.

Lisbon cross-appeals, arguing that the district court erred in finding that there were genuine issues of fact as to whether Lisbon was negligent and proximately caused the accident and whether Rasmussen had a reasonable belief that Lisbon was in imminent peril.

ANALYSIS

Rescue Doctrine

[4] We first address the summary judgment in favor of Lisbon in which the district court determined that Lisbon did not owe a duty to Rasmussen and that Nebraska does not recognize an independent cause of action based upon the rescue doctrine. "The rescue doctrine contemplates a voluntary act by one who, in an emergency and prompted by spontaneous human motives to save human life, attempts a rescue which he had no duty to attempt by virtue of a legal obligation or duty fastened on him by his employment." *Buchanan v. Prickett & Son, Inc.*, 203 Neb. 684, 688, 279 N.W.2d 855, 858 (1979).

This court has considered the rescue doctrine in several cases. Application of the rescue doctrine in Nebraska has

generally involved the issue of the contributory negligence of the plaintiff. In *Beatty v. Davis*, 224 Neb. 663, 400 N.W.2d 850 (1987), the plaintiff attempted to jump into an unoccupied moving vehicle to stop it, and she was injured when she fell out of the car as it traveled in a circle. We held that it was not contributory negligence for the plaintiff to expose herself to danger in an effort to save herself or others from injury to their person or property, unless the effort itself was an unreasonable one or the plaintiff acted unreasonably in the course of the rescue.

In *Moravec v. Moravec*, 216 Neb. 412, 343 N.W.2d 762 (1984), the plaintiff was burned when he attempted to warn the owners of a house about a fire in the kitchen. The trial court had concluded that the plaintiff, who undertook to fight a fire on the premises of another, assumed the risk. We reversed the judgment and remanded the cause, stating:

> Under the rescue doctrine it is not contributory negligence for a plaintiff to expose himself to danger in a reasonable effort to save a third person or the property of a third person from harm. The extent of the risk which the volunteer is justified in assuming under the circumstances increases in proportion to the imminence of the danger and the value to be realized from meeting the danger and attempting to remove or eliminate the hazard; i.e., the less the danger to the third party, the less the risk the volunteer is justified in taking.

Id. at 415, 343 N.W.2d at 764.

In *Struempler v. Estate of Kloepping*, 261 Neb. 832, 626 N.W.2d 564 (2001), the plaintiff injured her back while assisting an elderly, invalid neighbor into his wheelchair. The plaintiff sued the neighbor's estate, alleging that the neighbor negligently placed himself in a position of immediate peril by remaining in his residence without qualified medical personnel to assist him when he fell from his wheelchair. The plaintiff maintained she was a rescuer because the neighbor placed himself in a position of peril which invited rescue. The trial court granted summary judgment to the estate, and we affirmed. We declined the plaintiff's invitation to apply the rescue doctrine to the facts of that case.

Prior cases applying the rescue doctrine have generally involved three parties—the rescuer, the person rescued, and a third-party tort-feasor. The person attempting a rescue was trying to recover damages from a third person whose negligence allegedly put the victim in peril and created the need for the rescue. In the case at bar, the question is whether Lisbon, the person rescued, may be liable to Rasmussen, the rescuer.

We conclude that the district court should have applied the rescue doctrine to the facts of this case. Here, we find no reason to make a distinction between the negligence of the person being rescued which is a proximate cause of injury to the rescuer and the negligence of a third party which placed the person to be rescued in peril and caused injury to another who attempted the rescue.

Rasmussen alleged that Lisbon's negligent operation of her motor vehicle placed her in peril and invited the rescue by Rasmussen. It is reasonably foreseeable that one who witnesses a motor vehicle accident will stop and attempt to render assistance.

[5] Other courts have applied the doctrine based upon the premise that heroic people will do heroic deeds. See *Clinkscales v. Nelson Securities, Inc.*, 697 N.W.2d 836 (Iowa 2005). The Iowa court in *Clinkscales* noted that it had consistently and liberally applied the rescue doctrine, which was forged at common law, for more than 100 years. The court quoted Justice Benjamin Cardozo:

> "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer. . . . The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had."

697 N.W.2d at 841, quoting *Wagner v. International Ry. Co.*, 232 N.Y. 176, 133 N.E. 437 (1921). The rescue doctrine recognizes that those who negligently imperil life or property may

be liable not only to their victims, but also to the rescuers. *Clinkscales, supra*.

In *Clinkscales*, the plaintiff was burned when he attempted to turn off the gas line to a grill in a bar that had started on fire. The trial court and the Iowa Court of Appeals declined to apply the rescue doctrine, concluding that the plaintiff had suffered a "'self-inflicted wound.'" *Id*. at 840. The Iowa Supreme Court reversed, finding that so long as the rescuer's response was normal, the negligent actor would not escape liability for the rescuer's injuries. The court stated that in most cases, what constituted normal or natural conduct depended on the circumstances and was a question for the jury.

The Missouri Supreme Court also considered whether a person injured during a reasonable attempt to rescue another may recover from the person rescued when such person was guilty of negligently imperiling himself. *Lowrey v. Horvath*, 689 S.W.2d 625 (Mo. 1985). The court concluded that there was no logical basis to distinguish between a situation in which recovery is sought against the defendant whose negligence put a third party at peril and the situation in which recovery is sought against a defendant who put himself at peril negligently. The court stated:

> A person with reasonable foresight who negligently imperils another or who negligently imperils himself will normally contemplate the probability of an attempted rescue, in the course of which the rescuer may sustain injury. Under the rescue doctrine, "the right of action depends . . . upon the wrongfulness of the defendant's conduct in its tendency . . . to cause the rescuer to take the risk involved in the attempted rescue. . . ."

Id. at 628, quoting F. Bohlen, Studies in the Law of Torts (1926).

In *Hoefer v. Roche Biomedical Laboratories*, 826 S.W.2d 49 (Mo. App. 1992), a woman driving on an icy highway lost control, crossed the highway, and embedded her car in a ditch. A man traveling in the same direction saw the car in the ditch and crossed the road to help her. While assisting the woman, the man was struck by another vehicle that slid off the highway. The court held that the man could bring a cause

of action under the rescue doctrine against the woman whose loss of control of her vehicle had placed her in a position of peril.

In *French v. Uribe, Inc.*, 132 Wash. App. 1, 130 P.3d 370 (2006), the court applied the rescue doctrine to allow recovery of damages from the rescued person if the rescuer is injured during the rescue of a person who negligently caused the dangerous situation that invited the rescue. The court stated that the rescue doctrine serves two purposes:

> First, the rescue doctrine notifies tortfeasors that it is foreseeable a rescuer will come to the aid of the person imperiled by a tortfeasor's conduct, and that the tortfeasor owes the rescuer a duty similar to the duty owed to the person the tortfeasor imperils. Second, the doctrine negates the presumption that the rescuer assumed the risk of injury by undertaking the rescue, as long as the rescuer does not act rashly or recklessly.

Id. at 14, 130 P.3d at 375.

We conclude that the facts in the case at bar lend themselves to application of the rescue doctrine. The rescuer who sustains injuries in reasonably undertaking a rescue may recover from the rescued person if such person's negligence created a situation which necessitated the rescue. See Annot., 4 A.L.R.3d 558 (1965).

[6] The question of the duty owed by the rescued person is subsumed in our conclusion that the rescue doctrine applies to the case at bar. The rescue doctrine is "'shorthand for a public policy' that imposes a duty of care owed to rescuers." *Baldonado v. El Paso Natural Gas Company*, 143 N.M. 288, 292, 176 P.3d 277, 281 (2007), quoting *Govich v. North American Systems, Inc.*, 112 N.M. 226, 814 P.2d 94 (1991).

[7-9] Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Fuhrman v. State*, 265 Neb. 176, 655 N.W.2d 866 (2003). A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another. *Erickson v. U-Haul Internat.*, 274 Neb. 236, 738 N.W.2d 453 (2007). The rescue doctrine defines a particular standard of conduct and

recognizes a duty of the rescued person whose conduct has placed the rescuer in peril.

[10,11] It has long been held that a person has a duty to exercise ordinary care for his own safety. See, e.g., *Fullenwider v. Brawner*, 224 Ky. 274, 6 S.W.2d 264 (1928); *Varela v. Reid*, 23 Ariz. 414, 204 P. 1017 (1922). The driver of an automobile owes a duty of reasonable care in the operation of the vehicle. See *Adams v. Welliver*, 155 Neb. 331, 51 N.W.2d 739 (1952). Lisbon was required to exercise due care in the operation of her motor vehicle upon a public highway. It was reasonably foreseeable that a passing motorist, upon seeing the accident, would stop to render aid. Lisbon had a duty of reasonable care to avoid a risk of harm to herself that would invite rescue by others.

We therefore conclude that the district court erred in finding that Nebraska did not recognize an independent cause of action based on the rescue doctrine and in granting summary judgment in favor of Lisbon. There remain material issues of fact regarding Lisbon's alleged negligence and the damages resulting from her alleged negligence. For these reasons, we reverse the summary judgment granted in favor of Lisbon and remand the cause for further proceedings consistent with this opinion.

Having disposed of the matters involving Lisbon, we now proceed to the issues involving State Farm and the summary judgment entered in its favor against Rasmussen.

State Farm's Denial of Rasmussens' Claims

The Rasmussens assert that the district court erred in applying Michigan law and in concluding that they were not insureds and, therefore, not entitled to uninsured motorist benefits under the Bosch policy. They claim that under Nebraska law, they are insureds, and that the summary judgment should be reversed. They claim that neither Rasmussen nor his wife has collected the maximum amount payable under the Bosch policy.

The meaning of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *Steffensmeier v. Le Mars Mut. Ins. Co.*, 276 Neb. 86, 752 N.W.2d 155 (2008). We conclude that

under either Nebraska or Michigan law, the Rasmussens are not entitled to additional payments based on coverage pursuant to the uninsured motorist provisions of either the Bosch or the Rasmussen policy.

The Bosch policy provides:

> If uninsured motor vehicle coverage for *bodily injury* is available to an *insured* from more than one policy provided by us or any other insurer, the total limit of liability available from all policies provided by all insurers shall not exceed the limit of liability of the single policy providing the highest limit of liability. This is the most that will be paid regardless of the number of policies involved, *persons* covered, claims made, vehicles insured, premiums paid or vehicles involved in the accident.

The Rasmussen policy provides:

> If the *insured* sustains *bodily injury* as a pedestrian and other uninsured motor vehicle coverage applies:
>
> a. the total limits of liability under all such coverages shall not exceed that of the coverage with the highest limit of liability; and
>
> b. we are liable only for our share. Our share is that per cent of the damages that the limit of liability of this coverage bears to the total of all uninsured motor vehicle coverage applicable to the accident.

State Farm paid the Rasmussens $100,000 pursuant to the uninsured motorist coverage of the Rasmussen policy. Both the Bosch policy and the Rasmussen policy limit the uninsured motor vehicle benefits per person to $100,000.

Nebraska law provides:

> Regardless of the number of vehicles involved, persons covered, claims made, vehicles or premiums shown on the policy, or premiums paid, the limits of liability for uninsured or underinsured motorist coverage for two or more motor vehicles insured under the same policy or separate policies shall not be added together, combined, or stacked to determine the limit of insurance coverage available to an injured person for any one accident except as provided in section 44-6411.

Neb. Rev. Stat. § 44-6410 (Reissue 2004).

"In the event an insured is entitled to uninsured or underinsured motorist coverage under more than one policy of motor vehicle liability insurance, the maximum amount an insured may recover shall not exceed the highest limit of any one such policy." Neb. Rev. Stat. § 44-6411(1) (Reissue 2004).

Michigan courts have held that "antistacking provisions" are valid and not in contravention of public policy when they are clear and unambiguous. *State Farm Ins v Tiedman*, 181 Mich. App. 619, 624, 450 N.W.2d 13, 15 (1989). See, also, *DeMaria v Auto Club (On Rem)*, 165 Mich. App. 251, 418 N.W.2d 398 (1987). Thus, it is not necessary to determine which state's laws are applied here, because under either Michigan or Nebraska law, Rasmussen has already recovered the maximum amount to which he is entitled.

Although not assigned as a separate error, the Rasmussens' argument also suggests that neither Rasmussen nor his wife has received the maximum amount recoverable under any one policy because they were paid $100,000 together. The payment from State Farm was made payable to both of them, and the funds were deposited in a joint account. Rasmussen claims that he has received only $50,000, that his wife's loss of consortium claim was not fully compensated, and that each is due another $50,000.

[12] Loss of consortium claims are derivative. See *Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541 (1994). The loss of consortium claim is based upon the injuries sustained by Rasmussen in the accident. The coverage to Rasmussen under the Rasmussen policy is one-person coverage of $100,000 per person. There are not two separate injuries. Rasmussen's wife's loss is compensable as a part of Rasmussen's $100,000-per-person coverage and is not a separate bodily injury that would provide another $100,000 of coverage under the policy.

In *Wilson v. Capital Fire Ins. Co.*, 136 Neb. 435, 286 N.W. 331 (1939), a husband and wife were both injured. The insurance policy in question had a $5,000/$10,000 limit for loss from an accident resulting in bodily injuries to one or more persons. The wife, in one suit, obtained a judgment of $5,000, which the defendant paid. The husband, in a second action, sued for personal injuries and loss of consortium, which resulted in a

judgment of $4,000—$275 for injuries and property damage and $3,725 for loss of services and companionship. The issue was whether the insurance company was liable for loss of consortium. The court held that the loss of consortium represented injuries sustained by one person (the wife) and that the insurance company, having paid the limit for injuries to the wife, was not liable under the terms of the policy for damages for loss of consortium. The policy limit of $5,000 covered damages, whether direct or consequential.

Here, State Farm has paid the limit for injuries to one person. It is not liable for any amount above the $100,000 limit. The Bosch policy provided: "'*Bodily injury* to one *person*' includes all injury and damages to others resulting from this *bodily injury*." The Rasmussen policy has an identical provision. Any loss of consortium damages sustained by one spouse would fall into the category of damages resulting from bodily injury to the other spouse. Under the policy, such damages are combined with Rasmussen's damages and are subject to one limit of liability. State Farm has no additional liability to the Rasmussens under either policy, and the district court was correct in granting summary judgment to State Farm.

Bad Faith

[13] The Rasmussens also assert that the district court erred in finding that State Farm did not act in bad faith in refusing to pay benefits under the Bosch policy. The assigned error has no merit for two reasons. First, there has been no bad faith shown. Second, the Rasmussens have not argued this error on appeal. For an appellate court to consider an alleged error, the error must be both specifically assigned and specifically argued in the brief of the party assigning the error. *Parker v. State ex rel. Bruning*, 276 Neb. 359, 753 N.W.2d 843 (2008).

Cross-Appeal

Consistent with her argument that she owed no duty of care to Rasmussen and that there was no actionable negligence as a matter of law, Lisbon asserts the district court was correct in concluding that she did not owe a duty of care to Rasmussen and that the rescue doctrine did not provide an

independent cause of action against her under the facts and circumstances presented.

On cross-appeal, she argues that the district court erred in finding there was a genuine issue of material fact regarding whether she was negligent and proximately caused her vehicle to leave the roadway and slide into the ditch. She claims the court erred in finding that there was a genuine issue of fact as to whether Rasmussen had a reasonable belief that she was in imminent peril at the time he was struck by the Andersen vehicle.

Lisbon argues that even if Nebraska recognized an independent cause of action under the rescue doctrine, the Rasmussens' claims fail because they are predicated on the fact that Lisbon was negligent in the operation of her vehicle. She asserts that as a matter of law, she was not negligent.

[14] The burden of proving negligence is on the party alleging it, and merely establishing that an accident happened does not prove negligence. *Macfie v. Kaminski*, 219 Neb. 524, 364 N.W.2d 31 (1985). In *Macfie*, the defendant was traveling on Interstate 80 while it was raining or snowing and the temperature was near freezing. He lost control of his car, started sliding sideways along a bridge, and was hit by a second vehicle. His car eventually came to a stop straddling both eastbound lanes of the Interstate. A series of collisions occurred thereafter, including the one involving the plaintiff. The plaintiff contended that the defendant was negligent in operating his motor vehicle at an excessive rate of speed and failing to have his vehicle under proper control. The district court granted the defendant's motion for directed verdict, finding that the plaintiff had failed as a matter of law to present sufficient evidence to warrant submission of the question of negligence to the jury. We affirmed on appeal, finding that the evidence disclosed that the defendant was traveling at 55 m.p.h., that the plaintiff was traveling at 50 m.p.h., and that the rest of the traffic was also traveling at that speed. We said the evidence was clear that both the plaintiff and the defendant, as well as most of the other traffic, were traveling within the speed limit.

Lisbon argues that the record in this case demonstrates a complete lack of proof that she was negligent in the operation of her motor vehicle. She points out that the only evidence regarding the operation of her vehicle immediately before it left the roadway was that she was traveling at 65 m.p.h., the other traffic was going approximately the same speed, no cars were passing her, and she did nothing to affect the movement of her vehicle. Rasmussen admitted that he knew of no action Lisbon took which caused her vehicle to go off the roadway and that the speed of 65 m.p.h. seemed reasonable under the circumstances.

[15,16] 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 the court gives that party the benefit of all reasonable inferences deducible from the evidence. *Jardine v. McVey*, 276 Neb. 1023, 759 N.W.2d 690 (2009). The mere skidding of an automobile, without more, does not prove negligence. *Porter v. Black*, 205 Neb. 699, 289 N.W.2d 760 (1980). Skidding, together with evidence of some other facts and circumstances tending to show a failure to exercise reasonable care, may be sufficient to permit an inference of negligent loss of control. *Id*. Lisbon was traveling at 65 m.p.h. on the Interstate when it was snowing. Her car initially slid to the left side of the roadway and then to the right and into a ditch. Whether Lisbon was driving at a speed that was reasonable and proper under the then-existing conditions is a factual question and should be left to the jury. See *Middleton v. Nichols*, 178 Neb. 282, 132 N.W.2d 882 (1965).

[17] A motorist is required to maintain reasonable control of the vehicle commensurate with the road conditions then and there existing at the time of the occurrence. See *Huntwork v. Voss*, 247 Neb. 184, 525 N.W.2d 632 (1995). The speed of an automobile is excessive if it is found to be unreasonable or imprudent under the existing circumstances, even though it may not exceed the applicable statutory limits. *Id*. Giving all reasonable inferences to the Rasmussens, as we are required to do in a motion for summary judgment, we cannot say as a matter of law that the Rasmussens failed to establish any evidence of negligence on Lisbon's part.

Similarly, we find that the district court did not err in concluding that there was a material issue of fact whether Rasmussen had a reasonable belief that Lisbon was in immediate peril at the time he was struck by the Andersen vehicle. Even if Rasmussen realized that Lisbon was not in immediate peril when he began to return to his vehicle, it was the initial occurrence that caused him to stop and attempt a rescue. He still had to return to his vehicle in the same manner in which he had come. Whether Rasmussen no longer believed that Lisbon was in immediate danger is not material. Obviously, there was an immediate danger. Another vehicle slid off the Interstate and crashed into Lisbon's vehicle, Rasmussen, and the other motorist who had stopped to assist Lisbon.

To conclude as a matter of law that Rasmussen lost the status of a rescuer because he no longer believed that Lisbon was in immediate peril would defeat the purpose of the rescue doctrine. The question is whether Rasmussen had a reasonable belief that Lisbon was in immediate peril at the time he left his vehicle to render her assistance. We therefore conclude that Lisbon's cross-appeal is without merit.

CONCLUSION

The district court erred in granting summary judgment in favor of Lisbon and in concluding that Lisbon owed no duty to Rasmussen and that Nebraska does not recognize an independent cause of action under the rescue doctrine. However, the court was correct in granting summary judgment in favor of State Farm. Lisbon's cross-appeal is without merit.

For the reasons set forth herein, we affirm in part, and in part reverse and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. DARIN C. YORK, APPELLANT.

770 N.W.2d 614

Filed August 7, 2009. No. S-08-884.

1. **Postconviction: Proof.** One seeking postconviction relief has the burden of establishing a basis for such relief.
2. **Moot Question: Jurisdiction: Appeal and Error.** Mootness does not prevent appellate jurisdiction. But, because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, appellate courts review mootness determinations under the same standard of review as other jurisdictional questions.
3. **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.
4. **Postconviction.** The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008), provides that postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his constitutional rights such that the judgment was void or voidable.
5. **Postconviction: Convicted Sex Offender: Words and Phrases.** An individual who is subject to the registration requirements under the Sex Offender Registration Act, Neb. Rev. Stat. § 29-4001 et seq. (Reissue 2008), is not in custody under sentence for purposes of the Nebraska Postconviction Act.
6. **Convicted Sex Offender.** The Sex Offender Registration Act applies to any person who pleads guilty to or is found guilty of certain listed offenses, including incest of a minor as defined by Neb. Rev. Stat. § 28-703 (Reissue 2008).

Appeal from the District Court for Morrill County: LEO DOBROVOLNY, Judge. Appeal dismissed.

Bell Island, of Island, Huff & Nichols, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

WRIGHT, J.

NATURE OF CASE

Darin C. York pled guilty to incest pursuant to a plea agreement in Morrill County District Court, and the court sentenced

him to 4 to 6 years' imprisonment. York filed a motion under the Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008), alleging ineffective assistance of counsel, but he was released from prison before this court heard oral arguments. York claims that despite his release, he remains "in custody under sentence." See § 29-3001. York asserts that he can still seek postconviction relief because he is required to register as a sex offender for 10 years pursuant to Nebraska's Sex Offender Registration Act (SORA), Neb. Rev. Stat. § 29-4001 et seq. (Reissue 2008).

SCOPE OF REVIEW

[1] One seeking postconviction relief has the burden of establishing a basis for such relief. *State v. Thomas*, 236 Neb. 553, 462 N.W.2d 862 (1990).

[2,3] Mootness does not prevent appellate jurisdiction. But, because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, we have reviewed mootness determinations under the same standard of review as other jurisdictional questions. 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. *BryanLGH v. Nebraska Dept. of Health & Human Servs.*, 276 Neb. 596, 755 N.W.2d 807 (2008).

FACTS

On August 8, 2005, York pled guilty to one count of incest, a Class III felony, pursuant to a plea agreement that his attorney negotiated with the Morrill County Attorney. See Neb. Rev. Stat. §§ 28-703 and 28-105 (Reissue 2008). The underlying circumstances of the charge were that York had been having sexual intercourse with his younger sister for several years.

York's sister came forward with allegations of incest in August 2003. She alleged that York had subjected her to incest more than 50 times over a period of years beginning when she was 7 or 8 years old and York was between 10 and 12 years old. She alleged that the most recent incident occurred around Thanksgiving of 2002. At that time, York was 18 and his sister was 14.

After York was accused of this crime, York and his parents retained attorney David Eubanks to represent York. By the time he met with Eubanks, York had already confessed the sexual assaults to his parents, fiance, and pastor. Eubanks advised York to make a statement to the Nebraska State Patrol, which York did. York admitted that he had sex with his sister, but stated that they had sex approximately five times. He stated that the incest began when he was 15 and she was 11 and that the last incident occurred 4 days prior to his 17th birthday, which would have been approximately March 16, 2001.

Eubanks negotiated a plea agreement with the Morrill County Attorney, pursuant to which York agreed to cooperate with the investigation and plead guilty to one count of incest based on the alleged November 2002 incident. In return, the county attorney would not file additional charges. Eubanks stated that he advised York that probation was a possibility but not a guarantee. However, York alleges he believed that in exchange for his plea, the prosecutor would remain silent during sentencing. Based on his understanding of the agreement, York thought he would receive a sentence of probation. Accordingly, in August 2005, York pled guilty to the November 2002 incident. The district court accepted York's plea and sentenced him to 4 to 6 years in prison.

York appealed, claiming an excessive sentence and ineffective assistance of counsel based on conflict of interest and improper advice that he would receive probation if he pled guilty. York's conflict of interest claim was based on the fact that while his criminal case was pending, Eubanks was also representing York's parents in a civil claim for damages arising from a car accident involving York's sister. The appeal was not successful.

York then filed a motion for postconviction relief, again alleging ineffective assistance of counsel due to conflict of interest and counsel's promise that York would receive probation. He also claimed that his appellate counsel should have raised the issue of Eubanks' failing to object to a violation of the plea agreement.

The district court denied York's motion on July 22, 2008. It noted that in light of York's admissions, defenses of

nonoccurrence, alibi, or nature of the assault were not appropriate and his sister's credibility was not at issue. The court also determined that the evidence did not indicate Eubanks promised York he would receive probation and that the record did not support a finding that the final plea agreement contained a provision requiring the prosecutor to remain silent at sentencing. York filed a notice of appeal on August 14. On September 11, he was discharged from prison. He was not placed on parole.

This court heard oral arguments in the case at bar on March 31, 2009. At that time, neither party could inform the court as to York's custodial status, so the parties were ordered to advise the court of York's status. The State filed a written response that York had been released from prison and was not on parole. York informed the court that he is no longer incarcerated or on parole, but that he is required to register as a sex offender pursuant to § 29-4003(1)(a)(vii) for a period of at least 10 years. Based on that requirement, York claims he is still "under a sentence" for purposes of the Nebraska Postconviction Act.

ASSIGNMENT OF ERROR

York assigns that the district court erred in denying his request for postconviction relief.

ANALYSIS

[4] York alleges ineffective assistance of counsel because Eubanks represented him in a criminal case while simultaneously representing York's parents in a civil case on behalf of his sister, who was his victim in the criminal case. We do not reach the issue of ineffective assistance of counsel in this case, because York does not have standing to seek postconviction relief. The Nebraska Postconviction Act provides that postconviction relief is available to "[a] prisoner *in custody under sentence*" who seeks to be released on the ground that there was a denial or infringement of his constitutional rights such that the judgment was void or voidable. See § 29-3001 (emphasis supplied). York has the burden of establishing a basis for such relief. See *State v. Thomas*, 236 Neb. 553, 462 N.W.2d 862 (1990).

[5] The Nebraska Postconviction Act affords relief to prisoners who are in custody, on parole, or on probation in Nebraska under a Nebraska sentence. See, *State v. Costanzo*, 242 Neb. 478, 495 N.W.2d 904 (1993); *State v. Styskal*, 242 Neb. 26, 493 N.W.2d 313 (1992); *Thomas, supra*; *State v. Harper*, 233 Neb. 841, 448 N.W.2d 407 (1989). It is undisputed that York is not incarcerated, on parole, or on probation. York alleges, however, that he is required to register as a sex offender pursuant to the SORA for at least 10 years. He claims that this requirement renders him "in custody under sentence" such that he should be permitted to seek relief under the Nebraska Postconviction Act. See § 29-3001. We conclude that an individual who is subject to the registration requirements under the SORA is not "in custody under sentence" for purposes of the Nebraska Postconviction Act. See § 29-3001.

[6] The SORA applies to any person who pleads guilty to or is found guilty of certain listed offenses, including incest of a minor as defined by § 28-703. See *State v. Payan*, 277 Neb. 663, 765 N.W.2d 192 (2009). The SORA includes a general requirement that a person convicted of these listed offenses must register with the sheriff of the county in which he or she resides during any period of supervised release, probation, or parole, "for a period of ten years after the date of discharge from probation, parole, or supervised release or release from incarceration, whichever date is most recent." § 29-4005(1). The sentencing court may identify certain sex offenders as aggravated offenders who are subject to more restrictive requirements; however, there is no evidence that the sentencing court made such findings regarding York, and we decline to consider that scenario at this time. See, *Payan, supra*; *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004).

We have held that because the SORA's registration requirements arise solely and independently by the terms of the act itself only after the defendant's conviction, it is a collateral consequence of the conviction. See, *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002); *State v. Torres*, 254 Neb. 91, 574 N.W.2d 153 (1998). Further, the restrictions SORA registrants face are minimal compared to those faced by individuals

we have found to be "in custody" for purposes of postconviction relief.

Parolees, for example, although not in the State's physical custody, are still under the jurisdiction of the Nebraska Board of Parole and face returning to prison if their parole is revoked. See *Thomas, supra*. Conditions of parole may forbid an individual from leaving a geographical area without permission, require that the individual remain employed, require the individual to submit to medical or psychological treatment, or forbid the individual from associating with certain persons. See *id*. SORA registrants are not subject to such limitations. Accordingly, York is no longer in custody in Nebraska under a Nebraska sentence and his appeal is moot.

CONCLUSION

Postconviction relief is available only to a prisoner in actual custody, on parole, or on probation in Nebraska under a Nebraska sentence. Relief is not extended to individuals who are no longer in custody but are subject to noncustodial registration requirements pursuant to the SORA. Because York is no longer in custody in Nebraska under a Nebraska sentence, his appeal is dismissed as moot.

APPEAL DISMISSED.

KELLY JEAN CONNELLY AND TIMOTHY JAMES CONNELLY,
WIFE AND HUSBAND AND NATURAL GUARDIANS OF
RACHEL AND CHELSEA CONNELLY, APPELLEES,
V. CITY OF OMAHA, APPELLANT.
769 N.W.2d 394

Filed August 7, 2009. No. S-08-1011.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
3. ____: ____. Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.

4. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
5. **Final Orders: Words and Phrases.** The term "final judgment" as used in Neb. Rev. Stat. § 25-1315(1) (Reissue 2008) is the functional equivalent of a "final order" within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 2008).
6. **Jurisdiction: Final Orders: Appeal and Error.** A "final order" is a prerequisite to an appellate court's obtaining jurisdiction of an appeal initiated pursuant to Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).
7. **Actions: Parties: Final Orders: Words and Phrases.** With the enactment of Neb. Rev. Stat. § 25-1315(1) (Reissue 2008), 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 Neb. Rev. Stat. § 25-1902 (Reissue 2008) 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.
8. **Final Orders: Appeal and Error.** To be appealable, an order must satisfy the final order requirements of Neb. Rev. Stat. § 25-1902 (Reissue 2008) and, additionally, where implicated, Neb. Rev. Stat. § 25-1315(1) (Reissue 2008).
9. **Negligence: Liability: Damages: Final Orders: Appeal and Error.** In negligence actions, an interlocutory summary adjudication of liability alone, which does not decide the question of damages, is not a final, appealable order.
10. **Final Orders.** To be final, an order must ordinarily dispose of the whole merits of the case.
11. **Trial: Judges.** A trial judge has broad discretion over the conduct of a trial, and, absent abuse, that discretion should be respected.
12. **Trial: Parties.** Bifurcation of a trial may be appropriate where separate proceedings will do justice, avoid prejudice, and further the convenience of the parties and the court.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Order vacated, and appeal dismissed.

Thomas Mumgaard, Deputy Omaha City Attorney, for appellant.

Thomas M. Locher, Ralph A. Froehlich, and Timothy M. Morrison, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellees.

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

GERRARD, J.

Timothy James Connelly took his two daughters sledding in Omaha's Memorial Park. The two girls suffered significant injuries when their sled collided with a tree. Timothy and his wife, Kelly Jean Connelly, sued the City of Omaha (City), and they brought a separate action on behalf of the children that was consolidated with Timothy and Kelly's action.

Timothy and Kelly's case (but not the children's) went to trial on the issue of liability, which was bifurcated from the issue of damages. Evidence on damages was not received. The district court entered judgment against the City on liability but did not make a determination as to damages. The City moved for certification of a final judgment pursuant to Neb. Rev. Stat. § 25-1315 (Reissue 2008), and when that was granted by the district court, the City filed a notice of appeal. The first issue we must decide is whether an adjudication of liability alone, which does not decide the question of damages, is a final, appealable order subject to appellate certification under § 25-1315. Applying long-established principles, we conclude that such an interlocutory order is neither final nor appealable; thus, we vacate the court's order and dismiss the appeal.

FACTUAL BACKGROUND

In the afternoon of December 29, 2000, Timothy took his 5-year-old and 10-year-old daughters to Memorial Park to go sledding. When they arrived, Timothy surveyed the area, saw other people sledding, and chose a spot for his children to begin sledding. Timothy noted some trees on the right, left, and bottom of the sledding hill. The children got into their saucer-like sled and proceeded down the hill. The sled veered to the right, and the girls collided with a tree. As a result of the collision, both girls were injured.

Timothy and Kelly (who is the children's mother) filed suit against the City for the injuries suffered by the children while sledding at Memorial Park. The complaint lists five causes of action: (1) willful negligence, (2) loss of services, (3) negligent infliction of emotional distress upon Timothy, (4) negligent infliction of emotional distress upon Kelly, and (5) negligence. Timothy and Kelly sought damages for past

and future medical costs and services, in addition to general damages for their negligent infliction of emotional distress causes of action.

After a bench trial in March 2006, the court found that the City was liable for the children's injuries under Nebraska's Recreation Liability Act.[1] Trial on the issue of liability was bifurcated from the issue of damages, and evidence of damages was not received. The court found that there was insufficient evidence to support either parent's negligent infliction of emotional distress claim. And the court found no affirmative defenses applicable, except for 25-percent contributory negligence by Timothy. The court did not make a determination as to damages. Shortly after this initial proceeding, a second action was filed on behalf of the children, seeking general damages arising out of the same accident. The children's case was consolidated with their parents' action.

All the parties filed motions for partial summary judgment, raising several issues. In ruling favorably on the plaintiffs' motions for partial summary judgment, the court determined that each of the four plaintiffs could recover up to the individual statutory damages cap set forth in the Political Subdivisions Tort Claims Act.[2] The court found that Timothy's negligence would not be imputed to the other plaintiffs and that Timothy and Kelly's younger daughter could not be contributorily negligent as a matter of law due to her age. The court also determined that our decision in *Bronsen v. Dawes County*[3] would be applied retroactively. The court, however, rejected Timothy and Kelly's motion for summary judgment on their claim for loss of parental consortium and addressed the application of res judicata and collateral estoppel to the children's case. The City's motions for partial summary judgment and motion to amend the judgment were overruled.

Although the court had addressed a number of issues, there still had been no trial on Timothy and Kelly's damages, and no

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[1] Neb. Rev. Stat. §§ 37-729 to 37-736 (Reissue 2004).

[2] Neb. Rev. Stat. §§ 13-901 to 13-927 (Reissue 1997 & Cum. Supp. 2002). See § 13-926 (Reissue 2007).

[3] *Bronsen v. Dawes County*, 272 Neb. 320, 722 N.W.2d 17 (2006).

trial on liability or damages in the children's case. Nonetheless, the City moved for the court to "enter a final judgment on the issue of liability" pursuant to § 25-1315. The district court sustained the motion, reasoning that judicial efficiency would be served because the trial on damages was likely to be onerous. The court certified a final judgment with respect to the City's liability, the application of *Bronsen*, and the denial of the City's motion for partial summary judgment. The City appeals only the court's finding of negligence.

The Court of Appeals ordered the parties to brief the jurisdictional issue and application of *Cerny v. Todco Barricade Co*.[4] to the district court's § 25-1315 order. We later moved the case to our docket on our own motion. The parties argue that we have jurisdiction even though there is no finding as to Timothy and Kelly's damages or findings on liability or damages in the children's case.

ASSIGNMENTS OF ERROR

The City assigns, as consolidated and restated, that the district court erred in finding the City was negligent, rejecting the City's affirmative defenses, and finding that the City's negligence was greater than Timothy's.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[5]

ANALYSIS

Trial Court Erred in Certifying Its Interlocutory Adjudication of Liability as Final, Appealable Order.

[2,3] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues

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[4] *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

[5] *Dominguez v. Eppley Transp. Servs.*, 277 Neb. 531, 763 N.W.2d 696 (2009).

presented by a case.[6] Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.[7]

[4] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.[8] Here, the district court's order granting partial summary judgment reserved issues for later disposition, including the issue of monetary damages and liability in the children's case. Thus, the initial issue presented is whether the district court's order was a final order from which an appeal could be taken.

Section 25-1315(1) provides that

> [w]hen 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.

Section 25-1315 permits a judgment to become final only under the limited circumstances set forth in the statute.[9] By its

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[6] *Nebraska Dept. of Health & Human Servs. v. Weekley*, 274 Neb. 516, 741 N.W.2d 658 (2007).

[7] *Kilgore v. Nebraska Dept. of Health & Human Servs.*, 277 Neb. 456, 763 N.W.2d 77 (2009).

[8] *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007).

[9] *Cerny, supra* note 4.

terms, § 25-1315(1) is implicated only where multiple causes of action are presented or multiple parties are involved, and a *final judgment* is entered as to one of the parties or causes of action.[10]

[5,6] The term "final judgment" as used in § 25-1315(1) is the functional equivalent of a "final order" within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 2008).[11] A "final order" is a prerequisite to an appellate court's obtaining jurisdiction of an appeal initiated pursuant to § 25-1315(1).[12] In other words, an order that *was not* appealable under § 25-1902 before § 25-1315 was enacted did not *become appealable* after § 25-1315 was enacted.[13]

[7,8] Thus, 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. Therefore, to be appealable, an order must satisfy the final order requirements of § 25-1902 and, additionally, where implicated, § 25-1315(1).[14]

In the case at hand, we are presented with a consolidated action involving multiple causes of action and multiple parties. The district court's order granting the motion for partial summary judgment resolved the City's liability in the parents' action, but left unresolved the issues of liability in the children's case, in addition to monetary damages as to all of the causes of action and parties. The district court's order directing final judgment pursuant to § 25-1315(1) expressly states that "[t]rial has not been held in the children's action," that the

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[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] See, *id.*; *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997).

[14] *Cerny, supra* note 4.

issue of damages was bifurcated from liability issues, and that a "bench trial addressed only the liability issue."

[9,10] We have consistently refused jurisdiction based on the lack of a final, appealable order in situations nearly identical to the present case. Since at least *Hart v. Ronspies*,[15] we have held in negligence actions that an interlocutory summary adjudication of liability alone, which does not decide the question of damages, is not a final, appealable order. In *Hart*, we denied jurisdiction where the district court rendered partial summary judgment for the plaintiff on the issue of the defendant's negligence but reserved for trial the issues of contributory negligence, proximate cause, and damages.[16] This is so because no substantial right is affected by such an interlocutory determination.[17] Similarly, in *Burke v. Blue Cross Blue Shield*,[18] we denied jurisdiction where the district court entered partial summary judgment on the issue of the defendants' liability but retained the issue of damages for later disposition. To be final, an order must ordinarily dispose of the whole merits of the case.[19] Simply put, we have consistently held that a finding of liability without a determination of damages is not a final, appealable order.[20]

Here, no final order was entered (or determination made) regarding damages as required by § 25-1902, and accordingly, the court could not have directed the entry of a final judgment within the meaning of § 25-1315(1). Because the judgment does not dispose of the entirety of any one claim, it cannot be made an appealable judgment by recourse to § 25-1315.[21] As we have stated, § 25-1315 does not provide "'magic words,'"

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[15] *Hart v. Ronspies*, 181 Neb. 38, 146 N.W.2d 795 (1966).

[16] *Id.*

[17] *Id.*

[18] *Burke v. Blue Cross Blue Shield*, 251 Neb. 607, 558 N.W.2d 577 (1997).

[19] *Id.*

[20] See, e.g., *O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998); *Burke, supra* note 18; *Olsen v. Olsen*, 248 Neb. 393, 534 N.W.2d 762 (1995); *Grantham v. General Telephone Co.*, 187 Neb. 647, 193 N.W.2d 449 (1972); *Hart, supra* note 15.

[21] *Poppert v. Dicke*, 275 Neb. 562, 747 N.W.2d 629 (2008).

the invocation of which transforms any order into a final judgment for purposes of appeal.[22] We conclude that the court erred in certifying its partial summary judgment as final under § 25-1315(1). Because the district court's order of partial summary judgment was not a final, appealable order, we are without jurisdiction.

Bifurcation of Trial May Be Appropriate for Convenience of Parties and Interest of Justice.

[11,12] Finally, we observe that nothing in this opinion should be read as undermining the fact that there are good reasons and appropriate circumstances to bifurcate a trial. A trial judge has broad discretion over the conduct of a trial,[23] and, absent abuse, that discretion should be respected. Bifurcation of a trial may be appropriate where separate proceedings will do justice, avoid prejudice, and further the convenience of the parties and the court.[24] Bifurcation is particularly proper where a potentially dispositive issue may be decided in such a way as to eliminate the need to try other issues. In this case, for instance, if the district court had determined that the City was not liable for any of the causes of action, there would have been no need to determine damages. And an appeal could have appropriately been taken from such a final order. From the record presented, it appears that the district court exercised its discretion carefully in bifurcating the trial. The court's error was in certifying an interlocutory appeal (albeit in good faith), not in bifurcating the trial proceedings in the first place.

CONCLUSION

Without a final order, an appellate court lacks jurisdiction and must dismiss the appeal.[25] Because § 25-1315 was

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[22] *Keef v. State*, 262 Neb. 622, 629, 634 N.W.2d 751, 758 (2001).

[23] *Robison v. Madsen*, 246 Neb. 22, 516 N.W.2d 594 (1994).

[24] See, e.g., *Saxion v. Titan-C-Manufacturing, Inc.*, 86 F.3d 553 (6th Cir. 1996).

[25] *Poppert, supra* note 21.

erroneously applied, there is no final order from which an appeal may be taken in this case. Therefore, we vacate the court's order certifying a final judgment and, lacking jurisdiction, dismiss this appeal.

ORDER VACATED, AND APPEAL DISMISSED.

McCORMACK, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
DAMIAN L. THOMPSON, APPELLANT.
770 N.W.2d 598

Filed August 7, 2009. No. S-08-1134.

1. **Courts: Appeal and Error.** Both the district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record.
2. **Criminal Law: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion.
3. **Trial: Evidence.** An objection based upon insufficient foundation is a general objection.
4. **Trial: Evidence: Photographs.** As a general rule, photographic evidence is admissible when it is shown that it is a correct reproduction of what it purports to depict.
5. **Trial: Evidence: Appeal and Error.** A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion.
6. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
7. **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.
8. **Judgments: Trial: Evidence: Proof: Appeal and Error.** In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence in a case tried without a jury. The appellant must show that

the trial court made a finding of guilt based exclusively on the erroneously admitted evidence.

9. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.
10. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
11. **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.
12. **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.
13. **Trial: Convictions.** A conviction in a bench trial of a criminal case is sustained if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.
14. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Appeal from the District Court for Lancaster County, ROBERT R. OTTE, Judge, on appeal thereto from the County Court for Lancaster County, GALE POKORNY, Judge. Judgment of District Court affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and John C. Jorgensen for appellant.

Gary Lacey, Lancaster County Attorney, Daniel D. Packard, and Richard Grabow, Senior Certified Law Student, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Damian L. Thompson was convicted in Lancaster County Court of misdemeanor assault and sentenced to 100 days in jail. He appealed to the Lancaster County District Court, which affirmed the conviction and sentence. Thompson appeals.

SCOPE OF REVIEW

[1,2] Both the district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record. *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008). In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion. *Id.*

FACTS

Around 5 p.m. on August 30, 2006, Tanya Hansen arrived at her home in southwest Lincoln. She heard a woman screaming and asking someone to call the police. Hansen went to her backyard, which abutted an apartment building, and saw a man chasing a woman, who was yelling for help. She identified Thompson as the man she saw. Hansen saw Thompson and the woman enter the apartment building and then come back outside. Thompson got into a vehicle and left the area, and the woman yelled that Thompson had taken her car. Hansen called the 911 emergency dispatch service.

The woman asking for help was identified as Jessica Goff. Thompson and Goff were temporarily staying in an apartment with Kalli Ruleau. Ruleau testified that on August 30, 2006, she saw Thompson and Goff outside the apartment and heard them arguing. Goff, who appeared to be upset, was trying to leave, and Thompson was trying to stop her from leaving. Ruleau saw Thompson push Goff, who fell to the ground. Thompson walked away, and Ruleau went to help Goff. Goff had small scratches on her hands. Ruleau went into the apartment to get a telephone for Goff to use to call the police.

Officer Thomas Stumbo of the Lincoln Police Department was dispatched to the apartment for a domestic disturbance. When he arrived, Goff and Ruleau were standing outside the building. Goff appeared to be upset and was crying. Stumbo took photographs of Goff's injuries, which included a small laceration on the palm of each hand and a minor laceration on her left elbow.

A complaint was filed against Thompson, charging him with assault under Lincoln Mun. Code § 9.12.010 (1997). At a trial

to the court, an audiotape of a call to police about the incident was received into evidence over Thompson's objection. The call was from a woman who identified herself as Goff. The 911 operator testified that the caller seemed upset and reported that she had been assaulted by Thompson at an apartment in southwest Lincoln. Thompson was found guilty, and he was sentenced to 100 days in jail, consecutive to any other sentence he had pending.

Thompson appealed to the Lancaster County District Court, assigning the following errors: The county court erred in (1) receiving photographs of Goff's injuries into evidence without sufficient foundation; (2) overruling Thompson's motion to dismiss for lack of a prima facie case; (3) finding Thompson guilty without sufficient evidence to sustain the conviction; (4) imposing an excessive sentence; (5) receiving into evidence over Thompson's hearsay objection a tape of the call to police; and (6) overruling Thompson's motions pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), regarding evidence of other crimes, wrongs, or acts. Thompson claimed the cumulative effect of all the errors deprived him of his constitutional right to a public trial by a fair and impartial fact finder.

The district court affirmed the conviction and sentence. It found no error in the admission of photographs taken by Stumbo. The court determined it was clear from Stumbo's prior testimony that he identified Goff as the victim when he first arrived on the scene.

Thompson's motion to dismiss at the end of the trial was based on a claim that the State did not elicit testimony from Goff and, therefore, there was insufficient evidence to support a prima facie case. The district court found that the facts established by other witnesses met the State's burden of proof to establish a prima facie case against Thompson.

As to whether the sentence was excessive, the district court noted that violation of § 9.l2.010 is a misdemeanor, for which the penalty is a maximum of 6 months in jail, a fine of $500, or both, and Thompson was sentenced to 100 days in jail. The district court noted that the presentence investigation (PSI) showed that Thompson had twice been convicted of assault.

In addition, Thompson previously failed to appear for sentencing. The district court found no abuse of discretion by the county court.

The district court noted that Thompson had entered a timely and continuing objection to the receipt into evidence of the tape recording of the call to police purportedly from Goff. Thompson argued that the tape should not have been admitted because it was hearsay. The district court agreed that the foundational threshold necessary to admit the tape into evidence was lacking and that the county court should not have admitted the tape. However, the district court found that the admission of the tape was not so prejudicial as to require reversal of the county court's decision. The record was replete with facts the county court could rely on to establish the necessary evidence to find Thompson guilty.

The district court found no error concerning the evidence of other crimes, wrongs, or acts. Thompson did not argue the error in his brief, and the county court's ruling did not violate Thompson's rights.

The district court then addressed Thompson's claim that the cumulative effect of the errors violated his right to a fair trial. The court noted that even if the testimony of the 911 operator and the tape of the call had been excluded, other witnesses established the charge against Thompson beyond a reasonable doubt. The record supported the county court's factual findings.

ASSIGNMENTS OF ERROR

Thompson assigns the following errors: The county court erred in (1) receiving exhibits into evidence without sufficient foundation; (2) overruling his motion to dismiss for lack of a prima facie case; (3) finding Thompson guilty without sufficient evidence; (4) imposing an excessive sentence; and (5) overruling Thompson's rule 404 motions regarding evidence of other crimes, wrongs, or acts. Thompson also claims that the county court erred in receiving a tape of the 911 call into evidence when it was hearsay and violated his right of confrontation and that the district court erred in finding that admission of the evidence was harmless error. Finally, Thompson argues

that the cumulative effect of all the errors deprived him of his constitutional right to a public trial by a fair and impartial fact finder.

ANALYSIS

This case is before us as an appeal from the district court, which sat as an intermediate appellate court. In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and as such, its review is limited to an examination of the county court record for error or abuse of discretion. *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008). Both the district court and the Nebraska Supreme Court generally review appeals from the county court for error appearing on the record. *Id.*

Admission of Evidence

Thompson first argues that the county court erred in receiving into evidence exhibits 1 through 5, which are photographs of Goff. He argues that foundation was lacking for the admission of the photographs, because there was no confirmation of the identity of the person in the photographs.

Stumbo testified that he took the photographs of Goff and that the photographs were true and accurate depictions of Goff as she appeared on the date of the incident. Thompson claimed error because Stumbo had not testified as to how he identified the person in the photographs. The objection was overruled.

[3] An objection based upon insufficient foundation is a general objection. *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005). If such an objection is overruled, the objecting party may not complain on appeal unless (1) the ground for exclusion was obvious without stating it or (2) the evidence was not admissible for any purpose. *Id.* Thompson has not suggested that the ground for exclusion of the photographs was obvious. Nor has he argued that the photographs were not admissible for any purpose.

[4] Thompson's argument revolves around whether Stumbo identified Goff as the individual he talked to at the site of the assault and as the person who was portrayed in the photographs. As a general rule, photographic evidence is admissible

when it is shown that it is a correct reproduction of what it purports to depict. See *State v. Anglemyer*, 269 Neb. 237, 691 N.W.2d 153 (2005). "This is often proved by the testimony of the one who took the photograph." *Id.* at 246, 691 N.W.2d at 161-62. At trial, Stumbo described Goff's injuries and stated that he took the photographs of her.

[5] A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion. *State v. Jacobson*, 273 Neb. 289, 728 N.W.2d 613 (2007). The district court found no abuse of discretion in the county court's receipt into evidence of the photographs. The finding was correct.

[6] Thompson also objects to the county court's receipt into evidence of exhibit 6, the tape recording of the call to police. On appeal to this court, he claims that the tape was hearsay and violated his rights to confrontation and cross-examination. We note first, however, that Thompson did not raise the confrontation argument on appeal to the district court in his assignments of error, and the district court did not address the argument in its order. When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *State v. Pieper*, 274 Neb. 768, 743 N.W.2d 360 (2008). Thus, we need not address whether the tape violated Thompson's right to confrontation.

We then turn to the question of whether the tape was hearsay. The record shows that the 911 operator testified that she took the call on the police nonemergency telephone number. She stated that she had listened to the tape and that it was a true and accurate copy of the conversation she had with a person who identified herself as Goff. Thompson did not object. When the operator was asked to describe Goff's tone of voice or demeanor, Thompson's objection on the basis of speculation was overruled. The operator stated that Goff said she had been assaulted, and Thompson raised a hearsay objection. The objection was overruled, and after the operator stated that Goff said the assault had just occurred, Thompson asked for a continuing objection on the basis of hearsay and insufficient

foundation. The continuing objection was noted and overruled by the court.

The operator again stated that the tape was a true and accurate copy of the telephone conversation with a female who identified herself as Goff and that Goff said the person who assaulted her was Thompson. The State offered the tape into evidence, and Thompson objected on the basis of hearsay and insufficient foundation. Thompson's counsel stated, "I don't know if the State's attempting to elicit the [statement] under an excited utterance." The tape was received into evidence and played for the court.

The district court did not mention the excited utterance exception to the hearsay rule in its order, but Thompson suggests in his brief to this court that the excited utterance exception was the presumed ground for the county court's admission of the tape. The record does not support Thompson's suggestion that the county court admitted the tape into evidence as an excited utterance. Rather, it appears that the district court reviewed the admission of the call to police as a witness' pretrial identification of a defendant. The court cited *State v. Salamon*, 241 Neb. 878, 491 N.W.2d 690 (1992), in which this court stated that a witness' pretrial statement identifying a defendant as the perpetrator of a crime is hearsay pursuant to Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 2008), and inadmissible under Neb. Evid. R. 802, Neb. Rev. Stat. § 27-802 (Reissue 2008).

In the case at bar, the district court determined that the tape was inadmissible under the Nebraska Evidence Rules. The court then applied the harmless error analysis to find that the admission of the tape may have prejudiced Thompson but that the error was not so prejudicial as to require the court to overturn the county court's decision. See *State v. Hansen*, 259 Neb. 764, 612 N.W.2d 477 (2000). The court found that the record was replete with facts that could be relied on to establish the evidence necessary to find Thompson guilty beyond a reasonable doubt.

[7] As noted earlier, our review is for error appearing on the record. When reviewing a judgment for errors appearing

on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008). An appellate court nonetheless has an obligation to resolve questions of law independently of the conclusions reached by the trial court. *Id*.

[8] The district court concluded that the tape was hearsay and was improperly received into evidence by the county court. In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence in a case tried without a jury. *State v. Harms*, 264 Neb. 654, 650 N.W.2d 481 (2002) (supplemental opinion). The appellant must show that the trial court made a finding of guilt based exclusively on the erroneously admitted evidence. *State v. Lara*, 258 Neb. 996, 607 N.W.2d 487 (2000). If there is other sufficient evidence to support the finding of guilt, the conviction will not be reversed. *Id*. The burden rests on the appellant in a bench trial because of the presumption that the trial court, sitting as the fact finder, disregards inadmissible evidence. *State v. Harms, supra*. We conclude there was other sufficient evidence to support the finding of guilt.

This was a bench trial. Ruleau provided eyewitness testimony as to the assault of Goff by Thompson. Hansen, the neighbor, testified that she heard a woman screaming for help and that Thompson was present while the woman was screaming. Stumbo took photographs of Goff showing her injuries, and he testified to the accuracy of the depictions in the photographs. The district court's decision concerning the tape conformed to the law, was supported by competent evidence, and was not arbitrary, capricious, or unreasonable. Thompson's assignments of error concerning the admission of evidence have no merit.

Motion to Dismiss and Sufficiency of Evidence

Thompson argues that the county court erred in overruling his motion to dismiss for lack of a prima facie case. Subsumed in this claim is Thompson's assertion that the evidence was insufficient to sustain the conviction. His arguments are based on the failure of the State to elicit testimony from Goff, the alleged victim. The district court found that the facts established by the other witnesses clearly met the State's burden of proof to establish a prima facie case against Thompson.

[9] Thompson does not provide any case law to support his claim that the evidence was insufficient because the alleged victim did not testify. There is no statute requiring a victim to testify in a criminal case. This court must review only whether the evidence was sufficient. In so doing, 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. *State v. Babbitt*, 277 Neb. 327, 762 N.W.2d 58 (2009). The county court heard and observed the witnesses and was able to assess their credibility, and it found sufficient evidence to convict Thompson of violating the municipal code. The district court also found that the evidence was sufficient and that there was no error in the county court's failing to sustain the motion to dismiss because Goff did not testify.

We agree. As noted above, there was eyewitness testimony to Thompson's pushing Goff to the ground. A police officer took photographs of the injuries Goff sustained. A neighbor heard Thompson and Goff arguing. These assignments of error have no merit.

Excessive Sentence

Thompson claims the county court erred in imposing an excessive sentence. He argues that a lesser sentence would have satisfied the purpose of sentencing.

[10,11] Thompson was sentenced to a term of 100 days in jail. Although he mentions a PSI in his brief and the district court referred to a PSI, there is no such report in the record. In fact, the probation office has indicated in a letter that it did

not conduct a presentence investigation. Regardless, Thompson was convicted of a misdemeanor that was punishable by a term of imprisonment not to exceed 6 months, a fine not to exceed $500, or both. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Moore*, 277 Neb. 111, 759 N.W.2d 698 (2009). 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*. Thompson has not demonstrated any abuse of discretion on the part of the county court in imposing the sentence, and the district court was correct in affirming it.

Rule 404 Motions

[12] Thompson assigns as error the county court's overruling his rule 404 motions regarding evidence of other crimes, wrongs, or acts. He does not make any argument before this court related to the assignment, and he apparently did not present any argument to the district court on the issue. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court. *State v. Amaya*, 276 Neb. 818, 758 N.W.2d 22 (2008). Because Thompson offers no argument in support of the assigned error, we need not address it.

Constitutional Right to Fair Trial

Finally, Thompson argues that the cumulative effect of all the errors deprived him of his constitutional right to a public trial by a fair and impartial fact finder. The district court found no basis to this claim, and neither does this court. We have previously discussed the testimony presented to the trial court by Ruleau, the eyewitness; Hansen, the neighbor; and Stumbo, the police officer. In addition, the county court was provided photographs of Goff's injuries.

[13,14] A conviction in a bench trial of a criminal case is sustained if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. See *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003). In making this determination, an appellate court does not resolve

conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. *Id.* When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* Applying these standards to the case at bar, we find no error on the part of the county court or the district court.

CONCLUSION

The judgment of the district court, which affirmed the conviction and sentence of the county court, is affirmed.

AFFIRMED.

IN RE COMPLAINT AGAINST JEFFREY L. MARCUZZO, COUNTY COURT JUDGE OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF NEBRASKA. STATE OF NEBRASKA EX REL. COMMISSION ON JUDICIAL QUALIFICATIONS, RELATOR, V. JEFFREY L. MARCUZZO, RESPONDENT.

770 N.W.2d 591

Filed August 7, 2009. No. S-35-080001.

1. **Judges: Disciplinary Proceedings: Appeal and Error.** In a review of the findings and recommendations of the Commission on Judicial Qualifications, the Nebraska Supreme Court shall review the record de novo and file a written opinion and judgment directing action as it deems just and proper, and may reject or modify, in whole or in part, the recommendation of the commission.
2. **Judges: Disciplinary Proceedings.** Upon consent of the respondent in a judicial discipline proceeding, an order of reprimand, discipline, suspension, retirement, or removal may be entered by the Nebraska Supreme Court at any stage of the proceedings.
3. ____: ____. Pursuant to Neb. Rev. Stat. § 24-722(6) (Reissue 2008), a judge of any court of this state may be reprimanded, disciplined, censured, suspended without pay for a definite period not to exceed 6 months, or removed from office for conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

4. ____: ____. A clear violation of the Code of Judicial Conduct constitutes, at a minimum, a violation of Neb. Rev. Stat. § 24-722(6) (Reissue 2008).
5. ____: ____. The goals of disciplining a judge in response to inappropriate conduct are to preserve the integrity of the judicial system as a whole and to provide reassurance that judicial misconduct will not be tolerated.
6. ____: ____. The Nebraska Supreme Court is charged with the responsibility to dispense judicial discipline in a manner that preserves the integrity and independence of the judiciary and restores and reaffirms public confidence in the administration of justice.

Original action. Judgment of suspension without pay.

Anne E. Winner, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for relator.

Clarence E. Mock, of Johnson & Mock, for respondent.

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

PER CURIAM.

BACKGROUND

This is an original action before the court following a complaint filed on August 1, 2008, by the Commission on Judicial Qualifications (Commission). The complaint charged the respondent, Jeffrey L. Marcuzzo, a county judge of the Fourth Judicial District of Nebraska, with misconduct, in violation of the Nebraska Code of Judicial Conduct[1] (Code); Neb. Const. art. V, § 30; and Neb. Rev. Stat. § 24-722 (Reissue 2008).

A hearing on the complaint was held on October 23, 2008, before Judge James D. Livingston, a district court judge who was appointed to serve as special master. The special master concluded that Marcuzzo violated provisions of the Code and that the conduct was prejudicial to the administration of justice and brought the judicial office into disrepute, as prohibited by § 24-722(6).

The Commission adopted the findings of the special master and found by clear and convincing evidence that Marcuzzo violated certain provisions of the Code. The Commission recommended that Marcuzzo be suspended from office, without

[1] Neb. Code of Judicial Conduct §§ 5-201 to 5-205.

salary, for a period of 3 months. Marcuzzo entered a "Consent to Reprimand." The matter has been submitted to the court without oral argument. Pursuant to Neb. Ct. R. § 5-118, we have reviewed the record and now file this written opinion and judgment adopting the recommendation of the Commission.

FACTS

The complaint filed by the Commission alleged that Marcuzzo violated the following canons of the Code:

> **§ 5-201. Canon 1. A judge shall uphold the integrity and independence of the judiciary.**
>
> (A) An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code shall be construed and applied to further that objective.
>
> . . . .
>
> **§ 5-202. Canon 2. A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.**
>
> (A) A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> . . . .
>
> (B) A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. . . .
>
> . . . .
>
> **§ 5-203. Canon 3. A judge shall perform the duties of judicial office impartially and diligently.**
>
> . . . .
>
> (B) Adjudicative Responsibilities.

> . . . .
>
> (2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.
>
> . . . .
>
> (4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity . . . .
>
> . . . .
>
> (7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding . . . .

Three incidents were alleged in the complaint. The special master made findings of fact for each allegation and found that the facts were proved by clear and convincing evidence.

The first incident related to charges that Marcuzzo improperly involved himself in a criminal case against his nephew. In July 2006, Marcuzzo's nephew was charged with a misdemeanor violation in the Douglas County Court. The matter was scheduled for trial on July 12 before Judge Lyn White. Prior to that date, the parties had entered into a plea agreement which would have allowed Marcuzzo's nephew to plead guilty and serve a short jail sentence.

Marcuzzo's nephew failed to appear in Judge White's court on the date scheduled. A warrant was issued for his arrest, and the plea offer was revoked. The special master found that later that day, Marcuzzo inserted himself into his nephew's case by requesting that the prosecutor keep open or reinstate the plea agreement. That evening, Marcuzzo continued his involvement in the case by telephoning the nephew's attorney at her home and leaving a message arranging a meeting the next morning between Marcuzzo, his nephew, and his nephew's attorney.

The special master found that the attorney followed Marcuzzo's instructions and met with him and the nephew privately, at which time, Marcuzzo notified the nephew and his attorney that the nephew would be pleading guilty and the case would be taken care of at 9 a.m. Marcuzzo told the nephew and his attorney that Marcuzzo had arranged for Judge Lawrence Barrett to handle the plea. Prior to the nephew's appearance before Judge Barrett, Marcuzzo was seen having a discussion with Judge Barrett in a bailiff's office. Judge Barrett heard the case, and the nephew pled guilty to the misdemeanor charge. He was sentenced to probation.

The special master concluded that Marcuzzo was in violation of § 5-201 of the Code in that he willfully disregarded his duties as a judge by inserting himself into the criminal case involving his nephew. Marcuzzo had ex parte communications (1) with the prosecutor, in which Marcuzzo made a personal request to keep open the plea agreement; (2) with the nephew's attorney, both by telephone after hours and by meeting in person; and (3) with Judge Barrett concerning the handling of the case. The special master found that Marcuzzo's efforts had a bearing on the case as far as keeping open the plea agreement, scheduling the date and time for the case, and arranging which judge would hear the case.

In addition, the special master found that Marcuzzo violated § 5-202(A) and (B) by inserting himself into his nephew's case, which lent the prestige of his judicial office to advance the private interest of the nephew and gave others the impression that special treatment was being given to the nephew due to Marcuzzo's position as a judge. The special master found that was a direct affront to public confidence in the integrity and impartiality of the judiciary.

The special master noted that Marcuzzo's nephew's case was originally scheduled to be presented to a judge who had a reputation for stern handling of similar cases, with a plea agreement in which the parties agreed to recommend and accept 10 days in jail. The nephew violated his bail by failing to appear. Marcuzzo's insertion of himself into the criminal proceeding resulted in the case's being scheduled for a new date and time

with a different judge hearing the case and with Marcuzzo's nephew receiving a sentence of probation.

According to the special master, the evidence was uncontradicted that the change in the case was directly related to Marcuzzo's insertion of himself into the case and his conducting ex parte communications with the prosecutor, defense counsel, and Judge Barrett, who heard the case. Although there was no evidence that Marcuzzo conferred with Judge Barrett as to the outcome, it was uncontradicted that Marcuzzo spoke with Judge Barrett to arrange for him to hear the case.

The special master also determined that the ongoing involvement of Marcuzzo in his nephew's case was a violation of § 24-722(1) and (6). Marcuzzo's misconduct was willful and in bad faith, and it rose above a mere error in judgment. The special master found that Marcuzzo wrongfully used the power of his office intentionally or with gross unconcern for his conduct and that the actions were solely for the purpose of giving an advantage to the private interests of another in derogation of the faithful discharge of judicial duties. Marcuzzo's conduct was prejudicial to the administration of justice and brought the office of Marcuzzo, as a member of the judiciary, into disrepute.

The second incident involved a preliminary hearing conducted by Marcuzzo on October 29, 2007, at which Marcuzzo expressed displeasure concerning how the hearing was scheduled. At the end of the hearing, Marcuzzo raised the defendant's bond from $750,000 to $2.5 million. Marcuzzo also had an ex parte communication with the prosecutor in which Marcuzzo criticized the filing of the charges as being undercharged and in which Marcuzzo used profane terms.

The special master could not find that the bond increase was in violation of the Code or § 24-722 based on the evidence presented. He concluded he did not have sufficient background on the case and the parties involved to determine that the bond increase was other than a matter of judicial discretion based on the court's seeing and hearing the evidence presented. However, the special master determined that Marcuzzo violated §§ 5-201, 5-202(A), and 5-203(B)(4) and (7) of the Code by communicating ex parte with the prosecutor.

As to § 5-201 of the Code, the special master found that Marcuzzo compromised the integrity and independence of the judiciary by holding an ex parte communication with counsel for one of the parties and expressing his displeasure and opinion as to the charges filed. Marcuzzo advocated a position in an ongoing case in which he knew, or should have known, that the outcome could be affected by the ex parte communication.

Marcuzzo violated § 5-202(A) of the Code by inserting himself into a case which was still on file with a possibility of criminal charges being amended. The special master found that Marcuzzo's ex parte actions compromised the integrity and impartiality of the judiciary.

The special master found that Marcuzzo violated § 5-203(B)(4) of the Code by berating a colleague of the prosecutor with whom he had had an ex parte conversation. The profane manner in which the conversation was conducted was a violation of the patience, dignity, and courteousness of the official office. Marcuzzo violated § 5-203(B)(7) of the Code because his ex parte communication could have affected the legal proceedings, and Marcuzzo knew or should have known of that possible effect. In addition, the actions violated § 24-722(6).

The third incident involved Marcuzzo's leaving a profane and threatening message on an attorney's telephone when Marcuzzo believed a case had been improperly scheduled in his court. The special master found that these actions violated §§ 5-201 and 5-203(B)(4) of the Code. Marcuzzo violated the standards of conduct necessary to preserve the integrity and independence of the judiciary and did not act in a patient, dignified, and courteous manner with the attorney. The actions also violated § 24-722(6).

The Commission reviewed the entire record before the special master. As to the first matter, involvement in Marcuzzo's nephew's case, the Commission agreed with the special master that due to Marcuzzo's involvement, the case was presented to a different judge at a different time and place than originally scheduled and that the evidence was uncontradicted that the change was directly related to Marcuzzo's insertion of himself into the case and his ex parte communications.

Concerning the second incident, the preliminary hearing, the Commission noted that all attorneys involved in the case believed that the prosecutor followed the correct procedure to change the date of the hearing. At the beginning of the hearing, Marcuzzo expressed displeasure that he was not consulted before the hearing was rescheduled, and he indicated that he wanted to speak with the prosecutor. Marcuzzo appeared annoyed throughout the hearing, and at the close of the hearing, he found probable cause to bind the defendant to district court and raised the defendant's bond.

Immediately following the hearing, Marcuzzo had a private conversation with the prosecutor in an adjoining room concerning the scheduling of the case and the way the charges were brought. Marcuzzo used expletives several times during the conversation and explained that the defendant should have been "'hammered'" with other felony charges.

Concerning the third incident, the Commission noted that Marcuzzo called the prosecutor with respect to the above-described events and left a message on the prosecutor's voice mail. The message was threatening in tone, and Marcuzzo used profane language. A transcript of the voice mail message was included in the record. The prosecutor brought the message to the attention of his supervisors, who directed him to have no contact with Marcuzzo.

The next day, Marcuzzo attempted to speak with the prosecutor at the courthouse. When the prosecutor would not speak with Marcuzzo, he ordered the prosecutor to "'get over here.'" The prosecutor declined to speak with Marcuzzo. Six days later, Marcuzzo apologized to the prosecutor and his supervisors for leaving the message.

The Commission found that in his answer, Marcuzzo generally admitted the allegations in the complaint and offered additional facts and explanations for his conduct. He acknowledged that his conduct may have violated the Code. After the special master filed his report, Marcuzzo filed objections to the report, arguing that his conduct in the matter involving his nephew's criminal case was not done willfully or in bad faith. He otherwise acknowledged that his actions violated the Code and that disciplinary action was appropriate.

The Commission concurred with and adopted the findings of the special master with respect to the allegations regarding ex parte contact with a prosecutor and with respect to the threatening and profane voice mail message. The Commission also concurred with and adopted the findings with respect to the allegation that Marcuzzo involved himself in his nephew's criminal case, but the Commission found that Marcuzzo's conduct was willful and deliberate, but not necessarily done in bad faith.

The Commission concluded that there is clear and convincing evidence that Marcuzzo's conduct violated §§ 5-201, 5-202(A), and 5-203(B)(4) and (7) of the Code, as well as § 24-722(6). It recommended that Marcuzzo be suspended from office, without salary, for a period of 3 months. On February 17, 2009, Marcuzzo agreed to accept the recommendation of the Commission.

STANDARD OF REVIEW

[1] In a review of the findings and recommendations of the Commission, this court shall review the record de novo and file a written opinion and judgment directing action as it deems just and proper, and may reject or modify, in whole or in part, the recommendation of the Commission.[2]

ANALYSIS

[2] Upon consent of the respondent, an order of reprimand, discipline, suspension, retirement, or removal may be entered by this court at any stage of the proceedings.[3] Marcuzzo filed such a consent and did not file a petition to modify or reject the recommendation of the Commission.

The factual findings of the Commission have not been challenged before this court. We have reviewed the record de novo, and we conclude that the factual determinations set forth in the

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[2] *In re Complaint Against Lindner*, 271 Neb. 323, 710 N.W.2d 866 (2006). See, also, Neb. Const. art. V, § 30(2); Neb. Rev. Stat. § 24-723 (Reissue 2008); Neb. Ct. R. § 5-118.

[3] See Neb. Ct. R. § 5-115(C).

Commission's findings and recommendation are well supported by the record and have been proved by clear and convincing evidence.

The facts surrounding Marcuzzo's involvement in his nephew's criminal case show that Marcuzzo asked the prosecutor to leave the plea agreement open until his nephew appeared in court. Marcuzzo left a message on the voice mail of the nephew's attorney asking for a meeting with the attorney and the nephew the next morning. Marcuzzo was observed meeting with the judge who eventually handled the matter. The judge sentenced the nephew to probation, even though the earlier plea agreement would have resulted in the nephew's serving 10 days in jail. The record supports the Commission's finding that Marcuzzo's involvement altered the circumstances and outcome of the case.

The record also supports the Commission's finding that Marcuzzo had ex parte contact with a prosecutor after a preliminary hearing was rescheduled. Marcuzzo had a private conversation with the prosecutor, during which Marcuzzo used expletives and criticized the prosecutor for not filing additional charges. Marcuzzo later called the prosecutor and left a threatening, profane voice mail. Marcuzzo sternly ordered the prosecutor to come talk to Marcuzzo. Marcuzzo later sent a letter of apology to the prosecutor.

The Commission concluded that there was clear and convincing evidence that Marcuzzo's conducted violated the Code. We agree. His actions in all three instances demonstrated a lack of regard for the integrity and independence of the judiciary. Marcuzzo's actions were improper. His behavior did not promote public confidence in the integrity and impartiality of the judiciary. He allowed family relationships to influence his conduct and used the prestige of his judicial office to advance the private interests of a member of his family. His actions brought the judicial office into disrepute.

[3,4] We next determine the appropriate sanction. Pursuant to § 24-722(6), a judge of any court of this state may be reprimanded, disciplined, censured, suspended without pay for a definite period not to exceed 6 months, or removed from office for conduct prejudicial to the administration of

justice that brings the judicial office into disrepute.[4] A clear violation of the Code constitutes, at a minimum, a violation of § 24-722(6).[5]

[5] This is the first disciplinary action taken against Marcuzzo. However, the matter includes three instances of conduct that violated the Code. This court has stated:

> The goals of disciplining a judge in response to inappropriate conduct are to preserve the integrity of the judicial system as a whole and to provide reassurance that judicial misconduct will not be tolerated. . . . We discipline a judge not for purposes of vengeance or retribution, but to instruct the public and all judges, ourselves included, of the importance of the function performed by judges in a free society. . . .
>
> The discipline imposed must be designed to announce publicly our recognition that there has been misconduct. . . . It must be sufficient to deter the respondent from engaging in such conduct again, and it must discourage others from engaging in similar conduct in the future. . . . We weigh the nature of the offenses with the purpose of the sanctions and examine the totality of the evidence to determine the proper discipline.[6]

[6] By imposing discipline, this court assures the public that we will neither permit nor condone judicial misconduct. This court is charged with the "responsibility to dispense judicial discipline in a manner that preserves the integrity and independence of the judiciary and restores and reaffirms public confidence in the administration of justice."[7] In this case, the Commission has recommended a suspension without pay for 3 months. We conclude that a 120-day suspension without pay should be imposed as discipline for this judicial misconduct.

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[4] *In re Complaint Against Lindner, supra* note 2. See, also, Neb. Const. art. V, § 30(1).

[5] *In re Complaint Against Lindner, supra* note 2.

[6] *In re Complaint Against White*, 264 Neb. 740, 757, 651 N.W.2d 551, 566 (2002) (citations omitted).

[7] *In re Complaint Against Lindner, supra* note 2, 271 Neb. at 331, 710 N.W.2d at 872.

We therefore modify the recommendation of the Commission accordingly.

CONCLUSION

Judge Marcuzzo's conduct was in violation of the Code. As discipline, we impose a 120-day suspension from office without pay, effective on the issuance of the mandate in this case.

JUDGMENT OF SUSPENSION WITHOUT PAY.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V. ANTONIO BANKS, APPELLANT.

771 N.W.2d 75

Filed August 21, 2009. No. S-07-670.

1. **Trial: Juries: Appeal and Error.** The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court and is subject to reversal only when clearly wrong.
2. **Venue: Appeal and Error.** A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion.
3. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
4. **Constitutional Law: Appeal and Error.** An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause and reviews the underlying factual determinations for clear error.
5. **Pleadings.** The decision to grant or deny an amendment to a pleading rests in the discretion of the court.
6. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
7. **Jurors: Appeal and Error.** The erroneous overruling of a challenge for cause will not warrant reversal unless it is shown on appeal that an objectionable juror

was forced upon the challenging party and sat upon the jury after the party exhausted his or her peremptory challenges.

8. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
9. **Constitutional Law: Trial: Juries: Witnesses.** An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of a witness, or (2) a reasonable jury would have received a significantly different impression of the witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination.
10. **Constitutional Law: Trial: Witnesses.** Although the main and essential purpose of confrontation is the opportunity of cross-examination, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based upon concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.
11. **Trial: Witnesses.** A witness' credibility and weight to be given to testimony are matters for determination and evaluation by a fact finder.
12. **Jury Instructions: Appeal and Error.** It is not error for a trial court to refuse to give a party's requested instruction where the substance of the requested instruction was covered in the instructions given.
13. **Indictments and Informations.** A trial court, in its discretion, may permit a criminal information to be amended at any time before verdict or findings if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.
14. **Witnesses: Juries: Appeal and Error.** The credibility and weight of witness testimony are for the jury to determine, and witness credibility is not to be reassessed on appellate review.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Shawn Elliott for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and INBODY, Chief Judge.

MILLER-LERMAN, J.

NATURE OF CASE

Antonio Banks was convicted of first degree murder and use of a firearm to commit a felony in connection with the August 30, 2005, shooting death of Robert Herndon. The district court for Lancaster County sentenced Banks to life imprisonment on the first degree murder conviction and to a consecutive sentence of imprisonment for 20 to 30 years on the firearm conviction. Banks appeals. We affirm Banks' convictions and sentences.

STATEMENT OF FACTS

Banks was charged in connection with the death of Herndon, who died as the result of gunshot wounds to the chest in the early hours of August 30, 2005, in Lincoln, Nebraska. Various witnesses at Banks' trial testified regarding the events of the evening of August 29 and the early hours of August 30.

Amanda Herman was Herndon's girlfriend. Herman testified that she spent the evening of August 29, 2005, at Herndon's house watching a movie with Herndon and a friend of Herndon's. At the end of the evening, Herndon gave his friend a ride home and Herman remained at Herndon's house. Shortly after Herndon and his friend left, Herman heard a knock at the door. She opened the door and saw a man later identified as Victor Young. Young told her that his car had broken down, and he asked whether he could have a jug of water. A second man whom Herman had not seen at first pushed past Young and came into the house. He was wearing a shirt or mask over his face and carrying a shotgun. Although Herman was unable to identify the second man, Young's testimony identified Banks as the second man. Banks pointed the gun at Herman's chest and told her to get into a bathroom that was near the front door. Herman went into the bathroom, and someone closed the door behind her.

While she was in the bathroom, Herman heard the men going through the house searching cupboards and drawers and knocking things around. Young asked her where Herndon was, and she told him he had gone to take a friend home. Banks asked Herman "more than a couple" of times "where the money was at, where is the weed at." At one point, Herman responded that

he should look in the closet. One of the men came and took her out of the bathroom so that she could show them the closet. She then returned to the bathroom. Shortly thereafter, she heard Banks say "jack pot."

Herman then heard keys in the front door and heard Herndon enter the house and call for her. She did not respond, but she heard a sound of scuffling and heard Herndon say "you cracked me in the head." One of the men asked Herndon where the money and marijuana were, and Herndon responded, "I don't have anything, here's my wallet." Herman heard Banks say "let's bring [Herman] out here and kill her in front of him and then maybe he'll talk, maybe he'll tell us." Herman then heard what sounded like someone falling down the stairs, and she heard Banks say "stay downstairs or I'm going to kill you, don't call the cops." Thereafter, she heard what sounded like someone trying to come up the stairs and Banks saying "don't keep coming back up here, stay down there." She heard Herndon more than once say, "Get out . . . of my house." She also heard two loud bangs that she thought sounded like someone hitting something.

After several minutes, things quieted down and Herman thought the men had gone, so she came out of the bathroom. She called out for Herndon but got no response, so she went to the basement and through the house and the backyard looking for him. As she went through the house, she saw that it had been "ransacked," with drawers pulled out and things strewn on the floor. When she could not find Herndon, she grabbed her keys and went to her car, which was parked in the driveway. As she backed out of the driveway, she saw Herndon lying in the street by the curb. She got out of the car and ran to Herndon and discovered that he was bleeding and was lying on top of his shotgun. A neighbor told her that they had heard gunshots and that the police were on their way.

The first police officer who arrived at the scene testified at trial that he heard the dispatcher's report of the shooting at 12:26 a.m. on August 30, 2005, and that he arrived on the scene at 12:31 a.m. The officer saw Herndon's body lying in the street along the curb with a shotgun partially visible under his body. The officer saw no signs of life.

Herman was not able to identify Banks as one of the men; however, she testified that she had met Banks approximately 1 month before Herndon's shooting. She met him through Ella Durham, a friend of hers who was Banks' girlfriend, and she had seen him a few times that month. Herman testified that on one occasion, Banks and Durham came to Herndon's house to retrieve from Herman a purse that Durham had left in Herman's car. Herman testified, however, that she did not think Banks and Herndon had ever met.

Durham testified that she had previously spent the night of August 26, 2005, at Herndon's house with Herman and Herndon. The next morning, Durham saw a friend of Herndon's grab a bag of marijuana from a closet in Herndon's house. Herman told Durham that she had seen seven or eight bags of marijuana in the closet. That afternoon, Durham told Banks that Herndon had "seven or eight pounds" of marijuana in his house. Banks responded by wondering "how much they were selling it for."

Herman was able to identify Young from a photograph as being the first man at the door on the night Herndon was killed. Young testified at trial that on the evening of August 29, 2005, he was driving around Lincoln. At approximately 10 p.m., he received a call from Banks, whom Young had known since they played football together in their teens. Banks asked Young to pick him up at the corner of Eighth and C Streets. When Young picked up Banks, Banks told Young that he wanted to get some money to get out of town because he had a court case pending. Banks told Young he had an idea that he could "get fronted" an amount of marijuana from someone and that instead of paying that person back, he would take whatever money he could get for the marijuana and leave town. After Young and Banks drove around for a time, Young received a call from John Montgomery, a person to whom Young sold crack cocaine. Young drove to Montgomery's location and sold him drugs. Montgomery asked if he could ride with Young and hang out, and Young agreed. Banks was in the passenger seat, and Montgomery got into the back seat behind Banks.

Shortly thereafter, Banks asked Young to drive to the place where they could pick up the marijuana. Banks directed Young

to Herndon's house. When they reached the house, Banks asked Young whether he had a shotgun that Banks knew Young wanted to sell with him. Banks said that he might be able to sell the gun to the man in the house. Young told Banks the gun was in the trunk. Banks told Montgomery to stay in the car and that they would not be long. Young and Banks went to the trunk, and Banks grabbed the shotgun and a towel in which the shotgun was wrapped. The two went to the door of Herndon's house, and Banks told Young that he should go ahead to the door and ring the doorbell. After Young rang the doorbell, he saw Banks come from around the side of the house with the towel wrapped around his head and holding the shotgun in front of him. Young testified that when a woman answered the door, Banks directed him to tell her that his car had died. Banks then pointed the shotgun at the woman and entered the house.

Young testified that he did not know what Banks had planned to do and that he was in shock and simply followed along as Banks entered the house, guided the woman into the bathroom, and started going through the house. Young testified that Banks told him to ask the woman where the marijuana was located. Young stayed in the front hallway as Banks went through the rooms of the house. Young eventually heard some music from outside and heard Banks say "jackpot." Banks came back toward the front door and pushed Young into an adjoining room. Young heard Herndon come into the house calling for Herman. Young then heard, but did not see, Banks jump Herndon. Young heard Banks repeatedly asking Herndon where the marijuana was and telling Herndon to "[s]top coming up the stairs." Young also heard Banks say that "maybe if we pulled [Herman] out of the bathroom, she'll tell us — or you'll tell us then where [it] is at." Young heard Herndon responding that he did not have anything and that Banks should just go.

Young eventually left the adjoining room and went into the front hallway and saw Banks standing at the door to the basement. Young ran out of the house after he saw Banks holding a handgun and kicking the door to the basement. Young ran to the car and saw Banks run out of the house. As Banks was

getting into the passenger seat of the car, Herndon came out of the house carrying a shotgun pointed at the car and saying things like "come rob, come rob me." Young saw that Herndon had blood on his face. Banks got out of the car and pointed his handgun at Herndon and told him to "put the gun down or I'll shoot." Herndon kept coming toward Banks with the shotgun pointed down, and Banks shot Herndon twice with his handgun. Banks and Young both got back into the car. Young saw Herndon continue coming toward Banks after he had been shot, but Herndon fell down as Young drove the car away.

Montgomery testified at trial that he was waiting in the car outside Herndon's house and saw Young sprint out of the house to the car acting "[f]rantic, nervous, scared." Montgomery then saw Banks jog out of the house to the passenger side of the car. Banks stopped getting into the car when Herndon ran out of the house carrying a shotgun and bleeding from the head. Herndon came up to Banks at the side of the car, and the two yelled at each other and went into the street. Montgomery did not see Herndon point the shotgun at Banks; instead, Herndon held the shotgun "military style" across his chest. Montgomery heard Banks tell Herndon twice to put the gun down, and then he saw Banks shoot Herndon twice with a chrome 9-mm handgun.

Young testified that after leaving Herndon's house, he drove Banks and Montgomery to Young's apartment complex. During the ride, Young asked Banks why he shot Herndon, and Banks denied that he had shot him. Upon arriving at the apartment complex, Young told Banks he needed "to go, get away from me, you know, get out of here." Banks got out of the car and made some telephone calls. Eventually, Young saw a car drive up to Banks. Young identified the driver of the car as Charles Bowling. Young knew Bowling because Young had played on a basketball team with his son. Banks got into the car with Bowling, and they drove into the parking lot of a grocery store near Young's apartment complex. Young saw the two get out of the car, and they appeared to argue. Young yelled to them that they needed to leave.

Bowling testified at trial that he knew Banks because Banks and his family attended his church and Banks had gone to school with his sons. Banks had called Bowling in the early

hours of August 30, 2005, and asked him to come pick him up at a grocery store parking lot. Bowling initially resisted, but Banks persisted in calling and was "very stressed and very agitated," so Bowling went to pick him up. Bowling reached the parking lot between 1:45 and 2 a.m. Banks got into Bowling's car "very hastily and very agitated" and told Bowling he needed to get away quickly. Bowling took Banks to Bowling's apartment. Banks told Bowling that he had done "something bad" and needed to leave town. Banks stayed at the apartment for a half hour to an hour before he called someone and left. Banks later returned and took a shower. Banks asked Bowling for some clothes, and Bowling gave him a new shirt. Bowling testified that 2 or 3 days later, he threw away the shirt that Banks had originally been wearing. Banks stayed at Bowling's apartment for 2 to 3 hours after he returned. Banks requested money, and Bowling gave him between $35 and $45. Banks left the apartment when a young woman driving a van came to pick him up. Three or four days later, Bowling learned from a newspaper article that Banks had been involved in a homicide.

Parrish Casebier testified that he first met Banks on the morning of August 31, 2005. Casebier knew of Banks through Casebier's girlfriend and Banks' stepbrother. Banks came to Casebier's house to show him a 9-mm handgun, because Banks knew that Casebier had a friend in Kansas City interested in buying guns. Casebier and Banks discussed a trip that Casebier was planning to take to Houston, Texas, and Casebier and Banks agreed that Banks would go along. That afternoon, Banks, Casebier, and two women left for Houston in a van that belonged to one of the women.

On the return trip from Houston, they stopped in Kansas City on September 2, 2005. Casebier testified that he had been receiving calls from the husband of the woman who owned the van wanting to know where the van was. While in Kansas City, Casebier told Banks to return the van to Lincoln. Banks told Casebier that he did not want to go back to Lincoln because he had "hurt somebody really bad" and he did not know "whether he was dead or alive." Casebier testified that he did not see Banks again after that night.

Banks was arrested in Lincoln on September 3, 2005. The State filed an information charging Banks with first degree murder and use of a weapon to commit a felony. In charging first degree murder, the information stated that Banks killed Herndon "purposely and with deliberate and premeditated malice" or that he killed Herndon "in the perpetration of or attempt to perpetrate any robbery, or kidnapping." Prior to trial, the court granted the State's motion to strike the reference to kidnapping from the first degree murder charge. In the weapon charge, the original information stated that Banks "did use a knife or any other deadly weapon to commit" first degree murder. During jury selection, the State moved for leave to amend the weapon count to allege that Banks used a firearm to commit a felony, rather than that he used "a knife or any other deadly weapon." Banks objected to the amendment. The court overruled the objection but told the State the appropriate time to amend would be at the close of evidence. After the State rested its case, and over Banks' objection, the court gave the State leave to amend the information.

Prior to trial, Banks filed a motion to change venue asserting that he could not obtain a fair and impartial trial because of pretrial publicity. In support of the motion, Banks offered 16 newspaper articles about his involvement in the present case and two additional cases. One case involved a fatal car accident in February 2005; in connection with the accident, Banks had pled no contest to manslaughter. The other case was a home invasion robbery carried out by Banks and Young that occurred August 21, approximately 1 week before the incident in the present case. As part of a plea agreement, Young pled guilty to robbery in the August 21 incident and pled guilty to a reduced charge of manslaughter in connection with Herndon's death. The oldest of the 16 newspaper articles was dated February 17, 2005, and the most recent was dated February 21, 2007, less than 1 week before jury selection began in this case. The court took the motion to change venue under advisement, pending jury selection. At the end of voir dire but prior to the exercise of peremptory challenges, and again at the conclusion of the alternate juror selection, Banks renewed his motion to change venue. The court overruled the motion both times.

Jury selection began on the morning of February 26, 2007. During voir dire, Banks moved to strike four potential jurors for cause. In a questionnaire sent to potential jurors, each of the four had circled "Yes" to the question whether they had formed or expressed an opinion on the guilt or innocence of Banks. The court questioned each of the potential jurors, and during such questioning, each of the four expressed that he or she could set aside any previously formed opinion and could decide the case based on the evidence at trial. The court overruled Banks' motions to strike the four potential jurors for cause.

Banks also moved to strike a potential alternate juror for cause because during individual voir dire, she recalled reading about Banks' involvement in the fatal car accident. The court overruled Banks' motion to strike the potential alternate juror and noted that she stated that all she remembered was that an accident had occurred and that she did not remember anything else, such as the fact that Banks had been prosecuted and sentenced in connection with the accident. None of the potential jurors or alternate jurors of whom Banks complained ultimately sat on the jury. Although the record is not clear on this point, Banks asserts that he used his peremptory strikes on the challenged potential jurors and potential alternate juror.

Trial included the testimony of the witnesses described above. Additional evidence included testimony by several other witnesses, including a pathologist who testified that the cause of Herndon's death was two gunshot wounds to the chest. Physical evidence included a shotgun recovered from Young's car and which Young identified as the shotgun that Banks carried into the house. Analysis of blood found on the end of the shotgun revealed the presence of Herndon's DNA. The handgun used to shoot Herndon was not found, but two shell casings were found at the scene and were identified as being from a 9-mm handgun.

During his testimony at trial, Bowling stated that he was testifying under a use immunity order issued pursuant to Neb. Rev. Stat. § 29-2011.02 (Reissue 2008). Prior to Bowling's testimony, Banks made an offer of proof that Young would testify that Banks had once told him that Bowling "smoked crack."

The court sustained the State's objection to the offer of proof on the basis of foundation and hearsay.

During Bowling's testimony, Banks made another offer of proof in the form of a deposition in which Bowling stated that he had undergone drug counseling and treatment in 2006 because he had "struggled with" the drug crack for 1 year prior to treatment. Bowling denied buying drugs from or using drugs with Banks. Banks argued that he should be allowed to cross-examine Bowling regarding his drug use in order to support a theory that Young and Bowling were involved in drug transactions and that such involvement gave both witnesses motive to give false testimony. The court sustained the State's objections to Banks' offer of proof on the basis of foundation, relevance, and speculation.

At the close of the State's evidence, Banks moved the court to dismiss the charges against him on the basis that the testimonies of Young, Montgomery, Casebier, and Bowling were unreliable. The court overruled the motion. In his defense, Banks called three members of the police department and questioned them about the investigation. The court instructed the jury that the purpose of such testimony was to impeach the testimonies of Montgomery and Young. Banks did not testify. At the close of all evidence, Banks moved for dismissal or directed verdict, again arguing unreliable testimony. The court overruled the motion.

At the jury instruction conference, the State requested that the court instruct on both premeditated murder and felony murder theories of first degree murder. Banks also requested that the court instruct on both theories and further requested that the court instruct on second degree murder and manslaughter as lesser-included offenses. The court, however, determined that the evidence supported only an instruction on felony murder. The court therefore refused instructions on premeditated murder, second degree murder, and manslaughter. When the court stated that it would instruct only on felony murder, Banks requested an instruction on robbery and attempted robbery as lesser-included offenses of felony murder. The court refused the instruction.

Banks also requested a self-defense instruction. The court refused on the basis that self-defense is not a defense to felony murder. Banks argued that whether or not he actually presented or argued a theory of self-defense, an instruction was supported by the evidence, particularly testimony by Montgomery and Young to the effect that Herndon was advancing on Banks with a shotgun when Banks shot him.

The court refused other instructions proposed by Banks. Banks requested, but the court refused to give, an instruction on abandonment as an affirmative defense. The court also refused an instruction regarding Bowling's testimony. The requested instruction noted that Bowling had been given immunity and would have instructed that the jury "should consider that testimony with greater caution than that of other witnesses."

The court gave an instruction regarding accomplice testimony that referred to Montgomery and Young as claimed accomplices of Banks. Banks had requested an accomplice testimony instruction that also referred to Casebier and Bowling. The State objected to the inclusion of Casebier and Bowling, arguing that although they might be accessories after the fact, they were not accomplices. The court agreed and refused to include Casebier and Bowling in the accomplice instruction.

Following deliberations, the jury returned unanimous verdicts finding Banks guilty of first degree murder and of use of a firearm to commit a felony. The court sentenced Banks to life imprisonment for first degree murder and a consecutive sentence of imprisonment for 20 to 30 years on the firearm conviction.

Banks appeals.

ASSIGNMENTS OF ERROR

Banks asserts that the district court erred when it (1) overruled his motions to strike for cause the four potential jurors and the potential alternate juror challenged by Banks; (2) overruled his motion to change venue; (3) refused to instruct the jury on premeditated murder and the lesser-included offenses of second degree murder and manslaughter; (4) refused to instruct on robbery and attempted robbery as lesser-included offenses of felony murder; (5) refused his proposed instruction

on the affirmative defense of abandonment; (6) refused his proposed instruction on self-defense; (7) prohibited him from cross-examining Bowling regarding drug use, in violation of the Confrontation Clause; (8) refused to include Casebier and Bowling in the accomplice testimony instruction; (9) refused to give his proposed immunity instruction regarding Bowling's testimony; (10) allowed the State to amend the weapon charge in the information to specify that a firearm had been used; and (11) overruled his motion to dismiss.

STANDARDS OF REVIEW

[1] The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court and is subject to reversal only when clearly wrong. *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007).

[2] A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion. *Id.*

[3] 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. *Id.*

[4] An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause and reviews the underlying factual determinations for clear error. *State v. Jacobson*, 273 Neb. 289, 728 N.W.2d 613 (2007).

[5] The decision to grant or deny an amendment to a pleading rests in the discretion of the court. *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

[6] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters

are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. McGhee*, 274 Neb. 660, 742 N.W.2d 497 (2007).

ANALYSIS

The District Court Did Not Commit Reversible Error When It Overruled Banks' Motions to Strike Jurors for Cause.

Banks asserts that the district court erred when it overruled his motions to strike four potential jurors and one potential alternate juror for cause. We conclude that because none of the challenged potential jurors became part of the jury, the court did not commit reversible error when it overruled Banks' motions.

Banks argues that four potential jurors should have been struck because they circled "Yes" to a question on the juror questionnaire regarding whether they had formed an opinion on Banks' guilt or innocence. He argues that the potential alternate juror should have been struck because during voir dire, she admitted she had heard that Banks had been involved in a fatal car accident in March 2005. Banks asserts that because the court did not sustain his motions, he had to use his peremptory strikes on the challenged persons.

[7] We have stated that "'the erroneous overruling of a challenge for cause will not warrant reversal unless it is shown on appeal that an objectionable juror was forced upon the challenging party and sat upon the jury after the party exhausted his or her peremptory challenges.'" *State v. Hessler*, 274 Neb. 478, 496, 741 N.W.2d 406, 421 (2007) (quoting *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001)). None of the potential jurors challenged by Banks in this case actually sat on the jury. Under *Hessler* and *Quintana*, there can be no reversal based on a challenge to a potential juror if that person was not ultimately included on the jury, even if the defendant was required to use a peremptory challenge to remove the person. No biased juror sat on Banks' case, and in terms of due process and the constitutional right to a jury trial, Banks received what the law provides. Our decision is consistent with

Rivera v. Illinois, 556 U.S. 148, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009).

We conclude that reversal is not warranted in this case based on the court's overruling of Banks' motions challenging potential jurors where such potential jurors did not ultimately become members of the jury.

The District Court Did Not Err When It Overruled Banks' Motion for a Change of Venue Because Banks Did Not Establish That a Change of Venue Was Necessary for a Fair Trial.

Banks next asserts that the district court erred when it overruled his motion for a change of venue. Banks argues that a change of venue was required because of pretrial publicity. We conclude that Banks has not established that a change of venue was necessary and that the court did not abuse its discretion by denying the motion.

The only evidence Banks offered in support of his motion for a change of venue consisted of 16 newspaper articles that appeared in the Lincoln Journal Star between February 2005 and February 2007. The articles reported on Banks' alleged involvement in this case and in two other cases—one involving a fatal car accident, and one involving a home invasion robbery that occurred 1 week before the incident in this case.

In support of his argument that pretrial publicity required a change of venue, Banks notes that during voir dire, seven potential jurors were struck for cause. However, it does not appear from the record that the strikes were related to bias resulting from pretrial publicity.

Banks directs our attention to the five potential jurors he challenged for cause as discussed in connection with his first assignment of error. He argues that the voir dire of each of these potential jurors indicated that they were influenced by pretrial publicity. Although each of these potential jurors stated that he or she had seen newspaper articles about Banks, each also stated that he or she could be impartial despite what he or she had read. The court apparently accepted these statements and believed these persons could be impartial despite the newspaper articles when it overruled Banks' challenges to such

potential jurors. Furthermore, as noted above, none of these potential jurors actually sat on the jury.

In *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007), and in *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001), we noted that the record in each case showed that although potential jurors had heard publicity about the case, such potential jurors agreed that they could make decisions based solely on what they heard in court rather than what they had previously heard about the case. We further noted in both *Hessler* and *Quintana* that an impartial jury had ultimately been chosen, and we concluded that the defendant in each case had not shown that he could not receive a fair trial in the county at issue and that the court did not abuse its discretion in denying the defendant's motion to change venue.

Similar to *Hessler* and *Quintana*, we determine that Banks has not shown that a change of venue was necessary. The potential jurors who admitted reading the newspaper articles did not become members of the jury. Banks did not show that the jury actually selected was biased by pretrial publicity, and because an impartial jury was selected, Banks did not show that it was impossible to seat an impartial jury or that he could not receive a fair trial in Lancaster County.

We therefore conclude that the court did not abuse its discretion when it overruled Banks' motion for a change of venue.

The District Court Did Not Err and Did Not Violate Banks' Right of Due Process When It Refused to Instruct on Premeditated Murder and Its Lesser-Included Offenses; Banks Was Not Prejudiced by the Refusal to Instruct on Premeditated Murder, and the Evidence Did Not Produce a Rational Basis to Acquit Banks of Felony Murder and Convict Him of Second Degree Murder or Manslaughter.

Banks asserts that the district court erred when it refused to instruct on the premeditated murder theory of first degree murder and on the associated lesser-included offenses of second degree murder and manslaughter. We conclude that the district court did not err when it refused the instructions, because Banks was not prejudiced by the refusal to instruct

on premeditated murder, and the evidence did not produce a rational basis to acquit Banks of first degree murder under a felony murder theory and convict him of second degree murder or manslaughter.

At the jury instruction conference, the State requested that the court instruct on both premeditated murder and felony murder as alternate theories of first degree murder. Banks also requested that the court instruct on both theories, and he further requested that the court instruct on second degree murder and manslaughter as lesser-included offenses of first degree premeditated murder. The court, however, determined that the evidence supported an instruction on only the felony murder theory of first degree murder. The court therefore refused instructions on premeditated murder and the lesser-included offenses of second degree murder and manslaughter.

Banks makes a two-step argument as to why the court erred in refusing to instruct on premeditated murder: First, he claims that the court should have instructed on premeditated murder because the instruction was supported by the evidence, and second, he claims that his due process rights were violated because the jury was not allowed to consider lesser-included homicide offenses and was forced to choose between either convicting him of first degree murder or acquitting him.

We first consider the court's refusal to instruct on premeditated murder. To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007). With respect to the requirement that the appellant must show that he or she was prejudiced by the court's refusal to give an instruction, we note that premeditated murder and felony murder are not separate offenses but are alternate theories of first degree murder. See, *State v. Brouillette*, 265 Neb. 214, 655 N.W.2d 876 (2003) (crime of first degree murder constitutes one offense even though there may be alternative theories by which criminal liability for first degree murder may be charged and prosecuted); *State v.*

Nesbitt, 264 Neb. 612, 633, 650 N.W.2d 766, 785 (2002) ("premeditated murder and felony murder are simply alternate methods of committing first degree murder"). Without regard to whether an instruction on premeditated murder was supported by the evidence, Banks cannot show that he was prejudiced by the court's refusal to give an instruction on the theory of premeditated murder, because such an instruction would only have provided the jury with an additional route to convict him of first degree murder. To the extent that the court's refusal to give the premeditated murder instruction minimized the ways by which the jury could find Banks guilty of first degree murder, such refusal did not prejudice Banks.

Although he acknowledges that a premeditated murder instruction would have increased the theories under which the jury could have found him guilty of first degree murder, Banks nevertheless argues that he was prejudiced by the refusal to give the premeditated murder instruction, because it deprived him of the jury's potential consideration of the offenses of second degree murder and manslaughter which are lesser-included offenses of premeditated murder. We note that while second degree murder and manslaughter may be lesser-included offenses of first degree murder under a premeditated murder theory, they are not lesser-included offenses of first degree murder when it is charged and tried under a felony murder theory. See *State v. Bjorklund*, 258 Neb. 432, 447, 604 N.W.2d 169, 192 (2000) ("[w]e have repeatedly held that Nebraska law provides no lesser-included homicide offenses to felony murder"). Because the court determined that the evidence warranted an instruction on only the felony murder theory of first degree murder, it would not and did not instruct on the lesser homicide offenses because they are not lesser-included offenses to felony murder.

[8] With respect to lesser-included offenses, we have held that a court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the

lesser offense. *State v. Sinica*, 277 Neb. 629, 764 N.W.2d 111 (2009). In the present case, the "greater offense" is first degree murder whether under a premeditated murder theory or a felony murder theory. The district court refused the lesser-included offense instruction on second degree murder and manslaughter because the court determined that the evidence supported a conviction for only first degree murder under a felony murder theory. Considering the evidence, the court in effect determined that the evidence could support a finding of guilty of first degree murder under a felony murder theory, but the evidence could not support a rational basis for acquitting Banks of first degree murder under a felony murder theory and instead convicting him of second degree murder or manslaughter.

Banks argues that the court's refusal to instruct on the lesser-included offenses was contrary to *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), in which the U.S. Supreme Court held that it is a violation of a defendant's due process rights if a jury is not given an option to convict a defendant of any lesser-included offense that is supported by the evidence rather than being given an "all or nothing" option either to convict the defendant of a capital offense or to find the defendant not guilty. In *State v. Bjorklund, supra*, we noted that *Beck* was predicated on the rule that a defendant is entitled to a lesser-included offense instruction if the evidence would permit a jury rationally to acquit the defendant of the greater offense and find the defendant guilty of the lesser offense. In *Bjorklund*, we concluded that because the evidence did not so permit, it was not a due process violation under *Beck* when the court refused a lesser-included offense instruction.

Similarly, in the present case, we conclude that whether or not the court instructed on first degree murder under a premeditated murder theory, the evidence did not produce a rational basis for acquitting Banks of first degree murder under a felony murder theory and instead convicting him of second degree murder or manslaughter. If the court had instructed on both theories of first degree murder, the jury would have to have acquitted Banks under both theories before it could reach and convict him of second degree murder or manslaughter. Therefore, although second degree murder and manslaughter

are not lesser-included offenses of felony murder, it is appropriate for us to consider for completeness of our analysis whether there was a rational basis to have acquitted Banks of felony murder and otherwise convicted him of either of the lesser offenses.

The evidence presented by the State supported a finding of felony murder. The evidence in this case included the testimonies of Young, Herman, and Montgomery regarding the events connected to the attempted robbery and the shooting of Herndon. Taken together, such evidence indicates that Banks took part in a robbery or attempted robbery of Herndon's house and that in the perpetration of that crime, Herndon was shot and killed by Banks. The jury could have either accepted or rejected the testimony indicating that Banks was part of the entire incident. If the jury believed Young's and Montgomery's identification of Banks as the person who forced his way into Herndon's house and later shot Herndon, then the jury would find Banks guilty of felony murder. If the jury believed the two witnesses were mistaken or lying about Banks' involvement in the robbery or attempted robbery, the jury would find him not guilty of felony murder.

There is no evidence that would give the jury a rational basis to find that Banks was guilty of second degree murder or manslaughter but acquit him of felony murder. In order to convict Banks of second degree murder or manslaughter, the jury would have to find that Banks killed Herndon. In order to convict Banks of second degree murder or manslaughter but acquit him of first degree murder under a felony murder theory, the jury would have to find that Banks killed Herndon but that he did not do so in the perpetration of or the attempt to perpetrate a robbery. There was no evidence in this case to support a finding that Banks killed Herndon but that the killing was not in the perpetration of the robbery or the attempted robbery.

Banks argues that the robbery or attempted robbery ended as soon as he reached the car and that a new incident started when Herndon came at him with the shotgun and he got back out of the car to confront Herndon. He asserts that the jury could have found that at the time Banks shot Herndon, the robbery

or attempted robbery had been completed, and that therefore, Herndon was not killed in the perpetration of or the attempt to perpetrate a robbery but instead he was killed in a separate confrontation that occurred after the course of the robbery or attempted robbery was completed. Banks' suggestion is not consistent with the evidence.

The evidence indicated that Herndon was killed as Banks and Young were getting away. The getting away was an integral part of the unfolding perpetration of the robbery or attempted robbery. There is no evidence of a separation in time or distance from the perpetration or attempted perpetration of a robbery such that the jury could find that Herndon's killing was not part of the perpetration or attempted perpetration.

We conclude that Banks has not established reversible error from the court's refusal to instruct on premeditated murder and the lesser-included offenses of second degree murder and manslaughter. In this case, Banks was convicted of first degree murder based on sufficient evidence. Banks has shown no prejudice from the refusal to instruct on premeditated murder, because such instruction would have simply given the jury an additional theory under which to convict Banks of first degree murder. Banks also has not shown that he was prejudiced by the failure to instruct on premeditated murder with its corresponding lesser-included offenses, because the evidence did not produce a rational basis to acquit him of first degree murder under a felony murder theory but convict him of second degree murder or manslaughter. The district court therefore did not violate Banks' right to due process and did not otherwise prejudicially err when it refused to give the instructions requested by Banks.

The District Court Did Not Err When It Refused a Lesser-Included Offense Instruction on Robbery and Attempted Robbery Because the Evidence Did Not Produce a Rational Basis to Acquit Banks of Felony Murder and Convict Him of Robbery or Attempted Robbery.

Banks asserts that the district court erred when it refused to give an instruction on robbery and attempted robbery as lesser-included offenses of felony murder. We conclude that the court

did not err when it refused to give the lesser-included offense instruction because the evidence in this case did not produce a rational basis to acquit Banks of felony murder and convict him of robbery or attempted robbery.

With respect to whether robbery and attempted robbery are lesser-included offenses of felony murder, we note that in both *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006), and *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), although we stated that a predicate felony is a lesser-included offense of felony murder for sentencing purposes, we did not directly confront the question of whether a defendant in a felony murder case may be entitled to a lesser-included offense instruction on the underlying felony.

In both *Mason* and *Bjorklund*, we determined that it was not necessary to decide the issue, because even if the predicate felony were a lesser-included offense, the evidence in each case did not produce a rational basis for acquitting the defendant of felony murder and convicting him of the predicate felonies, and therefore, the court was not required to instruct on the underlying felonies even if they were lesser-included offenses.

Similar to *Mason* and *Bjorklund*, in the present case, we need not decide whether robbery and attempted robbery are lesser-included offenses of felony murder, because the evidence in this case does not produce a rational basis for acquitting Banks of felony murder and convicting him of only robbery or attempted robbery. The evidence presented by the State supported a finding of felony murder. Such evidence included the testimonies of Young, Herman, and Montgomery regarding the events connected to the attempted robbery and the shooting of Herndon. Taken together, such evidence indicates that Banks took part in a robbery or attempted robbery of Herndon's house and that in the perpetration of that crime, Herndon was shot and killed.

The jury could have accepted or rejected the testimony indicating that Banks took part in the robbery. If the jury believed Young's and Montgomery's identification of Banks as the person who forced his way into Herndon's house and later shot Herndon, then the jury would rationally find Banks guilty of felony murder. If the jury believed that the two witnesses were

lying or mistaken about Banks' involvement in the robbery or attempted robbery, the jury would find Banks was not involved in the robbery and find him not guilty of felony murder. Under the evidence presented, which showed that Herndon's death was an incident of the robbery, there was no rational basis upon which the jury could find that Banks was guilty of the robbery or attempted robbery but was not guilty of felony murder. Based on the evidence, the jury had to find either that Banks was guilty of felony murder or that he was not guilty of any crime.

Similar to his argument above with regard to the lesser-included homicide offenses, Banks also argues that the court's failure to instruct on robbery and attempted robbery as lesser-included offenses of felony murder violated his due process rights, contrary to the holding in *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). For the same reason we rejected the argument in connection with the lesser-included homicide offenses, we reject the argument here. In this case, as in *Bjorklund*, Banks' arguments regarding *Beck* and due process are unavailing, because the evidence does not support a finding to acquit Banks of felony murder but convict him solely of robbery or attempted robbery.

Because the evidence does not produce a rational basis for acquitting Banks of felony murder and convicting him of robbery or attempted robbery, we conclude that the court did not err when it refused to give the lesser-included offense instruction requested by Banks.

The District Court Did Not Err When It Refused to Give Banks' Proposed Instruction on the Affirmative Defense of Abandonment Because the Evidence Did Not Support the Defense.

Banks asserts that the district court erred when it refused his requested instruction regarding the affirmative defense of abandonment. We conclude the court did not err, because the evidence did not support the instruction.

Banks requested an instruction on abandonment as an affirmative defense that read:

> In regard to the offense of first degree murder, second degree murder, and manslaughter, abandonment of a

> criminal enterprise is a defense to said charge if you find that . . . Banks abandoned or withdrew from the robbery or attempted robbery of . . . Herndon, and that an appreciable interval of time elapsed prior to killing . . . Herndon.

The court refused the instruction.

Banks argues that he abandoned the robbery and was leaving the house when Herndon came out of the house and confronted him. He cites to, inter alia, *State v. Wilson*, 192 Neb. 435, 222 N.W.2d 128 (1974), to support his argument that an abandonment defense instruction was appropriate in this case.

We conclude that the facts of this case do not support an abandonment defense. In *Wilson*, this court stated:

> To be effective as a defense, there must be an appreciable interval between the alleged abandonment of the criminal enterprise and the act for which responsibility is sought to be avoided. The coconspirator must have a reasonable opportunity to follow the example and refrain from further action before the act in question is committed. A conspirator cannot escape responsibility for an act which is the natural result of a criminal scheme he has helped to devise and carry forward by running away at the instant when the act in question is about to be committed and the transaction which immediately begets it has actually been commenced.

192 Neb. at 437, 222 N.W.2d at 130. In *Wilson*, the defendant argued that he had abandoned a planned robbery before coconspirators threw the victim into the river, resulting in the victim's drowning death.

In the present case, there is no evidence to support a finding that Banks abandoned the robbery or attempted robbery before the crime was committed. Instead, the evidence indicates that the robbery was ongoing and not completed before Banks left the premises. Although Banks argues it is possible that the robbery was aborted because Banks and Young did not find the items for which they were looking, the evidence shows that the robbery was not abandoned and was still in progress at the time of the shooting. The evidence in this case was that Banks shot Herndon while Banks was escaping. Such evidence does not support an abandonment defense.

We conclude that the district court did not err when it refused to give Banks' proposed instruction on the affirmative defense of abandonment because the evidence did not support the instruction.

The District Court Did Not Err When It Refused Banks' Self-Defense Instruction Because Banks Did Not Offer Evidence to Support a Self-Defense Theory.

Banks asserts that the district court erred when it refused his self-defense instruction. We note that the district court rejected the instruction on the basis that self-defense is not a defense to felony murder. Without commenting on whether such basis was proper, and notwithstanding our conclusion above that this case forms the basis for felony murder, for completeness, we consider Banks' self-defense assignment of error and conclude that the court did not err when it refused the instruction, because self-defense was not Banks' theory of the case and he did not meet the initial burden of proving self-defense.

In *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007), we concluded that the trial court erred when it gave a self-defense instruction that was inconsistent with the defendant's theory of the case. We stated:

> [W]hen the defendant makes no effort to meet the initial burden of proof to prove self-defense and when self-defense is not the defendant's theory of the case, a self-defense instruction is not warranted. A theory of self-defense necessarily involves an inference or admission that the defendant harmed the victim, but that the defendant's acts were justified. By giving a self-defense instruction when the defendant's theory of the case is that he or she did not commit the crime, the court risks confusing or misleading the jury.

State v. Faust, 265 Neb. at 879, 660 N.W.2d at 874.

In the present case, the only evidence to which Banks points to support a theory of self-defense is evidence presented by the State. He notes that Montgomery's and Young's testimonies indicated that Herndon was coming at Banks with a shotgun when he shot Herndon, and he argues that such evidence

supports a self-defense instruction. However, Banks offered no evidence in his defense to support a theory of self-defense. Instead, Banks' defense strategy was to attack the credibility of the witnesses against him and to infer that the witnesses conspired to frame him for a crime he did not commit. There is no indication that Banks inferred or admitted that he had harmed Herndon but that his acts were justified as self-defense.

In *Faust*, the issue was whether the court erred in giving a self-defense instruction and whether trial counsel was ineffective for failing to object to such instruction. We concluded in *Faust* that it was error to give the instruction and that it was deficient and prejudicial for counsel to fail to object, because the instruction confused and misled the jury as to the defendant's theory of defense.

The present case differs from *Faust* because Banks requested the instruction and the court refused to give it. However, the rationale for the holding in *Faust* is also applicable in this case.

Self-defense is a statutorily defined affirmative defense in Nebraska. *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006). Neb. Rev. Stat. § 28-1409 (Reissue 2008) provides in pertinent part:

> (1) . . . [T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
>
> . . . .
>
> (4) The use of deadly force shall not be justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat, nor is it justifiable if:
>
> (a) The actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or
>
> (b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a

> right thereto or by complying with a demand that he abstain from any action which he has no duty to take . . . .

To successfully assert the claim of self-defense, one must have a reasonable and good faith belief in the necessity of using force, and the force used in defense must be immediately necessary and must be justified under the circumstances. *State v. Iromuanya, supra*.

We recognize that there was evidence that Herndon was walking toward Banks with a shotgun before Herndon was shot. Banks' theory of defense was essentially that he did not shoot Herndon, and therefore, Banks presented no evidence to support a finding that he had a reasonable and good faith belief that he needed to use force or that the force he did use in his defense was immediately necessary and was justified under the circumstances. Banks did not testify, as was his right. As a result, he did not admit that he shot Herndon and he did not present evidence that he reasonably believed that such use of force was necessary for him to defend himself. Instead, the manner of the presentation of his defense indicates that Banks' theory of defense was that he did not shoot Herndon and that the witnesses against him were not credible.

Because there was not evidence to support a claim of self-defense in this case and because a self-defense instruction would have misled or confused the jury, the district court did not err when it refused to give the requested instruction.

The District Court Did Not Violate Banks' Constitutional Right to Confrontation When It Sustained the State's Objections to Banks' Proposed Cross-Examination of Bowling Regarding Drug Use.

Banks next asserts that the district court erred when it refused to permit him to cross-examine Bowling regarding his drug use, because limiting the cross-examination violated his rights under the Confrontation Clause. We conclude that the court did not err in sustaining the State's objections to such cross-examination and that the limiting of cross-examination did not violate Banks' constitutional right to confrontation.

During Young's testimony, which occurred prior to Bowling's testimony, Banks made an offer of proof that Young would

testify that he had seen Bowling a few times in 2005 and that Banks had once told Young that Bowling "smoked crack." The court sustained the State's objection to the offer of proof on the basis of foundation and hearsay. During Bowling's testimony, Banks made another offer of proof in the form of Bowling's deposition in which Bowling stated, inter alia, that he had undergone drug counseling and treatment in 2006 because he had "struggled with" the drug crack cocaine for 1 year prior to treatment. Banks argued that he should be allowed to cross-examine Bowling regarding his drug use in order to support a theory that Young and Bowling were connected through the drug trade and that such connection gave both witnesses motive to lie in their testimonies. Banks also argued that Young's testimony that he had seen Bowling a few times in 2005 contradicted Bowling's testimony that he had not seen Young for several years before he saw him on August 30, 2005, and that such inconsistency would have led the jury to believe that Bowling was lying. The court sustained the State's objections to Banks' offer of proof on the basis of foundation, relevance, and speculation. The court stated that the fact Young sold crack cocaine to others did not prove he sold it to Bowling and that Young's testimony that he saw Bowling a few times in 2005 did not mean the two talked or that Bowling saw Young on those occasions.

[9,10] Banks asserts on appeal that the court's refusal to allow cross-examination of Bowling regarding his drug use violated Banks' right to confront witnesses. An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of a witness, or (2) a reasonable jury would have received a significantly different impression of the witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination. *State v. Schmidt*, 276 Neb. 723, 757 N.W.2d 291 (2008). Although the main and essential purpose of confrontation is the opportunity of cross-examination, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based upon concerns about, among

other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. *State v. Schmidt, supra*.

Banks asserts that cross-examination of Bowling regarding his drug use would have shown his bias and would have given the jury a significantly different impression of his credibility. He argues that the jury could have inferred that Young was Bowling's crack dealer and that the jury could have inferred that Young, Montgomery, Casebier, and Bowling were all connected through the drug trade and that such connection motivated each of them to protect the person who actually killed Herndon by supporting the story that Banks shot and killed Herndon.

We conclude that Banks' right of confrontation was not violated in either of the ways set forth above. The first type of violation refers to a court's prohibiting "otherwise appropriate cross-examination" designed to show bias. The court in this case sustained the State's objections to the proposed cross-examination based on foundation, hearsay, and relevance. If such objections were valid, then the cross-examination was not "otherwise appropriate." Banks makes no argument that the objections were without merit other than his argument that limiting cross-examination violated his right to confrontation. We find no error in the court's sustaining the objections. The proposed cross-examination was not "otherwise appropriate," and Banks' confrontation rights were not violated when his cross-examination was limited based on such objections.

The proposed cross-examination also would not have given the jury "a significantly different impression of the witness' credibility." There was no evidence in Banks' offers of proof that Young was Bowling's dealer or that Bowling was connected with Young or any of the other witnesses through the drug trade. Although there was evidence that Young sold drugs, neither Young nor Bowling testified that Young sold drugs to Bowling. Young also testified that he had seen Bowling a few times recently, but Young did not testify that Bowling saw him or that he sold crack to Bowling on those occasions. Banks' argument that the addition of evidence of Bowling's drug use would have altered the jury's assessment of his credibility

depended on significant speculation that Bowling was connected to Young, Montgomery, and Casebier through the drug trade. The district court observed that such inferences seemed "pretty farfetched." We cannot say that the district court's assessment was in error. We conclude that cross-examination regarding Bowling's drug use and Young's having seen Bowling a few times in 2005 would not have given the jury a significantly different impression of Bowling's credibility.

We conclude that the district court did not err when it sustained the State's objections to Banks' proposed cross-examination of Bowling and that limiting such cross-examination did not violate Banks' constitutional right of confrontation.

The District Court Did Not Err When It Refused to Include Casebier and Bowling in the Accomplice Testimony Instruction Because the Evidence Did Not Show That They Were Accomplices and the General Witness Credibility Instruction Adequately Covered Their Testimonies.

Banks asserts that the district court erred when it refused to include Casebier and Bowling in the accomplice testimony instruction. We conclude that the court did not err because the evidence did not indicate Casebier and Bowling were accomplices in the commission of the crime and they were adequately covered by the general witness credibility instruction.

In *State v. Mason*, 271 Neb. 16, 29, 709 N.W.2d 638, 650-51 (2006), we noted that an accomplice

> "'"must take some part in the crime, perform some act, or owe some duty to the person in danger that makes it incumbent on him to prevent the commission of the crime. Mere presence, acquiescence, or silence, in the absence of a duty to act, is not enough, however reprehensible it may be, to constitute one an accomplice. The knowledge that a crime is being or is about to be committed cannot be said to constitute one an accomplice . . . ."'"

In *Mason*, we noted that while certain witnesses might be considered accessories after the fact because there was evidence that they tried to cover up the crime, such witnesses were not "accomplices" and that therefore, an instruction identifying

such witnesses as "accomplices" was not necessary. General instructions to the effect that the jury should "closely examine the witnesses' testimony for motive to testify falsely and to convict only if there is evidence beyond a reasonable doubt" were given in *Mason*, 271 Neb. at 31, 709 N.W.2d at 651, and we conclude that such instructions were sufficient.

Similarly in the present case, the evidence indicates that Casebier and Bowling may have been accessories after the fact but there was no evidence that they were "accomplices" as described above. There was no evidence that either person took part in the commission of the robbery that led to Herndon's death. Banks' argument that the two were accomplices is based on a complicated theory that because Casebier and Bowling were each, to some extent, allegedly involved in the drug trade, it was possible that they were associates of Montgomery and Young and that some combination of Young, Montgomery, Casebier, and Bowling actually committed the robbery and shooting and then conspired to frame Banks for the shooting. Banks' theory requires considerable speculation based on tenuous connections, and the evidence does not support an implication that either Casebier or Bowling was an accomplice to the robbery.

Also, the court in this case gave a reasonable doubt instruction and a general instruction regarding the credibility of witnesses. In *Mason*, we considered it important that although the witnesses at issue were not identified as "accomplices," the jury was instructed to "closely examine the witnesses' testimony for motive to testify falsely and to convict only if there is evidence beyond a reasonable doubt." 271 Neb. at 31, 709 N.W.2d at 651 (citing *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001)). In the present case, the jury was instructed to convict only if there was evidence beyond a reasonable doubt. The witness credibility instruction in the present case did not specifically instruct the jury to consider "motive to testify falsely," but it did instruct the jury to consider "interest or lack of interest of the witness in the result of this case," "apparent fairness or bias of the witness, or the witness' relationship to the parties," and any "other evidence that affects the credibility of the witness."

Given the limited extent of Casebier's and Bowling's involvement in the events at issue, the court did not err when it did not include them in the accomplice instruction; the general witness credibility instruction was sufficient to instruct the jury on its duty to assess their testimonies. We find no merit to this assignment of error.

The District Court Did Not Err When It Refused Banks' Proposed Instruction Regarding the Immunity Given to Bowling Because the Instruction Was Not a Correct Statement of Law and Banks Has Not Shown That He Was Prejudiced by the Refusal.

Banks asserts that the district court erred when it refused his proposed instruction regarding the immunity given to Bowling and the effect of such immunity on Bowling's credibility. We conclude that the court did not err when it refused the instruction, because Banks' proposed instruction was not a completely correct statement of the law and the substance of the instruction was adequately covered by the witness credibility instruction given by the court.

At the beginning of his testimony, Bowling stated that he was testifying under a use immunity order issued pursuant to § 29-2011.02. Bowling later testified he understood that because of the immunity, his testimony in this trial could not be used against him. At the jury instruction conference, Banks requested an instruction that read as follows:

> You have heard testimony from . . . Bowling who has received immunity. That testimony was given in exchange for a promise by the State of Nebraska that his testimony will not be used against him in any future prosecution.
>
> In evaluating . . . Bowling's testimony, you should consider whether that testimony may have been influenced by the State's promise of immunity given in exchange for it, and you should consider that testimony with greater caution than that of other witnesses.

The court refused the instruction.

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law,

(2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007). Although Banks' proposed instruction may have been warranted by the evidence in this case, we conclude that the instruction was in part not a correct statement of the law and that Banks has not shown that he was prejudiced by the court's refusal to give the instruction.

[11] We note first that the proposed instruction is not a correct statement of law in that it instructs the jury that it "should consider [Bowling's] testimony with greater caution than that of other witnesses." A witness' credibility and weight to be given to testimony are matters for determination and evaluation by a fact finder. *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008). It was the jury's duty in this case to determine Bowling's credibility and the weight to be given his testimony, and therefore, it would have been improper for the court to instruct that his testimony should be considered "with greater caution than that of other witnesses."

In this respect, the proposed instruction went beyond the general witness credibility instruction, NJI2d Crim. 5.2, which highlights certain factors that the jury "may consider" in assessing credibility but which stresses that the jury is "the sole judge" of credibility and the weight to be given testimony. Similarly, the accomplice testimony instruction, NJI2d Crim. 5.6, instructs that the jury "should closely examine [an accomplice's] testimony for any possible motive . . . to testify falsely." However, while these instructions highlight matters for the jury to consider in its evaluation of a witness' credibility, they do not instruct the jury to consider a particular witness' testimony "with greater caution than that of other witnesses." This phrase could signal to the jury that the witness is less credible than the other witnesses and that the witness' testimony should be given less weight than that given to the testimony of other witnesses.

[12] Furthermore, even if the instruction were a correct statement of law to the extent it merely highlighted a matter for the jury to consider in assessing witness credibility, Banks has not shown that he was prejudiced by the court's refusal to give the

proposed instruction, because the court gave a general instruction regarding witness credibility which adequately covered the matter. The court gave an instruction which followed the pattern instruction NJI2d Crim. 5.2, "Evaluation of Testimony—Credibility of Witnesses." The court instructed:

> You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. In determining the weight which the testimony of the witnesses is entitled to receive, you should consider:
>
> . . . .
>
> 8. Any other evidence that affects the credibility of the witness or that tends to support or contradict the testimony of the witness.

It is not error for a trial court to refuse to give a party's requested instruction where the substance of the requested instruction was covered in the instructions given. *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

At trial, the court refused Banks' request to the effect that if his proposed immunity instruction was not given, the general witness credibility instruction include, as one of the factors to consider, "the fact that a witness is granted immunity." However, the immunity issue was adequately covered in the general instruction, because the jury was instructed to consider, inter alia, "[a]ny other evidence that affects the credibility of the witness." In this regard, we note that in the comment to NJI2d Crim. 5.2, the Nebraska Supreme Court Committee on Pattern Jury Instructions stated that the "other evidence" under numbered paragraph 8 includes evidence of "other specific instances of possible bias (such as a grant of immunity to a testifying witness)." The committee further stated in the comment that the reference to "other evidence" in paragraph 8 should be "sufficient as instruction to the jury and that a focus on particular instances regarding the possibility of bias more properly is left for highlighting by argument by counsel."

In this case, we believe that the reference in paragraph 8 to "other evidence" affecting credibility was sufficient to instruct the jury that it might consider evidence regarding immunity given to Bowling as a matter affecting his credibility and that the possibility of bias arising from such matter was better left

for argument by counsel. The record shows that in closing arguments, Banks' counsel referred to Bowling's immunity and argued that Bowling "testified because the [S]tate promised that whatever he said on that witness stand[, the State] would not use to prosecute him."

We further note that the possibility of bias arising from a grant of immunity is a matter that is particularly better left for argument by counsel because it is arguable whether immunity makes testimony less credible or more credible. One could argue that a grant of immunity would seem to bolster a witness' credibility, because he or she can tell the truth without being concerned that his or her testimony will be used against him or her in a subsequent prosecution except that the witness could be prosecuted for perjury if he or she gave false testimony. Therefore, it is better that immunity be considered one of the types of "other evidence" affecting credibility that a jury is instructed it may consider rather than that the jury be instructed, as Banks requested in this case, that immunity means that the witness' testimony should be considered "with greater caution than that of other witnesses." Instead, the jury should be allowed, as it was in this case, to consider the fact of immunity and make its own determination whether such fact makes the witness' testimony more or less credible than the testimony of other witnesses.

Banks' proposed instruction regarding the immunity given to Bowling was not a completely correct statement of the law, and Banks has not shown that he was prejudiced by the district court's refusal to give the instruction. We therefore conclude that the court did not err in refusing to give the proposed instruction.

The District Court Did Not Err When It Allowed the State to Amend the Information With Regard to the Weapons Charge Because the Amendment Did Not State an Additional or Different Offense and Banks' Substantial Rights Were Not Prejudiced.

Banks next asserts that the district court erred when it allowed the State to amend the information to change the charge of using a weapon to commit a felony to specify that

Banks used a firearm. We conclude that the court did not err in allowing the amendment, because the amendment did not state an additional or different offense and Banks was not prejudiced by the amendment.

The original information filed by the State alleged that Banks used "a knife or any other deadly weapon" to commit a felony. The caption of the information indicated that Banks was being charged with use of a weapon to commit a felony pursuant to Neb. Rev. Stat. § 28-1205 (Reissue 2008) and that the charge was a Class III felony. The information was amended to state that Banks used "a firearm" to commit a felony, and the caption was amended to indicate that the charge was a Class II felony.

[13] A trial court, in its discretion, may permit a criminal information to be amended at any time before verdict or findings if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. See, *State v. Aldrich*, 226 Neb. 645, 413 N.W.2d 639 (1987) (citing *State v. Gascoigen*, 191 Neb. 15, 213 N.W.2d 452 (1973)). In the present case, the State moved to amend the information during jury selection and the court allowed the State to make the amendment at the close of the State's evidence and prior to submission of the case to the jury. The court therefore had discretion to allow the amendment, provided that (1) no additional or different offense was charged and (2) Banks' substantial rights were not prejudiced.

Banks notes that under § 28-1205, use of a weapon other than a firearm is a Class III felony, whereas use of a firearm is a Class II felony. He argues that because the classification of the offense and the potential penalties are different depending on whether the weapon is a firearm, amending the information to specify that the weapon is "a firearm" rather than "a knife or any other deadly weapon" is an amendment in which a different offense is charged.

We note that § 28-1205(1) provides as follows:

> Any person who uses a firearm, a knife, brass or iron knuckles, or any other deadly weapon to commit any felony which may be prosecuted in a court of this state or who unlawfully possesses a firearm, a knife, brass or iron

> knuckles, or any other deadly weapon during the commission of any felony which may be prosecuted in a court of this state commits the offense of using a deadly weapon to commit a felony.

A distinction between firearms and other weapons is made in § 28-1205(2), wherein the statute provides that use of a deadly weapon other than a firearm is a Class III felony and that use of a deadly weapon which is a firearm is a Class II felony. Section 28-1205 defines a single offense of "using a deadly weapon to commit a felony" but classifies the offense differently depending on the type of weapon used. Therefore the amendment to the information in this case did not charge a different offense; the offense with which Banks was charged was still the offense of "using a deadly weapon to commit a felony." The amendment specified that the weapon was a firearm and therefore changed the classification of the offense, but it did not state an additional or different offense.

Because the amendment did not state an additional or different offense, the court had discretion to allow the amendment so long as Banks' substantial rights were not prejudiced. We conclude that there was no prejudice to Banks because it was clear throughout pretrial proceedings that the weapon used in the incident was a firearm. There was no evidence that a knife was used to kill Herndon, and there were several references not repeated here to firearms at pretrial proceedings. The original information made Banks aware that he was being charged with the offense of using a deadly weapon to commit a felony under § 28-1205, and the evidence was clear that the deadly weapon that was used was a firearm. Banks has not shown that his substantial rights were prejudiced by the amendment.

We conclude that the district court did not err when it allowed the State to amend the information.

The District Court Did Not Err When It Overruled Banks' Motion to Dismiss.

Banks finally asserts that the district court erred when it overruled his motion to dismiss. Banks' sole argument in favor of dismissal was that the evidence was insufficient because

certain testimony presented by the State was not reliable. We conclude that the credibility of witnesses was for the jury to decide and that therefore, the court did not err when it overruled Banks' motion to dismiss.

Banks moved the court to dismiss the charges against him at the close of the State's evidence; he renewed the motion at the close of all the evidence. The court overruled both motions. Banks argued that the charges should be dismissed, because the testimonies of Young, Montgomery, Casebier, and Bowling were not reliable and therefore, there was not sufficient evidence to support a conviction. Banks makes the same argument on appeal.

[14] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. McGhee*, 274 Neb. 660, 742 N.W.2d 497 (2007). Furthermore, we have stated that the credibility and weight of witness testimony are for the jury to determine, and witness credibility is not to be reassessed on appellate review. *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007). The credibility of the witnesses in this case was thus for the jury to decide, and it would not have been proper for the court to grant a dismissal based on its own determination of whether their testimony was reliable. The record shows that if the jury believed the testimonies of Young, Montgomery, Casebier, and Bowling, such evidence supported the charges against Banks. Although Banks presented evidence which might have called each witness' credibility into question, the credibility assessment was a matter for the jury to decide. We conclude that the district court did not err when it overruled Banks' motion to dismiss.

CONCLUSION

Having rejected Banks' assignments of error, we affirm Banks' convictions and sentences for first degree murder and use of a firearm to commit a felony.

AFFIRMED.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. WILLIAM PAUL BOUDA II, RESPONDENT.

770 N.W.2d 648

Filed August 21, 2009. No. S-08-1204.

Original action. Judgment of suspension.

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

PER CURIAM.

INTRODUCTION

On November 18, 2008, formal charges containing one count were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent, William Paul Bouda II. Respondent filed an answer to the charges on February 17, 2009. A referee was appointed on February 25. On April 1, the referee's hearing was held on the charges. Respondent, who was represented by counsel, appeared and testified. Exhibits were admitted into evidence.

The referee filed a report on May 5, 2009. With respect to the charges, the referee concluded that respondent's conduct had breached the following provisions of the Nebraska Rules of Professional Conduct: Neb. Ct. R. of Prof. Cond. § 3-501.1 (competence), § 3-501.2 (scope of representation and allocation of authority between client and lawyer), § 3-501.3 (diligence), § 3-501.4 (communications), § 3-503.3 (candor toward tribunal), and § 3-508.4 (misconduct). The referee further found that respondent had violated his oath of office as an attorney licensed to practice law in the State of Nebraska. See

Neb. Rev. Stat. § 7-104 (Reissue 2007). With respect to the discipline to be imposed, the referee recommended a 3-month suspension. Neither relator nor respondent filed exceptions to the referee's report. Relator filed a motion for judgment on the pleadings under Neb. Ct. R. § 3-310(L). We grant the motion for judgment on the pleadings and impose discipline as indicated below.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on May 26, 1999. At all times relevant to these proceedings, he has practiced in Omaha, Nebraska.

The substance of the referee's findings may be summarized as follows: The respondent was involved in the private practice of law from 1999 until 2007, with the dominant focus of his practice being insurance defense litigation for "AAA Motor Club" (AAA). As of August 1, 2007, respondent left the private sector and entered employment at Catholic Mutual Group. Upon leaving his private practice, respondent made arrangements to turn over the majority of his AAA defense files to an attorney with Fitzgerald, Schorr, Barmettler & Brennan. However, respondent retained three files involving rear-end collisions that he believed warranted settlement. In one of the files respondent retained, he was defending AAA and Tykeisha Tucker in a suit filed by Jason Olsen in the district court for Douglas County. Olsen was represented by attorney Leonard Shefren.

At the referee's hearing, respondent testified that he had received notice that the case involving Tucker was set for trial on April 7, 2008. Respondent stated that he had decided that the case should be settled because Tucker would not make a good witness and Tucker had no valid defense. Respondent admitted that he did not try to contact Tucker as the trial was approaching. Respondent claimed that he did send e-mails to Melissa Corbett, his contact person at AAA, about the need to settle the case, but that he could not produce the e-mails because they were lost due to a computer virus.

Respondent admitted that he never contacted anyone at AAA to address the settlement of the suit and that although he believed he discussed the issue of potentially settling the case

with Olsen's counsel, Shefren, respondent acknowledged that he talked to Shefren "barely at all until after the trial date." At the hearing, respondent admitted that he did not file a motion to continue the case.

Respondent's testimony at the referee's hearing showed that respondent was not prepared to go to trial and that he did not have the authority to settle the case. Nevertheless, on April 7, 2008, respondent represented to both Shefren and the district court that respondent had the authority to settle the case. Further, after April 7, respondent continued to inaccurately represent to Shefren that he had the authority to settle the case. On June 2, respondent approved a document as to both its form and content entitled "Joint Stipulation," which document reiterated respondent's multiple false statements made to Shefren and the district court. Respondent continued to misstate the status of the litigation against Tucker in a June 5 e-mail sent to Gina Smith-Gallant, a claims attorney for AAA.

At the hearing, the Counsel for Discipline indicated that at all times relevant to this case, respondent had fully cooperated with the Counsel for Discipline.

In his report filed May 5, 2009, the referee specifically found by clear and convincing evidence that respondent had violated the disciplinary rules recited above, as well as his oath of office as an attorney. The referee also found certain mitigating factors were present. These included that respondent did not have a prior record of misconduct, that respondent was experiencing difficulties in his marriage at the time of his infractions, and that respondent cooperated with the Counsel for Discipline during the course of the disciplinary proceedings.

With respect to the sanction to be imposed for the foregoing actions, and considering the mitigating factors, the referee recommended a 3-month suspension.

ANALYSIS

In view of the fact that neither party filed written exceptions to the referee's report, relator filed a motion for judgment on the pleadings under § 3-310(L). When no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. See *State ex rel. Counsel for Dis. v.*

Davis, 276 Neb. 158, 760 N.W.2d 928 (2008). Based upon the findings in the referee's report, which we consider to be final and conclusive, we conclude that the formal charges are supported by clear and convincing evidence, and the motion for judgment on the pleadings is granted.

A proceeding to discipline an attorney is a trial de novo on the record. *Id*. To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *Id*. Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *Id*.

Based on the record and the undisputed findings of the referee, we find that the above-referenced facts have been established by clear and convincing evidence. Based on the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated §§ 3-501.1, 3-501.2, 3-501.3, 3-501.4, 3-503.3, and 3-508.4. The record also supports a finding by clear and convincing evidence that respondent violated his oath of office as an attorney, and we find that respondent has violated said oath.

We have stated that the basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. Counsel for Dis. v. Wickenkamp*, 277 Neb. 16, 759 N.W.2d 492 (2009). Neb. Ct. R. § 3-304 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.

See, also, § 3-310(N).

With respect to the imposition of attorney discipline in an individual case, we evaluate each attorney discipline case in light of its particular facts and circumstances. *State ex rel. Counsel for Dis. v. Wickenkamp, supra*. For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Id.*

To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *Id.*

We have noted that the determination of an appropriate discipline to be imposed on an attorney requires consideration of any mitigating factors. See *State ex rel. Counsel for Dis. v. Fellman*, 267 Neb. 838, 678 N.W.2d 491 (2004).

The evidence in the present case establishes, among other facts, that respondent made repeated misrepresentations of facts to opposing counsel and the district court concerning his authority to settle a case and failed to effectively communicate with his clients. As mitigating factors, we note, as did the referee, that respondent has not been subject to prior discipline, that he was experiencing personal problems during the pendency of this action, and that he fully cooperated with the Counsel for Discipline during the disciplinary proceedings.

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, the court finds that respondent should be suspended for 3 months.

CONCLUSION

The motion for judgment on the pleadings is granted. It is the judgment of this court that respondent should be and is hereby suspended from the practice of law for a period of 3 months, effective immediately, after which period respondent may apply for reinstatement to the bar. Respondent shall

comply with Neb. Ct. R. § 3-316, and upon failure to do so, respondent shall be subject to punishment for contempt of this court. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and § 3-310(P) and Neb. Ct. R. § 3-323(B) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF SUSPENSION.

STEPHAN, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JEANELLE S. KLEVELAND, RESPONDENT.

770 N.W.2d 645

Filed August 21, 2009. No. S-09-115.

Original action. Judgment of suspension.

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

PER CURIAM.

INTRODUCTION

Respondent, Jeanelle S. Kleveland, was admitted to the practice of law in the State of Nebraska on April 30, 1984, and at all times relevant was engaged in the private practice of law in Lincoln, Nebraska. On February 3, 2009, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent. The formal charges set forth one count that included charges that by her conduct occurring prior to September 1, 2005, respondent violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102 (misconduct), and Canon 6, DR 6-101 (failing to act competently), as well as her oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 2007). Further, the charges alleged that by her conduct occurring after September 1, 2005, respondent violated the following provisions of the Nebraska Rules

of Professional Conduct: Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (competence) and 3-508.4 (misconduct), as well as her oath of office as an attorney, § 7-104.

On June 1, 2009, respondent filed a conditional admission under Neb. Ct. R. § 3-313 in which she knowingly did not challenge or contest the facts set forth in the formal charges and waived all proceedings against her in connection therewith in exchange for a stated form of consent judgment of discipline which is 60 days' suspension. Upon due consideration, the court approves the conditional admission.

FACTS

In summary, the formal charges stated that on October 24, 2002, respondent filed suit in the district court for Lancaster County on behalf of Rick Perry pursuant to 42 U.S.C. § 1983 (2006). Respondent named as defendants the "Nebraska Department of Corrections" and 14 individual defendants, personally and in their official capacities. The petition claimed that Perry was injured by the defendants' deliberate indifference to his medical needs while he was incarcerated. Perry sought damages in the amount of $1,000,000.

Prior to filing this lawsuit, respondent had never represented an individual in a § 1983 action, and the formal charges claimed that she was not competent to handle the suit without associating with a lawyer who was competent in this area. At no time during her representation of Perry did respondent associate with a lawyer who was competent to handle the case. The formal charges further allege that prior to filing the suit, respondent failed to adequately prepare either by research or by education and was unprepared during the pendency of the suit.

On November 22, 2002, the defendants appeared by special appearances, which were sustained because respondent had not adequately served defendants. Also on November 22, the defendants' demurrers were sustained and respondent was given 14 days to file an amended petition. Respondent did not file an amended petition in 2002 or 2003.

On December 18, 2003, the district court issued an order to show cause, by January 18, 2004, why Perry's case should not

be dismissed for want of prosecution. On January 20, respondent filed Perry's first amended petition and the case was removed from the dismissal docket.

On February 11, 2004, the Attorney General's office filed a motion to dismiss as to most of the defendants. A hearing on the motion was held on March 19. On May 3, 2004, the court sustained the motion to dismiss and respondent was given 21 days to file a second amended petition. In its May 3 order, the court stated that although certain named individuals were sued in their individual and official capacities, none of the named individuals had been properly served in their official capacities, and that therefore, the court dismissed the suit against the defendants in their official capacities.

Respondent did not file a second amended petition within the time the court had provided. On December 14, 2004, the court issued another order to show cause why Perry's case should not be dismissed for want of prosecution. On January 14, 2005, respondent filed a second amended petition. On January 26, defendants filed a demurrer to the second amended petition. The demurrer was sustained on February 4, and respondent was given 14 days to file a third amended petition. Respondent filed the third amended petition on February 18.

On March 2, 2005, the defendants filed a demurrer to the third amended petition, which demurrer was sustained on March 28, 2005. In its order, the court reiterated that Perry's petition was dismissed as to all state officials sued in their official capacities. The court also dismissed two defendants because there were no specific allegations of conduct by them relating to Perry's injuries, and it dismissed one defendant because he had not been served within 6 months.

On April 19, 2005, the Attorney General's office filed a motion for summary judgment, which was sustained as to all of the remaining defendants except one, a unit caseworker. Trial was held on January 10 and 11, 2006. In its order of May 9, 2006, the court stated that it was clear that the medical care provided to Perry was deficient but that the deficient care was not attributable to the unit caseworker, because he was a lay-person who could not be expected to recognize the seriousness of Perry's conditions.

The formal charges allege that throughout the pendency of the suit, respondent repeatedly neglected the case.

ANALYSIS

Section 3-313 provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to § 3-313, and given the conditional admission, we find that respondent knowingly does not challenge or contest the formal charges, which we now deem to be established facts, and we further find that by her conduct prior to September 1, 2005, respondent violated DR 1-102 and DR 6-101 of the Code of Professional Responsibility, as well as her oath of office as an attorney licensed to practice law in the State of Nebraska. Further, by her conduct after September 1, 2005, respondent violated §§ 3-501.1 and 3-508.4, as well as her oath of office as an attorney licensed to practice law in the State of Nebraska. Respondent has waived all additional proceedings against her in connection herewith, and upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Based on the conditional admission of respondent, the recommendation of the Counsel for Discipline, and our

independent review of the record, we find by clear and convincing evidence that by her conduct prior to September 1, 2005, respondent violated DR 1-102 and DR 6-101 of the Code of Professional Responsibility, as well as her oath of office as an attorney licensed to practice law in the State of Nebraska. Further, by her conduct after September 1, 2005, respondent violated §§ 3-501.1 and 3-508.4, as well as her oath of office as an attorney licensed to practice law in the State of Nebraska. Respondent should be, and hereby is, suspended from the practice of law for a period of 60 days, effective 30 days after the filing of this opinion. Respondent shall comply with Neb. Ct. R. § 3-316, and upon failure to do so, she shall be subject to punishment for contempt of this court. Respondent is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323(B) within 60 days after the order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF SUSPENSION.

W.K. STETSON, M.D., ET AL., RELATORS, V. HONORABLE BRIAN C. SILVERMAN, JUDGE, DISTRICT COURT FOR DAWES COUNTY, NEBRASKA, RESPONDENT, AND SHARON K. RANKIN, INTERVENOR.

770 N.W.2d 632

Filed August 21, 2009. No. S-09-209.

1. **Mandamus: Words and Phrases.** Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right. A writ of mandamus is issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person.
2. **Mandamus.** A court issues a writ of mandamus only when (1) the relator has a clear right to the relief sought, (2) a corresponding clear duty exists for the respondent to perform the act, and (3) no other plain and adequate remedy is available in the ordinary course of law.
3. **Mandamus: Proof.** In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that such party is entitled to the particular remedy sought and that the respondent is legally obligated to act.
4. **Mandamus: Pretrial Procedure: Appeal and Error.** In determining whether mandamus applies to a discovery issue, an appellate court considers whether

the trial court clearly abused its discretion in not limiting the scope of the discovery.

5. **Administrative Law: Pretrial Procedure.** Neb. Rev. Stat. § 38-1,106 (Reissue 2008) does not preclude discovery of information that originated outside of the Department of Health and Human Services' investigation of a credential holder.
6. **Administrative Law: Evidence: Records.** The evidentiary privilege under Neb. Rev. Stat. § 38-1,106 (Reissue 2008) belongs to the Department of Health and Human Services and is limited to protecting the department's incident reports, complaints, and investigatory records.
7. **Evidence: Waiver.** Generally, an evidentiary privilege is waived when the holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication.
8. **Administrative Law: Words and Phrases.** A proceeding becomes a contested case when a hearing is required.
9. **Administrative Law: Disciplinary Proceedings: Compromise and Settlement.** Under Neb. Rev. Stat. § 38-190(1) (Reissue 2008), if the parties dispose of a disciplinary petition through an agreed settlement before a hearing, then the proceeding is not one required by law or constitutional right to be determined after an agency hearing.
10. **Pretrial Procedure: Trial.** Relevancy at the discovery stage, when the issues are not clearly defined, is construed more broadly than relevancy at trial.

Original action. Peremptory writ denied.

Mark E. Novotny, of Lamson, Dugan & Murray, L.L.P., and Lonnie R. Braun, of Thomas, Braun, Bernard & Burke, L.L.P., for relators.

Maren Lynn Chaloupka and Robert Paul Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for intervenor Sharon K. Rankin.

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

CONNOLLY, J.

SUMMARY

This is an original action. The relators have asked us to issue a peremptory writ of mandamus, ordering the Honorable Brian C. Silverman, judge of the district court for Dawes County, to vacate his discovery order in the underlying medical malpractice action. In that action, Sharon Rankin, the plaintiff, had filed notice of her intent to issue a subpoena to the Department

of Health and Human Services (Department) for document production. In the subpoena, she sought the investigatory materials in the disciplinary action against W.K. Stetson, M.D., one of the defendant physicians. The defendants objected that the requested materials were privileged under Neb. Rev. Stat. § 38-1,106 (Reissue 2008). In his order, Judge Silverman overruled the defendants' objection. His order also permitted Rankin to conduct other discovery regarding the misconduct. This case centers on whether Rankin can discover the underlying facts supporting the disciplinary action against Stetson.

BACKGROUND

This action has its origin in *Rankin v. Stetson*,[1] a case we previously decided. Rankin sued Stetson; C.A. Sutera, M.D.; and the Chadron Medical Clinic, P.C. She alleged that the defendants failed to properly diagnose and treat her spinal cord injury after she fell. Stetson was the emergency room physician. On appeal, we affirmed the district court's order that excluded Rankin's expert's testimony, but we reversed the district court's order granting the defendants summary judgment. We concluded that another expert's affidavit submitted by Rankin contained statements that sufficiently created a factual issue on causation.

While our decision was pending, Stetson surrendered his medical license. The State had brought a disciplinary action against Stetson. It alleged that from 2000 to 2008, during nongynecological examinations, he engaged in inappropriate sexual touching of patients. In May 2008, Stetson waived his right to a hearing, pleaded no contest to the allegations, and voluntarily surrendered his license for a minimum of 2 years.

In January 2009, Rankin moved to file an amended complaint. In the complaint, she had added a claim alleging that she did not give informed consent to Stetson's medical care, because he had not disclosed his "compulsions" and unfitness. Rankin concedes that Stetson did not engage in misconduct with her. But she claimed that the material was relevant because his "compulsions" likely distracted him from concentrating

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

on her injury. She also filed notice of her intent to serve the Department's records custodian with a rule 34(A) subpoena for production of documents.[2] She wanted to obtain the complaints and complete investigatory record in the State's case against Stetson. Stetson objected to the subpoena. Rankin then moved to compel Stetson to supplement his original responses to interrogatories and to overrule the defendants' objection to the subpoena. Stetson's original responses had stated that he was board certified and listed the professional boards and associations to which he belonged. Stetson argued that Rankin could not discover the material, because it was irrelevant and statutorily privileged under § 38-1,106.

In a February 13, 2009, journal entry, Judge Silverman overruled the defendants' objections to the subpoena. He also continued the trial so that Rankin could conduct further discovery regarding the allegations and surrender of Stetson's license. The permitted discovery included a second deposition of Stetson.

The defendants then applied for leave with this court to file an original action for mandamus. We granted an alternative writ of mandamus directing Judge Silverman to vacate and set aside his order of February 13, 2009, or to show cause why we should not issue a peremptory writ of mandamus. We also granted Rankin's motion to intervene.

ANALYSIS

[1-3] Mandamus is a law action. We have defined it as an extraordinary remedy, not a writ of right. A writ of mandamus is issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person. A court issues a writ only when (1) the relator has a clear right to the relief sought, (2) a corresponding clear duty exists for the respondent to perform the act, and (3) no other plain and adequate remedy is available in the ordinary course of law.[3] And in a mandamus action, the relator has the

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[2] See Neb. Ct. R. Disc. § 6-334(A).

[3] See *State ex rel. Upper Republican NRD v. District Judges*, 273 Neb. 148, 728 N.W.2d 275 (2007).

burden of proof and must show clearly and conclusively that such party is entitled to the particular remedy sought and that the respondent is legally obligated to act.[4]

[4] In determining whether mandamus applies to a discovery issue, we consider whether the trial court clearly abused its discretion in not limiting the scope of the discovery.[5] Here, we consider only three issues: (1) whether Judge Silverman could permit Rankin to conduct additional discovery from original sources of information used by the Department; (2) whether Stetson could invoke § 38-1,106 to prevent discovery of the Department's complaints and investigatory records; and (3) whether the discovery of Stetson's unprofessional conduct was relevant for discovery purposes.

Under rule 26(b)(1) of Nebraska's discovery rules, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ."[6] Resolving this mandamus request centers on the evidentiary privilege under § 38-1,106(1). Before deciding the substantive issues, however, we explain why we are referring to the current version of the statutory privilege, which was not in effect when the Department investigated the complaints against Stetson or when he surrendered his license in May 2008.

Recodification of Statutes Does Not Affect Analysis

At the time Stetson surrendered his license, the Legislature codified the statutory privilege at Neb. Rev. Stat. § 71-168.01(7) (Reissue 2003). But in February 2009, when the court entered its discovery order, the current recodification of statutes governing disciplinary actions against "credentials"[7] was in effect.[8] Under the current statutes, "credential" includes a license, certificate, or registration.[9] The new statutes refer to

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[4] *State ex rel. Stivrins v. Flowers*, 273 Neb. 336, 729 N.W.2d 311 (2007).

[5] See *id.*

[6] See Neb. Ct. R. Disc. § 6-326(b)(1).

[7] See Neb. Rev. Stat. §§ 38-176 to 38-1,113 (Reissue 2008).

[8] See 2007 Neb. Laws, L.B. 463, and 2008 Neb. Laws, L.B. 308 (operative December 2008).

[9] See Neb. Rev. Stat. § 38-113 (Reissue 2008).

conduct by a "credential holder" instead of a licensee or certificate holder.[10]

In some circumstances, the recodification of a statutory privilege might require us to determine whether the controlling statute was the one in effect when the trial court resolved the discovery dispute or the one in effect when the protected action occurred.[11] But here, both versions of the statutes are essentially the same regarding the public or privileged status of the filings and investigatory records. So we need not decide which statute governed the issue. Because no relevant difference exists between the statutes, we shall refer to the current codification. Next, we explain the extent of the evidentiary privilege in disciplinary proceedings.

Public Records and Privileges Under Disciplinary Proceedings Statutes

Sections 38-186 to 38-1,113 set out the permitted procedures for resolving allegations in a complaint to the Department or a petition for discipline against a credential holder. The Attorney General receives a copy of all the Department's complaints. Afterward, the Attorney General's office can choose between three options: (1) It can file a petition for discipline; (2) it can negotiate a voluntary settlement; or (3) it can refer insubstantial violations to the Department for a professional board's recommendation that the Attorney General enter into a nondisciplinary "assurance of compliance" agreement with the credential holder.[12] But even if the Attorney General does not elect to file a petition, the Department can independently request that the Attorney General commence such a proceeding after board review.[13]

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[10] See, e.g., § 38-181.

[11] Compare *State v. Pelley*, 828 N.E.2d 915 (Ind. 2005), with *Ley v. Blose*, 698 N.E.2d 381 (Ind. App. 1998); *Sweasy v. King's Daughters Mem. Hosp.*, 771 S.W.2d 812 (Ky. 1989); and *Dyer v. Blackhawk Leather LLC*, 313 Wis. 2d 803, 758 N.W.2d 167 (Wis. App. 2008).

[12] See § 38-1,107(1)(c).

[13] See § 38-1,105 and Neb. Rev. Stat. § 38-1,139 (Reissue 2008).

If the Attorney General files a petition for discipline with the Department, the allegations in the petition are not privileged.[14] Additionally, any settlement that the Department accepts after the Attorney General has filed a petition for discipline is public.[15] Finally, the Department's underlying complaints and investigatory records are public if there is a contested hearing before the Department and the materials are made part of the record.[16] But, if the materials are not included in a contested hearing, the Department's incident reports, underlying complaints, and investigatory records are statutorily privileged from discovery. Section 38-1,106(1), in relevant part, provides:

> Reports under sections 38-1,129 to 38-1,136, complaints, and investigational records of the department shall not be public records, shall not be subject to subpoena or discovery, and shall be inadmissible in evidence in any legal proceeding of any kind or character except a contested case before the department. Such reports, complaints, or records shall be a public record if made part of the record of a contested case before the department.[17]

Section 38-1,106 Does Not Preclude Rankin's Request for a Second Deposition of Stetson and Additional Discovery

Stetson, Sutera, and Chadron Medical Clinic (hereinafter collectively relators) claim that Judge Silverman erred in ruling that Rankin could conduct discovery, including a second deposition, regarding Stetson's surrendering of his license for sexual misconduct. But the relators make a faint argument. In their brief, they contend that § 38-1,106 "prevents the compelling of supplementary responses to written discovery or deposition

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[14] See § 38-186(2).

[15] See § 38-190. See, also, Neb. Rev. Stat. § 71-161.03 (Reissue 2003) (former codification of § 38-190).

[16] See § 38-1,106. See, also, § 71-168.01(7) (former codification of § 38-1,106).

[17] See, also, § 71-168.01(7) and Neb. Rev. Stat. § 71,168.02(2) (Reissue 2003).

questions to the extent they involve the privilege matters of the [Department]."[18]

We narrowly construe statutorily created evidentiary privileges.[19] Such privileges are in derogation of common law and the truth-seeking function of trials in settling controversies.[20] Section 38-1,106 privileges the Department's complaints, incident reports, and investigatory records. But it does not provide a clear privilege against a party's discovering any information about a disciplinary action from an original source (Stetson). Nor do the disciplinary statutes show that the Legislature intended the privilege to protect the credential holder (Stetson) from disclosure of the information after the Attorney General has filed a petition for discipline.

The Legislature has not specified whom the privilege protects. The statutes, however, show the Legislature intended to balance the public's need to know about disciplinary actions against health care professionals with the State's need to encourage the reporting of unprofessional conduct. Specifically, the Legislature has immunized from liability persons making a complaint and requesting an investigation and made such complaints confidential.[21] And professional boards must conduct closed meetings on any matter pertaining to an investigation or recommendation to the Department.[22] It has also immunized insurance employees and peer review members from liability regarding incident reports to the Department and made these reports confidential.[23] In contrast to the confidentiality afforded to insurance and peer review reports, after the

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[18] Brief for relators at 19.

[19] See, *State ex rel. AMISUB v. Buckley*, 260 Neb. 596, 618 N.W.2d 684 (2000); *Branch v. Wilkinson*, 198 Neb. 649, 256 N.W.2d 307 (1977).

[20] See, *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974); *Branch, supra* note 19. Compare *IAFF Local 831 v. City of No. Platte,* 215 Neb. 89, 337 N.W.2d 716 (1983), *disapproved on other grounds, Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*, 269 Neb. 956, 698 N.W.2d 45 (2005).

[21] See Neb. Rev. Stat. § 38-1,138 (Reissue 2008).

[22] See § 38-1,105(5).

[23] See Neb. Rev. Stat. §§ 38-1,127, 38-1,134, and 38-1,135 (Reissue 2008).

Attorney General files a petition for discipline, confidentiality is not absolute. The statutes make public the allegations in the petition[24] and any agreed settlement between the parties that the Department accepts.[25]

These sections illustrate that the Legislature has provided immunity from liability and discovery privileges to encourage reporting to the Department incidents of unprofessional conduct. But the statutes do not show the Legislature intended to protect the credential holder (Stetson) from discovery of the underlying facts supporting the disciplinary proceedings after the Attorney General has filed a petition for discipline. Nor would this interpretation be consistent with the way this court and other courts have interpreted the related peer review privilege for hospitals. When applying the peer review privilege, other courts have held that it does not extend to information that a person has obtained or collected independent of the peer review process.[26] We have similarly refused to extend the peer review privilege to protect materials that originated outside of the peer review process.

We have held that the peer review privilege does not apply to incident reports regarding the care of individual patients that were not prepared at the request of the hospital's peer review committee.[27] In *State ex rel. AMISUB v. Buckley*,[28] we stated that the peer review privilege serves a twofold purpose related to improving a hospital's care and treatment of patients: (1) It encourages communications to a hospital review committee,

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[24] See § 38-186(2).

[25] See § 38-190(1).

[26] See, e.g., *Babcock v. Bridgeport Hosp.*, 251 Conn. 790, 742 A.2d 322 (1999); *Roach v. Springfield Clinic*, 157 Ill. 2d 29, 623 N.E.2d 246, 191 Ill. Dec. 1 (1993); *Virmani v. Presbyterian Health Services*, 350 N.C. 449, 515 S.E.2d 675 (1999); *State ex rel. Brooks v. Zakaib*, 214 W. Va. 253, 588 S.E.2d 418 (2003). See, also, Annot., 69 A.L.R. 5th 559 (1999); 23 Am. Jur. 2d *Depositions and Discovery* § 159 (2002); 81 Am. Jur. 2d *Witnesses* § 537 (2004). Compare *Sun Health Corp. v. Myers*, 205 Ariz. 315, 70 P.3d 444 (Ariz. App. 2003).

[27] *State ex rel. AMISUB, supra* note 19.

[28] See *id.*

and (2) it encourages the committee's frank discussion and candid evaluation of clinical practices. We have further stated, "'Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit.'"[29] But we concluded that the Legislature did not intend the peer review privilege to shield hospitals from all potential liability or to preclude discovery of all hospital records. We reasoned, in part, that interpreting the privilege so broadly that hospitals were never held accountable for wrongdoing does not serve the goal of improving the care of patients.[30]

[5] We find this reasoning persuasive in interpreting § 38-1,106. The privilege under § 38-1,106 is justified because it serves the public goal of improving the care and treatment of patients. It serves this goal in much the same way that the peer review privilege does: by encouraging communications to the Department about unprofessional conduct. But like the peer review privilege, § 38-1,106 does not preclude discovery of information from persons who obtained the information from outside of the privileged investigatory process. Thus, in *State ex rel. AMISUB*,[31] the plaintiff could discover incident reports that were written or collected by hospital nurses because they were neither originated by nor requested by a hospital review committee. Similarly, plaintiffs in a malpractice action could discover information about the incident from a hospital physician because the physician had obtained the information from a nurse before any peer review process had been initiated.[32]

[6] Moreover, interpreting the statutes as providing a privilege to the credential holder would not make sense. It would effectively mean that a plaintiff in a malpractice action could never show why a health care professional had lost his or her license even if the State had disciplined the professional for the

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[29] *Oviatt v. Archbishop Bergan Mercy Hospital*, 191 Neb. 224, 226, 214 N.W.2d 490, 492 (1974).

[30] *State ex rel. AMISUB, supra* note 19.

[31] See *id.*

[32] See *Roach, supra* note 26.

very conduct alleged in the complaint. This creates an absurd result because the plaintiff filing the suit has waived any confidentiality in the original complaint. And so, we conclude that the evidentiary privilege under § 38-1,106 belongs to the Department, not to Stetson. And § 38-1,106 limits the privilege to protecting the Department's incident reports, complaints, and investigatory records when they are not included in a contested hearing. The relators have failed to clearly and conclusively show that § 38-1,106 protects Stetson from Rankin's further discovery of information available independent of the Department's investigation.

Stetson Was Not Entitled to Invoke the Privilege Against Rankin's Rule 34(A) Subpoena for Document Production

The relators argue that we should issue a writ of mandamus prohibiting the rule 34(A) subpoena because the district court had a clear legal duty under § 38-1,106 to protect any information involving the Department's investigation. The relators argue that under § 38-1,106, the materials Rankin sought are privileged.

Rankin disagrees. She argues that under § 38-1,106, she can discover the Department's reports of unprofessional conduct made by patients or coworkers. She further argues that Stetson waived any protection under the privilege by entering into an agreed settlement. We disagree with both parties' arguments.

[7] We will first discuss Rankin's arguments. Waiver does not apply here. Generally, an evidentiary privilege is waived when the holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication.[33] As discussed, the privilege under § 38-1,106 was not Stetson's to waive. Further, in noncontested cases, the Legislature has explicitly privileged the Department's incident reports, complaints, and investigatory records despite making

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[33] See, Neb. Rev. Stat. §§ 27-511 and 27-512 (Reissue 2008); *Leeds v. Prudential Ins. Co.*, 128 Neb. 395, 258 N.W. 672 (1935). See, also, *In re Grand Jury Proceedings, Vargas*, 723 F.2d 1461 (10th Cir. 1983); *Harold Sampson v. Linda Gale Sampson*, 271 Wis. 2d 610, 679 N.W.2d 794 (2004).

public the petition for discipline and the order accepting the agreed settlement. Thus, the public record status of the petition and the order has no effect on the Department's privilege.

We further disagree with Rankin's argument that the Department's "reports" of unprofessional conduct made by patients or coworkers are generally discoverable under this statute. She argues that § 38-1,106's protection of reports under Neb. Rev. Stat. §§ 38-1,129 to 38-1,136 (Reissue 2008) refers only to insurers' reports to the Department, showing that § 38-1,106 does not privilege reports from other sources. It is true that these sections deal only with insurers' incident reports. But Rankin's interpretation of § 38-1,106 ignores this section's further protection of "complaints." To interpret the statute's protection as excluding patients' or coworkers' complaints to the Department would be inconsistent with the Legislature's use of the word "complaint" under § 38-1,138. Section 38-1,138(1) provides:

> Any person may make a *complaint* and request investigation of an alleged violation of the Uniform Credentialing Act or rules and regulations issued under such act. *A complaint submitted to the department shall be confidential*, and a person making a complaint shall be immune from criminal or civil liability of any nature, whether direct or derivative, for filing a complaint or for disclosure of documents, records, or other information to the department.

(Emphasis supplied.) The Legislature has defined "confidential" information under these statutes to mean "information protected as privileged under applicable law."[34]

Because the Legislature has made public the "petition" for discipline against a credential holder,[35] the word "complaints" in § 38-1,106 clearly does not refer to a petition for discipline. Obviously, the Legislature intended "complaints" in § 38-1,106 to refer to the underlying complaints submitted to the Department under § 38-1,138. The Legislature has also privileged as confidential information patients' or coworkers'

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[34] § 38-177(1).

[35] See § 38-186.

complaints from peer review committees.[36] Thus, Rankin's argument is without merit.

[8] We also reject Judge Silverman's interpretation of the statutes. He contends that the complaints and records here were part of the record in a contested case. Neb. Rev. Stat. § 84-901(3) (Reissue 2008) of the Administrative Procedure Act defines a "contested case" as "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." We have held that a proceeding becomes a contested case when a hearing is required.[37]

After a petition for discipline has been filed under § 38-186, the director, under §§ 38-188 and 38-189, must fix a time and place for a hearing and serve notice upon the credential holder. Section 38-186(3) provides that the proceeding shall be summary in nature and triable as an equity action. It further specifies the type of evidence that a party may use in the proceeding. Finally, §§ 38-191 and 38-192 require the director to adjudicate the allegations based on the director's findings of fact. As we discussed in *Langvardt v. Horton*,[38] this type of proceeding clearly requires the Department to act in a quasi-judicial capacity and constitutes a contested case under § 84-901(3).

[9] But under § 38-190(1), the parties may dispose of any petition by "stipulation, agreed settlement, consent order, or similar method" at any time before the director enters an order. If the director accepts a settlement, the settlement becomes the basis of the director's order. Thus, if the parties dispose of a disciplinary petition through an agreed settlement before a hearing, as in this case, then, under § 38-190(1), the proceeding is not one required by law or constitutional right to be determined after an agency hearing. Because this was not a contested case, the privilege would apply to the Department's underlying complaints and investigatory records.

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[36] See § 38-1,127.

[37] *Kaplan v. McClurg*, 271 Neb. 101, 710 N.W.2d 96 (2006), citing *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998).

[38] *Langvardt v. Horton*, 254 Neb. 878, 581 N.W.2d 60 (1998).

Having disposed of Rankin's arguments and Judge Silverman's application of the statutes, we turn to the heart of the inquiry: Stetson's argument that Judge Silverman had a clear legal duty to protect these documents from discovery under § 38-1,106. We view the dispositive issue, however, as whether Stetson could invoke the privilege.

The Nebraska rules of evidence set forth most of the commonly recognized evidentiary privileges.[39] For privileges related to confidential matters, as in this case, an evidentiary privilege may generally be asserted in two ways: (1) The holder of the privilege, or a person authorized to act on behalf of the holder, can assert the privilege, or (2) the other party to a confidential communication can assert the privilege if the other party is doing so on the holder's behalf. Courts apply a similar rule regarding the constitutional privilege against self-incrimination: the privilege must be claimed by the witness who is the holder of the privilege, not a party opposing admission of the evidence.[40] And courts have applied the same standing rule against other types of privileges.[41] Stetson was not a party to the confidential matters privileged by § 38-1,106; he was the subject of the investigation. As previously stated, the privilege did not run to Stetson. And, obviously, as the subject of the investigation, he was not asserting the privilege on the Department's behalf. Therefore, Stetson has failed to clearly and conclusively show that Judge Silverman had a duty to protect the information in the absence of the Department's claiming a privilege under § 38-1,106. We next consider whether the relevancy requirement under rule 26(b) precluded Rankin's discovery of further information regarding Stetson's misconduct.

Relevancy for Discovery Is Broader Than Relevancy for Trial

The relators contend that we should issue a peremptory writ of mandamus against any further discovery of the facts related to Stetson's discipline, because the information is irrelevant,

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[39] See Neb. Rev. Stat. §§ 27-503 to 27-510 (Reissue 2008).

[40] See *U.S. v. Ortega*, 150 F.3d 937 (8th Cir. 1998).

[41] See 1 McCormick on Evidence § 73.1 (6th ed. 2006).

highly prejudicial, and inadmissible at trial. Rankin contends that Stetson's admitted unfitness to practice medicine at the time he was treating Rankin is discoverable and relevant. She argues that she would have asked different questions at his first deposition if she had known of his sexual misconduct. She also argues that further discovery of his unprofessional conduct could lead to other admissible evidence whether his medical judgment was impaired.

As stated, under rule 26(b)(1), information sought through discovery must also be "relevant to *the subject matter* involved in the pending action." This requirement differs significantly from the relevancy test for admission of evidence at trial: having a tendency to make the existence of any fact at issue more or less probable.[42] Moreover, under rule 26(b)(1), the inadmissibility of the information at trial is not ground for objection if the information "appears reasonably calculated to lead to the discovery of admissible evidence."

[10] Under the same language of Nebraska's rule 26, many courts have held that relevancy at the discovery stage, when the issues are not clearly defined, is construed more broadly than relevancy at trial.[43] We agree. This reasoning is consistent with our recognition that discovery rules are broadly written to permit discovery.[44]

Stetson principally relies on a criminal case in which the Wisconsin Supreme Court affirmed the trial court's order that excluded impeachment evidence against the prosecution's expert witness.[45] The evidence would have shown that the psychiatrist was facing criminal charges related to his sexual abuse of patients when he testified that the defendant was not suffering from a mental disease when he killed two people. The defendant argued that the prosecution had opened the door on the psychiatrist's character and that the evidence was relevant

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

[43] See 8 Charles Alan Wright et al., Federal Practice and Procedure § 2008 (2d ed. 1994 & Supp. 2009).

[44] See *State ex rel. Acme Rug Cleaner v. Likes*, 256 Neb. 34, 588 N.W.2d 783 (1999).

[45] See *State v. Lindh*, 161 Wis. 2d 324, 468 N.W.2d 168 (1991).

to show bias and for character impeachment. The Wisconsin Supreme Court rejected both arguments. Regarding character impeachment, the court concluded that the evidence was irrelevant to the psychiatrist's reputation for truth or veracity or his abilities as an expert witness.

We note, however, that the Seventh Circuit later held in a habeas action that the evidentiary ruling violated the defendant's Confrontation Clause rights.[46] The defendant should have been permitted to impeach the psychiatrist with evidence that he was about to lose his license and faculty position at a university, and possibly go to prison. The court reasoned that the evidence was relevant to show bias for the State, but mostly to counter the prosecutor's misleading evidence that the psychiatrist was a witness of impeccable credentials and high moral standing in the community.

While we are not dealing with a Confrontation Clause issue, we find the Seventh Circuit's reasoning regarding relevancy persuasive. We have recognized that parties have a right to discover information that might impeach a witness.[47] And we have set out the purposes of the discovery process as follows:

> The primary purpose of the discovery process is to explore all available and properly discoverable information to narrow the fact issues in controversy so that a trial may be an efficient and economical resolution of a dispute. . . . The discovery process also provides an opportunity for pretrial preparation so that a litigant may conduct an informed cross-examination. . . . Moreover, pretrial discovery enables litigants to prepare for a trial without the element of an opponent's tactical surprise, a circumstance which might lead to a result based more on counsel's legal maneuvering than on the merits of the case.[48]

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[46] See *Lindh v. Murphy*, 124 F.3d 899 (7th Cir. 1997).

[47] See *State ex rel. Acme Rug Cleaner, supra* note 44. See, also, 8 Wright et al., *supra* note 43, § 2015.

[48] *Paulk v. Central Lab. Assocs.*, 262 Neb. 838, 846, 636 N.W.2d 170, 177 (2001) (citations omitted).

Clearly, some of the information that Rankin seeks through discovery, i.e., the reason for Stetson's surrender of his licensure, is public information. But we cannot say at the discovery stage that she could not obtain further information that would be relevant to Stetson's credibility or a misleading characterization of him at trial. Nor can we rule out her obtaining information that would be relevant to showing his medical judgment was impaired at the time he treated Rankin. But we emphasize that we are not commenting on whether this information is admissible at trial.

CONCLUSION

We conclude that the relators have failed to meet their burden of showing clearly and conclusively that they are entitled to quash discovery of information regarding Stetson's surrender of his license. In addition, they do not have standing to quash a subpoena directed at the Department to obtain its records. We therefore deny their request for a peremptory writ of mandamus ordering Judge Silverman to vacate his discovery order.

PEREMPTORY WRIT DENIED.

McCORMACK, J., participating on briefs.

ROXANA RECIO, APPELLANT, V.
MICHELLE EVERS, APPELLEE.
771 N.W.2d 121

Filed August 28, 2009. No. S-07-1338.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all favorable inferences deducible from the evidence.
3. **Torts: Intent: Proof.** To succeed on a claim for tortious interference with a business relationship or expectancy, a plaintiff must prove (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the

part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.

4. ____: ____: ____. One of the basic elements of tortious interference with a business relationship requires an intentional act which induces or causes a breach or termination of the relationship.
5. **Actions: Intent.** In order to be actionable, interference with a business relationship must be both intentional and unjustified. An intentional, but justified, act of interference will not subject the interferer to liability.
6. **Torts: Employer and Employee.** Factors to consider in determining whether interference with a business relationship is "improper" 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.
7. **Torts: Liability.** A person does not incur liability for interfering with a business relationship by giving truthful information to another. Such interference is not improper, even if the facts are marshaled in such a way that they speak for themselves and the person to whom the information is given immediately recognizes them as a reason for breaking a contract or refusing to deal with another.
8. **Pleadings.** The purpose of pleadings is to frame the issues upon which a cause of action is to be tried, and the issues in a given case will be limited to those which are pled.
9. **Libel and Slander: Words and Phrases.** Actual malice, in the context of defamation, is defined as "hate, spite, or ill will."
10. **Libel and Slander: Intent.** Actual malice requires that the defendant act with a desire to harm the plaintiff that is unrelated to a desire to protect the acting party's rights and which is not reasonably related to the defense of a recognized property or social interest.
11. ____: ____. Actual malice is generally an issue of fact.
12. **Summary Judgment: Words and Phrases.** There is a difference between an "issue of fact" and a "genuine issue as to any material fact" within the meaning of Neb. Rev. Stat. § 25-1332 (Reissue 2008).
13. **Summary Judgment.** The primary purpose of the summary judgment procedure is to pierce the allegations in the pleadings and show conclusively that the controlling facts are other than as pled.
14. ____. Simply alleging an issue of fact is insufficient to defeat a motion for summary judgment.
15. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

Kevin J. McCoy, of Smith, Gardner, Slusky, Lazer, Pohren & Rogers, L.L.P., for appellant.

Thomas F. Hoarty, Jr., of Byam & Hoarty, P.C., L.L.O., for appellee.

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

GERRARD, J.

Roxana Recio, a professor at Creighton University (Creighton), was placed on probation and required to attend counseling after Creighton's sexual harassment committee found merit in a sexual harassment complaint made by Recio's colleague, Michelle Evers. Recio sued Evers for tortious interference with a business relationship, but the district court entered summary judgment against Recio. The primary question presented by this appeal is whether there is a genuine issue of material fact as to whether Evers' sexual harassment complaint was justified. Based on the record presented, we find that Evers' sexual harassment complaint was justified because it provided truthful information to Creighton. Therefore, we affirm the judgment of the district court.

BACKGROUND

Recio was a tenured professor of Spanish in Creighton's department of modern languages and literatures (the Department). In February 2001, Evers accepted a position as a professor of Spanish in the Department, to begin in August 2001. Evers and Recio became acquainted during Evers' hiring process and began e-mailing one another. Recio's e-mails to Evers formed the basis of Evers' eventual complaint of sexual harassment. The messages were originally in Spanish or Catalan; Recio does not deny sending the messages, but the semantics of their translation and context are disputed. The following excerpts are taken from Evers' translations, because they are the only complete translations that are in the record. Any relevant disputes over translation are noted. And because of the informal style of these messages, there are various grammar, spelling, and syntax errors. Indicating each error with a "[sic]" would be distracting, so we reproduce each of the translated messages in its original form. Because they are essential to resolving this appeal, they are quoted at some length.

RECIO'S E-MAILS

The first message at issue, sent by Recio to Evers on April 16, 2001, mostly discussed the work of a particular Catalan poet who was apparently of academic interest to them. Recio also discussed her summer travel plans, however, and promised to send postcards from each of her stops. Recio wrote, "I'll write you from everywhere and you don't have to answer my postcards, of course, what I would like though would be to receive a letter from you sometime, short, but at least send me one." Recio also wrote that she would help Evers prepare articles for publication.

> I would like you to publish, if you want, of course, I don't want to stick myself in your life . . . but I do want to be your friend, do you understand? I hope so, because if you don't understand, you will end up hating me and I will have an attack. If I don't see you in August as we were saying this morning . . . UFFF! . . . I think I would shoot myself in the head (think that I'm bad off in the head if you want, I don't care, but I *will* shoot myself).

(Emphasis in original.) Recio claims that "I don't want to stick myself in your life" is a literal translation, but that the verb would have been better translated as "'to meddle, intrude, interfere.'"

A message sent the following day was still discussing the same poet, but was more personal. Recio wrote:

> The truth is, I really feel like talking to you and I don't know if I'll have time and if I'll be able to tell you all that I want. . . . The most important thing is to communicate and I am happy with your e-mails in any case. Of course, I haven't erased your voice from my answering machine. It makes me happy and I love it. I'll leave it there a few days. I just feel like it. I'm trying hard not to call you . . . but I won't do it because I don't want to take advantage of you. I was thrilled to talk to you yesterday. You already know that I don't have to tell you what I feel because you know quite well and also I am always repeating to you like a parrot.

Recio contends that "Of course" should have been translated "'[B]y the way'" and that "It makes me happy and I love it"

should have been translated "'I find it funny and I like it.'" Recio claims that "I was thrilled to talk to you" would have been more accurately translated as "I enjoyed talking to you" or "I loved to talk to you." Recio also contends that "You already know that I don't have to tell you what I feel" actually contained a reference to the previous sentence, so the idea was "'[Y]ou already know that I loved to talk with you.'"

Recio's message went on to say that she had told her husband she wanted to take Evers to a particular restaurant in Spain and that "[h]e doesn't mind, he says it's fine." Recio wrote, "Let's see if we can go someday (you can bring whomever you want, but I want to bring you)." Recio also commented more on a particular poet and wrote, "I love that you're reading him and that you stay up late reading it. How great, I figured out what you like! Could you keep telling me what you like to read? I want to share with you." Recio again asked Evers to write her, and promised, "I'll send you all the e-mails that I can. You'll get tired of it, I won't. For me, you are very important." Recio concluded, "Hey, I miss you (I won't ever tell you that again, I promise). Write me when you can, okay? Don't forget. I hope the summer goes by fast (to be able to see you once and for all!)."

Another, shorter message was sent later the same day. Recio, who is a Cuban exile, asked Evers if she was "Pro-Castro." Recio asked:

> Do you believe all that propaganda? It would hurt me but I would still have the same caring feelings for you. The truth is, I already care so much for you that I don't know what I would say. It would be terribly hard to discuss with you. I'll tell you seriously, you are in charge. I am at your feet, I am not a man . . . (that last part is a joke)[.]

Recio concluded by promising to write later, and she did so that evening. Recio wrote:

> I just called you and it surprised me that you had already read the message I sent you. But I liked that you told me that you aren't Pro-Castro, it wouldn't have mattered, but I feel much better, I confess. To tell you the truth, it would have been painful for me but I wouldn't

> have discussed it with you. Of course I discuss it but with you it wouldn't have made a difference. Okay, but the thing is, it was funny the way you proclaimed it. You know what I am discovering? I think that you like to laugh, you like good humor, you have a spark when you talk etc. but behind it all there is an intelligent and sensitive woman, very intelligent and sensitive and I want to discover more. Has it ever occurred to you that it is hard to meet a guy not because you are pushy, like you say, but rather for your intelligence and sensitivity? I don't know, I think that could be it.

Recio says that "you have a spark" actually means "'[you are] witty and sharp.'" Recio's message continues:

> What I am missing is the directions. Look: I write you and later, if you would like, you write me, those things that they call "traditional" letters. What do you think? I only ask that if I write you four, you write me one, nothing more. It's that in Barcelona I'll see my e-mail two or three times a week, but in Sitges maybe once, and that's even going to be hard because I'm going to miss you (I'm not going to keep saying it, honestly). You don't understand because you see me like some nice person who tortures you with e-mails and who you will work with, you are kind, polite, etc but for me it is different, Michelle, I feel so much for you, don't you notice? Don't you see that I talk to you not just to pass the time, but rather because it makes me happy? That's how it is, and of course, I will miss you and the other type of mail will help me to be near you even if you don't answer me. It's something caring, affectionate that doesn't have to do with anything else. What's more, when you say things like what you said about [a particular writer], I find it interesting to talk to you. I'm going to save your message. I have to read it better. Okay, so that you have to wait a little I'll send the addresses from there, that way, you don't have to worry about saving them or anything. Let's see if some day you have half of the affection that I feel for you. Let's see. I doubt it but oh well. Today people are just plain savage (that's a joke)[.]

Recio says that the translated words "I feel so much for you" are too strong and should have been translated as "'I have developed some affection for you'" and that the phrase "it makes me happy" actually meant "'I feel comfortable.'"

Recio continued the message by writing:

> In reference to Spain I love what you say: it's true, we'll coincide there sometime and it will be great. Sometimes I'm afraid that if you would come you would be disappointed. We'll do everything possible for that not to happen. But it's true: there is a lot of life to live and good times to be had and above all: introduce you to Juan who will just faint when he sees you[.]

Recio asked Evers to "[t]ell me what books you want me to bring you and tell me what I can do to not miss you so much." Recio concluded by describing how she had told a friend about Evers, explaining:

> I want her to help me (and everyone else too) to not miss this wonderful girl who knows tons of stuff and who writes and thinks like few people do . . . I've never missed Omaha or the U.S., this time, I will. You see and you're telling me that I'm going to have a great time. I'll have a good time but you know, you won't be there. I told you that I'm obsessive (but don't freak out, I'm not like Jeffrey Dohmer, is that how you write his name?) and when I really like someone I'm like that, this doesn't usually happen to me.

Recio asserts that "when I really like someone" should have been translated as "'when I am impressed by someone.'"

Recio's next message, sent the next day, began by asking:

> Where are you? The truth is, I've been going on all day without any news from you and it's making me crazy. Have you heard of a drug called "Michelle," I have an addiction to it now. It's just that I'm not going to be here much longer to talk with my pal and I'm a little down about it.

Recio says that "it's making me crazy" actually meant "'I am annoyed.'"

Recio went on to write that she was not disappointed with Evers' desire to marry and start a family:

> You should know by now after all we've talked about that it would have to be something really huge to disappoint me. It would be impossible. On the contrary: what worries me is how good I feel with you . . . do you thin[k] that I should separate myself a little from you to see you more distantly? Do you think it would be good if I were to disappear in Spain and show up again in August? I don't know. I admire you and I love talking to you and leaving is making me feel badly. Maybe you would advise me to take some distance . . . I'm going to make you crazy. Pardon me for talking like that but I'm a little tired.
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> I don't know if I should have told you that. But I know you'll understand and give me your opinion, you have nothing to lose. Maybe it's just my tiredness and lack of control and courtesy on my part. Hey, I'm sorry. Please, don't get mad, okay? Before getting mad, think about this person talking to you who really holds you in esteem and who doesn't have bad intentions. Okay? But what do you want, I feel phenomenal with you. Yes.

Recio's next message, sent the next day, was much shorter. Recio wrote:

> You are right, I'm exaggerating. Don't pay any attention to me. The truth is, I deserve a cake (*I've behaved in a silly way*)[.] Thanks for scolding me, I think that in Spain I'll get back to my common senses. . . . Can I write you these days even if you don't answer because you're busy? . . . Okay! Come on, don't get mad.

That afternoon, Recio wrote:

> I answered your message and you didn't answer me, especially knowing what I said to you yesterday. . . . I thought that you weren't answering me because you were busy writing your dissertation. You know what? Yes, I am nervous, impatient and what's more I get desperate with people who I care for, but these defects, I think they are small in the face of some of the virtues that I've shown. I think you need a different type of person different than me. . . .
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> Your hard attitude has insulted me. You know, it's better just to be colleagues in our work and that's it. Don't

> give me any lessons and I'm sorry for having been so sincere and sentimental with you. But I don't want to deal with a person so tough who forgets all my good traits for one little error. Thanks for the punch. We'll see each other (what choice do we have?) in August.

The final e-mail was sent several days later, apparently responding to another message from Evers. Recio wrote:

> I was offended because you told me you were writing your dissertation, you embarrassed me (*by not answering my email*) and it hurt me because I was busting my head to figure out how to get used to having less contact with you (since it would be hard in Sitges to have e-mail, etc). I don't know, maybe it wasn't that big of a deal. I don't know. But what I do know is that, I don't understand you and you don't understand me. It would be better to be in person to see if we can communicate. I'm not mad anymore but I'm scared, because I'm not like all these proud imbeciles here. They have fucked me enough around here. I want peace with you and the best is to wait to see each other because from a distance I am afraid.

Recio claims that "you embarrassed me" actually meant "'you told me a big lie'" and that "maybe it wasn't that big of a deal" actually meant "'maybe it was not a lie.'" Recio also claims that the profanity attributed to her no longer carries its literal meaning in Spanish and is no longer particularly profane; rather, it means "'to annoy, pester.'" (For example, an equivalent English idiom might be to "screw with" someone.)

Recio concluded:

> Thanks for wishing me a good trip. The truth is, I need to rest. We'll see each other in August and with peace, and pardon me if I reacted like that but it's just that it hurt me like a pair of swords in my side, I don't know why but that's what I felt. Let's just leave it at that. It isn't important. Good luck with your dissertation and now let's be in peace and harmony, nothing ever happened. You can blame my emotional immaturity or whatever you like.
>
> But everything's alright, eh? Nothing happened. August is just around the corner.

EVERS' SEXUAL HARASSMENT COMPLAINT

Evers began teaching at Creighton in the fall of 2001 and did not have much contact with Recio for several months. Recio was on sabbatical during the 2002-03 academic year. Recio returned in the fall of 2003.

It is apparent from the record that the faculty in the Department did not get along with one another. On February 10, 2004, the Spanish section of the Department held a separate meeting. The Department chair, Thomas Coffey, attempted to preside over the meeting, and Recio objected because Coffey was primarily a French professor. The meeting became contentious, and Evers walked out, returned, then walked out again. On February 12, Recio sent an e-mail to Coffey and Creighton administrators, complaining about Evers' conduct at the meeting. On February 13, Evers and three other members of the Spanish faculty sent a letter to Coffey complaining about Recio's conduct at the meeting and other alleged emotional outbursts by Recio.

A few days later, Evers provided Coffey, the dean of Creighton's college of arts and sciences, and the Creighton legal department with copies of Recio's 2001 e-mails to her. Evers later contacted the chairperson of Creighton's sexual harassment committee and Creighton's affirmative action officer. On March 17, 2004, Evers filed a complaint with the sexual harassment committee, attaching the e-mails and her translations of them. The sexual harassment complaint also set forth a "Timeline of Incidents with . . . Recio," describing the events listed above, and other instances in which Evers alleged Recio had behaved inappropriately. The complaint also stated that Recio's "frequent public outbursts" created a hostile environment for anyone required to work with her and that because Evers did not want to have any further contact with Recio, Evers suggested that "the only adequate solution would be to dismiss . . . Recio from the faculty and remove her presence from" the Department.

The sexual harassment committee held five meetings and heard evidence from Evers, Recio, several other faculty members, and one student. Other members of the faculty reviewed the e-mails in Spanish. A member of the faculty of Creighton's

college of business administration, who was a friend of Recio's and apparently fluent in Spanish, said that the e-mails could be "'explained away by culture and effusiveness.'" But members of the Department's Spanish faculty believed that the e-mails were inappropriate, even accounting for cultural differences.

The committee found that Recio's messages were inappropriate, noting that "[w]itnesses from various Hispanic cultures including Cuba, Venezuela, Spain, and Puerto Rico differed with . . . Recio's interpretation that culture could be used to explain away" the e-mails and had described them as "inappropriate, shocking, and of a sexual nature." The committee found that "[a]t best, the emails in their intensity and obsessiveness are ominous and caused . . . Evers great distress." The committee also noted several other incidents, including a sexual harassment complaint against Recio and "difficulties" that had allegedly occurred when Recio had been at another university, and personal behavior toward other new faculty members. The committee noted that "departmental witnesses described her in the following terms: obsessive, a bully, aggressive, irrational, . . . demanding, creates conflict, stalking, retaliates, rages, verbal violence, explosive, forceful and creates a hostile work environment."

The committee concluded that

> the emails constituted sexual harassment and a hostile environment by displaying a pattern of obsessive behavior which created discomfort and distress for . . . Evers. The committee believes the implicit sexual overtones and the aggressive, demanding tone of the emails reflected a need by . . . Recio to create a sense of power in this relationship. It is inconceivable that a senior member of the Creighton . . . faculty would write these words to a new faculty member.

The committee also found that the February 12, 2004, letter that Recio wrote, complaining about Evers, "borders on retaliation" for not responding to Recio's advances. And the committee found that Recio "displayed a pattern of obsessive, aggressive and retaliatory behavior" toward Evers and that Recio's "long-standing unprofessional behavior has contributed to a dysfunctional and hostile academic environment for the

entire department that continues constantly to be addressed by the administration." The committee unanimously recommended to Creighton's president, Fr. John P. Schlegel, S.J., that Recio's employment be immediately terminated.

Schlegel agreed with many of the committee's conclusions, but decided, in a letter dated May 12, 2004, that the case was "much more than a sexual harassment case" and stated that his "recommendations for action reflect that fact." Schlegel concluded that "Recio would benefit from a program of psychological counseling and educational programs on communication, appropriate interactions with others, teamwork, etc." Schlegel placed Recio on a term of probation of a little more than a year and directed her to have no contact or communication with Evers. Recio was directed to commence a psychological counseling program, at her cost, and to attend educational programs recommended by the dean of Creighton's college of arts and sciences.

District Court Proceedings

On May 4, 2006, Recio filed a complaint against Evers in the district court, alleging a claim for tortious interference with a business relationship. Recio alleged that the e-mails supporting Evers' sexual harassment claim had been translated "in a misleading manner in order to create a distorted impression of suggestive content." Recio alleged that "Evers' spurious allegations of sexual harassment were made with malicious intent and without justification in order to damage and disrupt Recio's contractual employment . . . ." And Recio alleged that "[a]s a proximate [result] of Evers' interference with Recio's contractual relations," Recio was put on probation and suffered, among other things, lost salary, costs of counseling, damage to her reputation, emotional distress, and "renegotiation terms and conditions different from [those of] similarly situated colleagues." In her answer, as an affirmative defense, Evers alleged that her submission of the sexual harassment complaint was privileged.

The district court granted Evers' motion for summary judgment, finding "no evidence that the [sexual harassment] complaint filed by [Evers] was made in bad faith or with malice."

The court also stated that "it would defeat the sexual harassment policy of Creighton . . . to allow an employee who in good faith files a valid sexual harassment complaint to be sued for tortious interference with employment by the individual who harassed her." Thus, the court stated that Evers' actions "were privileged and that no genuine issues of material fact exist." The court dismissed Recio's claim with prejudice.

ASSIGNMENTS OF ERROR

Recio assigns, as consolidated, that the district court erred in (1) finding that Evers' sexual harassment complaint was privileged as a matter of law, (2) finding that there were no disputed material facts or inferences deducible from those facts as to whether Evers acted in bad faith or with malice in charging Recio with sexual harassment, and (3) claiming that there was no evidence that Evers interfered with Recio's employment or caused her harm.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all favorable inferences deducible from the evidence.[2]

ANALYSIS

Tortious Interference With Business Relationship

[3,4] Before discussing Recio's arguments in detail, it will be helpful to review some of the basic propositions of law relating to a claim for tortious interference with a business relationship. To succeed on a claim for tortious interference with a business relationship or expectancy, a plaintiff must

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[1] *Schuyler Co-op Assn. v. Sahs*, 276 Neb. 578, 755 N.W.2d 802 (2008).

[2] *Id.*

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.[3] One of the basic elements of tortious interference with a business relationship requires an intentional act which induces or causes a breach or termination of the relationship.[4]

It is not entirely clear, in this case, whether Recio is claiming that Evers' act of interference was directed at Creighton or at Recio—in other words, whether Evers' alleged act of interference made Creighton breach its employment relationship with Recio or made Recio's performance of her employment obligations more difficult.[5] For purposes of our analysis, we assume that Recio stated a claim for relief with respect to breach of the employment relationship, even though Creighton has clearly not terminated Recio's employment and Recio only pled that her performance of her obligations under that agreement had been made more difficult.[6] We need not resolve this ambiguity, because we conclude that in any event, Evers' alleged act of interference was justified.

Justification for Provision of Truthful Information

[5] In order to be actionable, interference with a business relationship must be both intentional and unjustified.[7] An intentional, but *justified*, act of interference will not subject the interferer to liability.[8]

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

[4] *Wiekhorst Bros. Excav. & Equip. v. Ludewig*, 247 Neb. 547, 529 N.W.2d 33 (1995).

[5] See *Pettit v. Paxton*, 255 Neb. 279, 583 N.W.2d 604 (1998).

[6] But see, e.g., *George A. Fuller Co. v. Chicago Col. of Ost. Med.*, 719 F.2d 1326 (7th Cir. 1983). Cf. *Pettit, supra* note 5.

[7] *Aon Consulting, supra* note 3.

[8] *Wiekhorst Bros. Excav. & Equip., supra* note 4.

[6] We have expressly adopted the seven-factor balancing test of the Restatement (Second) of Torts § 767[9] for use in determining whether interference is "unjustified" under Nebraska law. Factors to consider in determining whether interference with a business relationship is "improper" 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.[10]

These are the important factors to be weighed against each other and balanced in arriving at a judgment; but they do not exhaust the list of possible factors. The issue in each case is whether or not the interference is improper under the circumstances; 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. The decision depends upon a judgment and choice of values in each situation.[11]

Section 772 of the Restatement contains a "special application of the general test" stated in § 767.[12] It provides:

> One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person
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> (a) truthful information, or
>
> (b) honest advice within the scope of a request for the advice.[13]

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[9] See, Restatement (Second) of Torts § 767 (1979); *Huff v. Swartz*, 258 Neb. 820, 606 N.W.2d 461 (2000).

[10] *Aon Consulting, supra* note 3.

[11] See *id.*

[12] See Restatement, *supra* note 9, § 772, comment *a.* at 50.

[13] Restatement, *supra* note 9, § 772.

This is true even if the facts are marshaled in such a way that they speak for themselves and are immediately recognized as a basis for breaching the contract.[14] Simply put, if the information provided is truthful, the interference is not "improper."[15]

Based on that reasoning, the general rule is that an action for tortious interference with a business relationship will not lie where the substance of the alleged interference is the provision of truthful information.[16] Society has a strong interest in promoting the transmission of truthful information, and the factors enumerated in § 767 weigh in favor of permitting such conduct without liability. When truthful information provides the basis for a termination of a business relationship, the resulting liability, if any, should rest on the party who made an informed choice to terminate the relationship—not the party who provided the facts upon which that decision was based.

Although we have never expressly adopted the principle expressed in § 772(a), we implicitly endorsed it in *DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co.*,[17] in which we held that a creditor's communications with a debtor's suppliers did not support a claim for defamation or tortious interference with a business relationship when the communications at issue were truthful. We also implicitly

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[14] *Id.*, comment *b.* See, also, W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 129 (5th ed. 1984).

[15] See *id.*

[16] See, e.g., *Worldwide Primates, Inc. v. McGreal*, 26 F.3d 1089 (11th Cir. 1994); *Tiernan v. Charleston Area Medical Center*, 203 W. Va. 135, 506 S.E.2d 578 (1998); *Dyer v. Bergman & Associates, Inc.*, 657 A.2d 1132 (D.C. 1995); *Four Nines Gold, Inc. v. 71 Const., Inc.*, 809 P.2d 236 (Wyo. 1991); *Montrone v. Maxfield*, 122 N.H. 724, 449 A.2d 1216 (1982); *Cohen v. Battaglia*, 41 Kan. App. 2d 386, 202 P.3d 87 (2009); *Kutcher v. Zimmerman*, 87 Haw. 394, 957 P.2d 1076 (Haw. App. 1998); *Savage v. Pacific Gas and Elec. Co.*, 21 Cal. App. 4th 434, 26 Cal. Rptr. 2d 305 (1994); *Liebe v. City Finance Company*, 98 Wis. 2d 10, 295 N.W.2d 16 (Wis. App. 1980).

[17] *DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co.*, 196 Neb. 398, 243 N.W.2d 745 (1976).

adopted § 772(b), protecting the giving of honest advice, in *Wiekhorst Bros. Excav. & Equip. v. Ludewig*.[18] And we have expressly adopted other "special application[s]" of § 767.[19] Simply stated, we have already adopted § 767 and its related sections; the special application of § 767 set forth in § 772(a) is not only well recognized and sensible, but necessary for our law to be consistent.[20]

[7] Therefore, we now expressly hold that as stated in § 772(a), a person does not incur liability for interfering with a business relationship by giving truthful information to another.[21] Such interference is not improper, even if the facts are marshaled in such a way that they speak for themselves and the person to whom the information is given immediately recognizes them as a reason for breaking a contract or refusing to deal with another.[22]

In this case, Recio's brief sets forth, at length, supposed factual inconsistencies and improper behavior on the part of Evers, other Department faculty, and Creighton administrators. Generally, Recio's brief describes a narrative in which Evers' sexual harassment complaint is only part of a larger campaign of persecution directed at Recio by Creighton and her colleagues in the Department. As noted above, the record reflects a substantial amount of discord in the Department. But it does not support the construction put upon it by Recio. Most pertinently, there is nothing in the record that substantially contradicts the factual basis of Evers' sexual harassment complaint.

[8] And despite Recio's attempts to broaden the issues in this case, our analysis is limited by Recio's pleadings to the

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[18] *Wiekhorst Bros. Excav. & Equip., supra* note 4.

[19] See, *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, *supra* note 9, §§ 768 and 772, comment *a*. at 50.

[20] See, *Cohen, supra* note 16; *Liebe, supra* note 16.

[21] See, *Savage, supra* note 16; Restatement, *supra* note 9, § 772, comment *b.* at 50.

[22] See Restatement, *supra* note 9, § 772, comment *b.*

content and effect of Evers' sexual harassment complaint. The purpose of pleadings is to frame the issues upon which a cause of action is to be tried, and the issues in a given case will be limited to those which are pled.[23] And the only act Evers is alleged to have committed that affected Recio's employment relationship with Creighton was the sexual harassment complaint. To the extent that Recio's pleading can be read to allege that Evers made Recio's performance of her job obligations more difficult, such a claim fails because there is no evidence that Recio suffered a pecuniary loss from her alleged inability to perform any contractual duties.[24] In other words, the only damages alleged in Recio's pleadings that can be attributed to Evers' alleged interference with Recio's employment resulted from the sexual harassment complaint. So, we focus on whether the sexual harassment complaint was justified under the principles of § 772(a).

The essence of Recio's argument is the contention that "Evers made false, inflated and fabricated claims against Recio."[25] But Recio's brief, and the record as a whole, are notably short on instances in which Evers' complaint was demonstrably false. Most importantly, Recio does not deny sending the e-mails that formed the basis and bulk of the complaint. Recio said that she did not clearly remember the content of the e-mails. She also denied that they had sexual overtones and objected to their lack of context, i.e., Evers' failure to retain or provide other e-mails that Evers and Recio had sent to one another. And Recio complains about the "misleading manner" of Evers' translations of the e-mails.

But these arguments do not establish any genuine issue of material fact about whether Recio sent the e-mails at issue. While Recio claimed not to remember their content clearly, she did not deny sending them and generally accepted them as presented. Recio denied that the e-mails constituted "sexual harassment" within the meaning of the relevant Creighton sexual

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[23] *Destiny 98 TD v. Miodowski*, 269 Neb. 427, 693 N.W.2d 278 (2005).

[24] See, *Pettit, supra* note 5; Restatement, *supra* note 9, § 766A.

[25] Brief for appellant at 47.

harassment policy, but that is in essence a legal conclusion, not a denial of the underlying conduct that was the gravamen of Evers' complaint. And Recio's speculation about Evers' translation of the e-mails is unsupported. Recio's criticisms about various words and phrases are largely semantic—Recio's alternative translations, in our view, are not meaningfully different. And Evers' sexual harassment complaint also included the original, untranslated e-mails—thereby defeating the suggestion that Evers intended to mislead the sexual harassment committee about what Recio had actually written.

We also are not persuaded by the suggestion in Recio's brief that Evers' e-mails showed that the content of Recio's messages was "in essence no different from that of Evers' correspondence - - perhaps effusive or at times melodramatic to an Anglo reader, but in no way threatening or sexually harassing."[26] Those e-mails have not been reproduced here, because, contrary to Recio's suggestion, we do not find them to be particularly relevant. They are friendly and often conclude with traditional Catalan salutations meaning such things as "a big hug" or "a kiss." But they do not resemble Recio's messages in any relevant respect, and the suggestion that they are similar is an exaggeration.

Nor is there evidence that the "Timeline of Incidents with . . . Recio" attached to the sexual harassment complaint was substantially untruthful. Recio testified that she did not recall some of the events, and she interpreted some of the events differently. But she did not materially dispute any of them. Instead, Recio attempts to manufacture falsehoods out of discrepancies in the record on facts such as whether the e-mails were sent before or after Evers accepted Creighton's offer of employment, whether she told anyone at Creighton about the e-mails before February 2004, and whether she communicated with Creighton's affirmative action officer before or after she contacted the chair of the sexual harassment committee. But those inconsistencies are either inconsequential or explained by the record. Creighton did not place Recio on probation because

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[26] *Id.* at 32.

of any of those facts. Creighton placed Recio on probation because of a series of e-mails that Recio did not deny sending and a sequence of events that Recio did not materially dispute. The factual disputes that Recio notes are simply not issues of *material* fact.

At oral argument, Recio also intimated that Evers' testimony to the sexual harassment committee formed some basis for liability. This argument is unavailing, for many of the reasons set forth above. Evers' testimony was neither materially inconsistent with her complaint nor denied in any relevant respect—but most significantly, her committee testimony was not placed at issue by Recio's pleadings, nor was it clearly implicated by Recio's appellate brief. We reject Recio's belated attempt to bring it into contention.

In short, we find that Evers' sexual harassment complaint was justified, as providing truthful information to Creighton. The incidents upon which Creighton's disciplinary decision was based were, according to Recio, misunderstood. But they were not denied, and the record evidences no genuine issue of material fact about whether those incidents actually took place. The district court did not err in concluding that Evers' complaint was justified, and therefore, we find no merit to Recio's first assignment of error.

Actual Malice

In support of her second assignment of error, Recio argues generally that there is a genuine issue of material fact as to whether Evers' complaint was made maliciously. In support, she relies on Restatement sections that relate to defamation actions and generally describe the ways in which a conditional privilege may be abused.[27] And in Nebraska, by statute, truth is a defense to a claim of libel or slander "unless it shall be proved by the plaintiff that the publication was made with actual malice."[28] Recio contends there is evidence that Evers'

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[27] See Restatement, *supra* note 9, § 600 et seq.

[28] Neb. Rev. Stat. § 25-840 (Reissue 2008). See, also, Neb. Const. art. I, § 5.

complaint, even if truthful, was motivated by actual malice. So, Recio argues, Evers' complaint was not justified.

But Recio's argument in that regard is unavailing. To begin with, while actual malice may defeat a conditional privilege defense against a defamation claim, it is not at all clear that the same principles apply to a justification defense against a claim of tortious interference with a business relationship. We have, in fact, specifically disapproved any suggestion that an intentional but justified interference may subject the interfering party to liability.[29] And while a malicious motive is a factor which may be considered in determining whether interference is unjustified, it is generally insufficient standing alone to establish that fact under § 767 of the Restatement.[30] In general, § 772(a) does not permit *any* liability to be imposed for the communication of truthful information.[31]

[9,10] But even if we consider Recio's actual malice argument, it is unsupported by the record. Actual malice may not be presumed from a communication.[32] And actual malice, in this context, is defined as "hate, spite, or ill will."[33] Actual malice requires that the defendant act with a desire to harm the plaintiff that is unrelated to a desire to protect the acting party's rights and which is not reasonably related to the defense of a recognized property or social interest.[34] That standard is not met here—aside from Recio's speculation, there is insufficient evidence to support a finding that Evers' complaint was *entirely* motivated by malice. Recio's opinion as to Evers' motive will not support a finding that Evers acted with actual

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[29] *Matheson, supra* note 19.

[30] *Huff, supra* note 9.

[31] See *Cohen, supra* note 16.

[32] See, *Helmstadter v. North Am. Biological*, 5 Neb. App. 440, 559 N.W.2d 794 (1997); § 25-840.

[33] *Young v. First United Bank of Bellevue*, 246 Neb. 43, 48, 516 N.W.2d 256, 259 (1994). Accord *Turner v. Welliver*, 226 Neb. 275, 411 N.W.2d 298 (1987).

[34] *In re Estate of Albergo*, 275 Ill. App. 3d 439, 656 N.E.2d 97, 211 Ill. Dec. 905 (1995). See, also, *Huff, supra* note 9; *Tams, supra* note 19.

malice and does not preclude summary judgment in Evers' favor.[35] Conclusions based on guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.[36]

[11-14] Recio relies on the allegation in her pleadings that Evers acted maliciously and seems to suggest that whether a defendant acted maliciously is *always* a question for the trier of fact precluding summary judgment. But while actual malice is generally an issue of fact,[37] there is a difference between an "issue of fact" and a "*genuine* issue as to any *material* fact" within the meaning of Neb. Rev. Stat. § 25-1332 (Reissue 2008) (emphasis supplied).[38] The primary purpose of the summary judgment procedure is to pierce the allegations in the pleadings and show conclusively that the controlling facts are other than as pled.[39] Simply alleging an issue of fact is insufficient to defeat a motion for summary judgment.[40] Therefore, the district court did not err in finding no genuine issue of material fact relating to actual malice. Recio's second assignment of error is without merit.

Remaining Issues

[15] Having concluded that Evers is not liable to Recio based on Evers' sexual harassment complaint, we need not consider whether the complaint caused any harm to Recio. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.[41] And in support of her argument that her sexual harassment complaint was justified, Evers relied on a conditional privilege that some

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[35] See, *Young, supra* note 33; *White v. Ardan, Inc.*, 230 Neb. 11, 430 N.W.2d 27 (1988).

[36] *Marksmeier v. McGregor Corp.*, 272 Neb. 401, 722 N.W.2d 65 (2006).

[37] See *Helmstadter, supra* note 32.

[38] *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005).

[39] *Id.*

[40] See *id.*

[41] *Concrete Indus. v. Nebraska Dept. of Rev.*, 277 Neb. 897, 766 N.W.2d 103 (2009).

courts have applied to sexual harassment complaints.[42] In view of our analysis above, we need not discuss whether we would adopt such a privilege.[43]

Finally, we note Recio's argument that Creighton's procedures for handling Evers' sexual harassment complaint were flawed. At oral argument, Recio characterized the Creighton sexual harassment committee as a "kangaroo court." It is not at all clear how this argument relates to Recio's claim against Evers or provides any basis for a finding of liability. If Creighton treated Recio unfairly in resolving Evers' sexual harassment complaint, that would support a claim against Creighton, not Evers. And Recio's claims against Creighton were brought by and decided against her in federal court.[44]

CONCLUSION

We conclude that a person cannot incur liability for interfering with a business relationship by giving truthful information to another. In this case, Recio's claim for tortious interference with a business relationship rested on Evers' sexual harassment complaint, and the record establishes that the material allegations of Evers' complaint were truthful. And even if actual malice can defeat a defense that interference with a business relationship was justified, there is insufficient evidence in the record to show that Evers' sexual harassment complaint was motivated by actual malice. Therefore, the district court correctly concluded that Evers' sexual harassment complaint was justified. The court's judgment is affirmed.

AFFIRMED.

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[42] See, e.g., *Cole v. Chandler*, 752 A.2d 1189 (Me. 2000); *Vickers v. Abbott Laboratories*, 308 Ill. App. 3d 393, 719 N.E.2d 1101, 241 Ill. Dec. 698 (1999).

[43] See *Concrete Indus., supra* note 41.

[44] See *Recio v. Creighton University*, 521 F.3d 934 (8th Cir. 2008) (affirming No. 8:06CV361, 2007 WL 1560323 (D. Neb. May 29, 2007)).

LEON DEAN KUHN, PERSONAL REPRESENTATIVE OF THE ESTATE OF ASHTON HASEBROOK, APPELLEE, V. WELLS FARGO BANK OF NEBRASKA, N.A., APPELLEE, TJ LAUVETZ ENTERPRISES, INC., DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, AND O'KEEFE ELEVATOR COMPANY, INC., THIRD-PARTY DEFENDANT, APPELLEE.

771 N.W.2d 103

Filed August 28, 2009. No. S-08-141.

1. **Moot Question: Jurisdiction: Appeal and Error.** Because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, an appellate court reviews mootness determinations under the same standard of review as other jurisdictional questions.
2. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.
4. **Contracts.** The meaning of a contract and whether a contract is ambiguous are questions of law.
5. **Statutes.** The meaning of a statute is a question of law.
6. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
7. **Moot Question: Words and Phrases.** 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.
8. **Courts: Jurisdiction.** Although not a constitutional prerequisite for jurisdiction, an actual case or controversy is necessary for the exercise of judicial power.
9. **Courts: Judgments.** In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.
10. **Moot Question.** As a general rule, a moot case is subject to summary dismissal.
11. **Liability: Damages.** Indemnification is available when one party is compelled to pay money which in justice another ought to pay or has agreed to pay.
12. **Moot Question: Proof.** The burden of proving mootness is on the party seeking dismissal.
13. **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.

14. **Contracts: Negligence: Intent.** An indemnitee may be indemnified against his or her own negligence if the contract contains express language to that effect or contains clear and unequivocal language that that is the intention of the parties.
15. **Contracts: Negligence: Intent: Presumptions.** The parties to a contract are presumed to intend that an indemnitee shall not be indemnified for a loss occasioned by his or her own negligence unless the language of the contract affirmatively expresses an intent to indemnify for such loss.
16. **Contracts: Words and Phrases.** An indemnity agreement is a contract to be construed according to the principles generally applied in construction or interpretation of other contracts.
17. **Contracts.** 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.
18. **Negligence: Words and Phrases.** Gross negligence is great or excessive negligence, which indicates the absence of even slight care in the performance of a duty.
19. **Invitor-Invitee: Words and Phrases.** In tort law, an invitee is a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant or for their mutual advantage.
20. **Landlord and Tenant.** A landlord has a duty to keep the common areas of leased premises, such as areas under his or her control and areas used by more than one tenant, reasonably safe.
21. **Landlord and Tenant: Invitor-Invitee: Negligence.** Guests and invitees of a tenant derive their right to enter upon the premises leased through the tenant and have the same but no greater right to proceed against the landlord for personal injuries resulting from alleged defects than the tenant has.
22. **Statutes: Legislature: Intent.** The principal objective of construing a statute is to determine and give effect to the legislative intent of the enactment.
23. **Words and Phrases.** Under the ejusdem generis canon of construction, when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed.
24. ____. Under the ejusdem generis canon of construction, specific terms modify and restrict the interpretation of general terms when they are used in a sequence.
25. **Contracts: Property: Words and Phrases.** "Maintenance of a building," within the meaning of Neb. Rev. Stat. § 25-21,187(1) (Reissue 2008), does not encompass the ordinary activities associated with management of commercial property.
26. **Contribution: Words and Phrases.** Contribution is defined as a sharing of the cost of an injury as opposed to a complete shifting of the cost from one to another, which is indemnification.
27. **Liability: Contribution.** Common liability is required between a party seeking contribution and the party from whom it is sought.
28. **Contribution: Words and Phrases.** Indemnification is distinguishable from the closely related remedy of contribution in that the latter involves a sharing of the loss between parties jointly liable.

29. **Liability: Contracts.** An obligation to indemnify may grow out a liability imposed by law or a contractual relation.
30. **Negligence: Tort-feasors: Liability.** Indemnity may occur when an active or primary tort-feasor is held liable for injuries proximately caused by the passive negligence of a joint tort-feasor.
31. **Liability: Contracts.** Indemnity may occur when a party expressly contracts for it.
32. **Summary Judgment: Final Orders: Appeal and Error.** When adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and SIEVERS and MOORE, Judges, on appeal thereto from the District Court for Adams County, STEPHEN R. ILLINGWORTH, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Justin R. Herrmann and Jeffrey H. Jacobsen, of Jacobsen, Orr, Nelson, Lindstrom & Holbrook, P.C., L.L.O., for appellant.

Michael F. Scahill and Terry J. Grennan, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee Wells Fargo Bank of Nebraska, N.A.

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

GERRARD, J.

This appeal arises from a procedurally complicated tort case involving an injured plaintiff, the owner of the building in which the plaintiff was injured, the bank that the plaintiff was in the building to patronize, and the installer of the elevator in which the plaintiff fell. The bank was dismissed from the case, and the remaining parties apparently settled, although the settlement agreement is not in the record. The question presented, on further review to this court, is whether the building owner's appeal from the dismissal of its indemnity claim against the bank is moot because the appellate record does not contain the terms of the building owner's settlement with the plaintiff. We conclude that the appeal is not moot. We further conclude that the district court erred in dismissing the bank from the case.

I. BACKGROUND

1. Premises and Lease

TJ Lauvetz Enterprises, Inc. (Lauvetz), owned Burlington Center, a building in Hastings, Nebraska, containing approximately 55,000 rentable square feet. Lauvetz leased a little less than half that space to what is now Wells Fargo Bank of Nebraska, N.A. (the Bank), on the first floor and on the "garden," or basement, level of the building. The rest of the building contained other offices, including Lauvetz'.

Lauvetz' lease agreement with the Bank provided, within the "Utilities and Services" section, that Lauvetz "shall furnish passenger elevator service whenever the Building is open." Lauvetz "shall have the right to stop the operation of said elevators whenever alterations, improvements or repairs therein or in the machinery or appliances connected therewith shall be necessary or desirable and shall not be liable for damages for any such stoppage of service." And the "indemnity" section, paragraph 20 of the lease, provided, in relevant part:

> With the exception of those claims arising out of [Lauvetz'] *gross negligence* or willful misconduct, . . . [the Bank] shall indemnify [Lauvetz] and hold it harmless from any claim or damage arising out of any injury, death or property damage occurring in, on or about the Property, the Building, the Leased Premises and appurtenances thereto to [the Bank] or an employee, customer or invitee of [the Bank]. With the exception of those claims arising out of [the Bank's] *negligence* or willful misconduct, . . . [Lauvetz] shall indemnify [the Bank] and hold it harmless from any claim or damage arising out of any injury, death or property damage occurring in, on or about the Property, the Building, the Leased Premises and appurtenances thereto to [Lauvetz] or any employee, customer or invitee of [Lauvetz].

(Emphasis supplied.)

2. Accident

The elevators in the building had been malfunctioning by reporting to the wrong floors. A repairperson from O'Keefe Elevator Company (O'Keefe) instructed Lauvetz to implement

a new procedure for elevator use over the weekend. The old procedure had been to take the elevators to the ground floor and turn them off. To help O'Keefe diagnose the problem, the repairperson suggested that the malfunctioning elevator be turned to "independent service" over the weekend of March 1, 2003. An elevator on independent service does not respond to calls from hallway buttons. Instead, the elevator remains parked with the doors open until a floor is selected on the inside panel and the "close door" button is held down. The elevator will then travel to the selected floor, where it will again remain parked with the doors open.

In addition to helping O'Keefe diagnose the problem, setting the elevator to independent service would allow the building's janitors to use it over the weekend. That was why it was decided not to put a sign or caution tape in front of the elevator. But turning an elevator to independent service can also cause the elevator's self-leveling device to not operate properly.

The new independent service procedure began on a Friday. Early the next day, Ashton Hasebrook, who was 90 years old, visited the Bank to get a certificate of deposit from his safe deposit box, which was located in the Bank's basement. He went to the elevators to go back upstairs and found one standing open. He stepped into the elevator, fell, and broke his hip. Hasebrook testified that the elevator car was "about a foot" below floor level, although other observers described the difference as being less than 2 inches after the accident.

3. Procedural History

Hasebrook sued Lauvetz and the Bank in district court, seeking damages for medical expenses, pain and suffering, disability, and future medical care. Lauvetz and the Bank filed cross-claims against one another, seeking indemnity under paragraph 20 of the lease. And Lauvetz filed a third-party complaint against O'Keefe. Hasebrook later died, and the claim was revived by Leon Dean Kuhn, the personal representative of his estate. For the sake of clarity, the estate is also referred to simply as "Hasebrook."

In 2006, the Bank and Lauvetz each filed motions for summary judgment. The district court found that the Bank could

not be liable to Hasebrook because it did not control the elevator. The court reasoned that the lease agreement did not shift the duty Lauvetz owed to Hasebrook from Lauvetz to the Bank. The court further found that paragraph 20 of the lease was "ambiguous and does not clearly set forth that Lauvetz should be indemnified by [the Bank]." Therefore, the court found that Lauvetz' cross-claim against the Bank did not state a claim upon which relief could be granted. The court denied Lauvetz' motion for summary judgment and granted the Bank's. The Bank was dismissed as a party, with prejudice. Lauvetz filed a notice of appeal, but the appeal was dismissed without opinion for lack of a final, appealable order.[1]

The claims left pending were Hasebrook's against Lauvetz, and Lauvetz' against O'Keefe. In 2008, Hasebrook, Lauvetz, and O'Keefe filed a joint motion and stipulation for dismissal with prejudice. Apparently, the various claims were settled, although the settlement itself is not in the record. The district court granted the motion and dismissed the remaining claims. Lauvetz again filed an appeal from the 2006 summary judgment order, contending that the court had erred in granting summary judgment for the Bank and dismissing it from the case.

The Nebraska Court of Appeals dismissed the appeal as moot.[2] The Court of Appeals explained that the final order entered in 2008 dismissed Hasebrook's complaint without any finding as to liability or an award of damages. Although the order theoretically preserved Lauvetz' cross-claim against the Bank, the Court of Appeals reasoned that without a finding of liability or damages against Lauvetz, there was no basis for indemnity. Although Lauvetz asserted at oral argument that the case had been settled, the Court of Appeals found that to be irrelevant, because there was no evidence in the record of any settlement agreement or payment pursuant to such an agreement. The court concluded that because of the 2008 order dismissing Hasebrook's claim against Lauvetz, any opinion on

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[1] See *Kuhn v. Wells Fargo Bank*, No. A-06-1003 (Neb. App. Nov. 8, 2006).

[2] See *Kuhn v. Wells Fargo Bank of Neb.*, No. A-08-141, 2009 WL 97167 (Neb. App. Jan. 13, 2009) (selected for posting to court Web site).

Lauvetz' right to indemnity from the Bank would be moot.[3] We granted Lauvetz' petition for further review.

II. ASSIGNMENTS OF ERROR

On further review, Lauvetz assigns that the Court of Appeals erred in determining that the district court's 2008 order dismissing Hasebrook's complaint as to Lauvetz rendered Lauvetz' appeal of its cross-claim against the Bank moot.

In its brief to the Court of Appeals, Lauvetz assigned, consolidated and restated, that the district court erred in (1) finding that Lauvetz could not contractually require indemnification from the Bank for damages arising from an injury occurring to the Bank's customer on the leased premises and arising from Lauvetz' ordinary negligence, (2) finding that the indemnification provision of the lease was ambiguous and did not clearly set forth that Lauvetz should be indemnified by the Bank, (3) failing to apply the indemnification provision as written, and (4) overruling Lauvetz' motion for summary judgment and sustaining the Bank's.

Lauvetz also assigned error with respect to the court's finding that Lauvetz, not the Bank, had a legal duty to Hasebrook to maintain a safe elevator. But Lauvetz did not argue that in his brief, so it does not need to be addressed.[4]

III. STANDARD OF REVIEW

[1,2] Because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, an appellate court reviews mootness determinations under the same standard of review as other jurisdictional questions.[5] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts.[6]

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[3] See *id.*

[4] See *Epp v. Lauby*, 271 Neb. 640, 715 N.W.2d 501 (2006).

[5] *In re Interest of Anaya*, 276 Neb. 825, 758 N.W.2d 10 (2008).

[6] *Id.*

[3] 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, giving that party the benefit of all reasonable inferences deducible from the evidence.[7]

[4-6] The meaning of a contract and whether a contract is ambiguous are questions of law.[8] The meaning of a statute is also a question of law.[9] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[10]

IV. ANALYSIS

1. Mootness

[7-10] Lauvetz assigns that the Court of Appeals erred in dismissing its appeal as moot. 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.[11] Although not a constitutional prerequisite for jurisdiction, an actual case or controversy is necessary for the exercise of judicial power.[12] In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.[13] Therefore, as a general rule, a moot case is subject to summary dismissal.[14]

[11] Lauvetz does not take issue with these propositions. Nor does Lauvetz argue that any exception to the mootness

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[7] *In re Estate of Ronan*, 277 Neb. 516, 763 N.W.2d 704 (2009).

[8] *Pavers, Inc. v. Board of Regents*, 276 Neb. 559, 755 N.W.2d 400 (2008).

[9] *Harvey v. Nebraska Life & Health Ins. Guar. Assn.*, 277 Neb. 757, 765 N.W.2d 206 (2009).

[10] *In re Estate of Ronan, supra* note 7.

[11] *BryanLGH v. Nebraska Dept. of Health & Human Servs.*, 276 Neb. 596, 755 N.W.2d 807 (2008).

[12] *Id.*

[13] *Id.*

[14] *Id.*

doctrine is applicable.[15] And Lauvetz does not contend that in the absence of some liability to Hasebrook, there is any basis for indemnity. Under Nebraska law, indemnification is available when one party is compelled to pay money which in justice another ought to pay or has agreed to pay.[16] Lauvetz' claim for indemnification will ultimately require proof of such a payment to Hasebrook, in essence to prove its damages.

Instead, the issue here is based on the appellate record. As the Court of Appeals noted, the record does not affirmatively demonstrate that this appeal is *not* moot—that is, the record does not prove a basis for Lauvetz' liability besides the now-dismissed tort action. But the record does not *disprove* other bases for liability either—in particular, the apparent settlement of Hasebrook's tort claim. We must determine what inferences can be drawn from such a record or, more precisely, what the record should show in order for an appellate court to make a determination regarding mootness.

In that regard, our decisions in *Mullendore v. School Dist. No. 1* (*Mullendore I*)[17] and *Mullendore v. Nuernberger* (*Mullendore II*)[18] are instructive. In those cases, the Legislature had enacted a law containing a formula for determining non-resident high school tuition and a corresponding tax levy.[19] A taxpayer filed a petition for declaratory judgment in the district court, challenging the law as unconstitutional. But before the case was decided by the district court, the Legislature repealed the law. The district court granted the defendants' motion for summary judgment, reasoning that the repeal of the challenged legislation made the case moot.

But in *Mullendore I*, we reversed that determination. We noted that the record did not conclusively establish that taxes had already been collected under the challenged law. However,

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[15] See, e.g., *In re Interest of Anaya, supra* note 5.

[16] See, *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007); *Warner v. Reagan Buick*, 240 Neb. 668, 483 N.W.2d 764 (1992).

[17] *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986).

[18] *Mullendore v. Nuernberger*, 230 Neb. 921, 434 N.W.2d 511 (1989).

[19] See 1982 Neb. Laws, L.B. 933.

the taxpayer's petition "provide[d] a reasonable inference" that they had.[20] If taxes had been levied, a controversy would remain between the taxpayers and school district. And while the record did not establish that taxes had been collected, it did not establish that they had not been either. Therefore, there was a question of fact regarding the viability of the action, and the district court had erred in dismissing it as moot.[21]

On remand, the district court decided the case on the constitutional merits, and it declared the law unconstitutional. But on appeal, we again reversed the district court's judgment, finding in *Mullendore II* that there *was* no justiciable case or controversy.[22] In *Mullendore II*, unlike *Mullendore I*, the court had decided the declaratory judgment action on the merits. And the taxpayer had *still* not proved any adverse impact on him while the challenged legislation had been in effect. So, we reasoned that the taxpayer had failed to prove an element of his prima facie case for declaratory relief, because he had not proved that his rights had been affected by the statute.[23]

The difference between *Mullendore I* and *Mullendore II* was the burden of proof. In *Mullendore I*, the burden had been on the defendants to establish that the case was moot, so when the record did not affirmatively prove mootness, we reversed the lower court's dismissal. But the taxpayer still had the burden to prove his prima facie case for declaratory relief in order to prevail on the merits, and in *Mullendore II*, we determined he had not.

[12] The procedural posture of the present case is more akin to *Mullendore I*. Generally, the burden of proving mootness is on the party seeking dismissal.[24] Although the Court of

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[20] See *Mullendore I, supra* note 17, 223 Neb. at 37, 388 N.W.2d at 100.

[21] See *id.*

[22] See *Mullendore II, supra* note 18.

[23] See Neb. Rev. Stat. § 25-21,150 (Reissue 2008).

[24] See, e.g., *County of Los Angeles v. Davis*, 440 U.S. 625, 99 S. Ct. 1379, 59 L. Ed. 2d 642 (1979); *Kansas Judicial Review v. Stout*, 562 F.3d 1240 (10th Cir. 2009); *In re Smith*, 880 A.2d 269 (D.C. 2005); *Novi v. Adell Children's Funded Trust*, 473 Mich. 242, 701 N.W.2d 144 (2005).

Appeals raised mootness as an issue in this case sua sponte, the principle remains the same. In the district court, the Bank's motion for summary judgment did not shift the burden to Lauvetz to prove damages, because the motion was based solely on the lease. In the Court of Appeals, no order to show cause was entered that directed either party to adduce evidence relating to mootness. Without a motion or order requiring Lauvetz to present evidence of damages, there was no basis for the Court of Appeals to infer mootness from the absence of such evidence.

In order to prevail on the merits of its claim, Lauvetz will have to prove that it was liable to Hasebrook. One possible means of establishing this liability—a court judgment on the merits of Hasebrook's tort claim—has been foreclosed. But the record does not foreclose the possibility that Lauvetz paid Hasebrook in settlement of his claim. That, in fact, may reasonably be inferred from this record. Hasebrook's dismissal of his tort claim precludes one way of proving liability, but does not support a finding of mootness.

A brief hypothetical might help to illustrate this point. A plaintiff sues a defendant in a separate action—not a cross-claim—for contractual indemnification. The defendant files a motion for summary judgment based solely on the allegation that the contract provides no basis for indemnity. The motion is sustained, and the plaintiff appeals. An appellate court would not be justified in dismissing the appeal as "moot" simply because the record did not prove that the plaintiff had suffered damages. At that point in the action, the plaintiff would not have been required to present evidence of damages, and there would be no burden on the plaintiff to present a record affirmatively proving its damages or any other element of its prima facie case besides the contract.

The procedural posture of the present case is substantially indistinguishable. The record does not show that Lauvetz will be able to prove liability to Hasebrook, but does not foreclose it either. The order of dismissal does not mean that Lauvetz cannot prove liability arising from some other source (e.g., settlement payment), and the Court of Appeals should not have assumed an absence of liability from an absence of evidence,

when Lauvetz' burden to prove liability had not yet been implicated. The record does not show that Lauvetz' appeal is moot, and Lauvetz' assignment of error on further review has merit.

[13] The Court of Appeals erred in finding that this appeal is moot, and its decision to that effect will be reversed. Upon reversing a decision of the Court of Appeals, we may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach.[25] Because some of the issues raised in the Court of Appeals involve novel legal questions,[26] we will consider the errors Lauvetz assigned in its appellate brief.

2. Indemnity Clause

Lauvetz argues, generally, that the district court erred in finding that paragraph 20 of the lease is ambiguous and does not clearly set forth that Lauvetz should be indemnified by the Bank. The Bank makes three arguments in response: (1) that paragraph 20 is ambiguous and unenforceable, (2) that paragraph 20 is void as against public policy under Neb. Rev. Stat. § 25-21,187 (Reissue 2008), and (3) that there is no basis for indemnity because the Bank and Lauvetz share no common liability to Hasebrook. We address each argument in turn.

(a) Ambiguity

By way of reminder, the "indemnity" language of paragraph 20 most pertinent to this case provides:

> With the exception of those claims arising out of [Lauvetz'] *gross negligence* or willful misconduct, . . . [the Bank] shall indemnify [Lauvetz] and hold it harmless from any claim or damage arising out of any injury, death or property damage occurring in, on or about the Property, the Building, the Leased Premises and appurtenances thereto to [the Bank] or an employee, customer or invitee of [the Bank].

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[25] *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009).

[26] See Neb. Rev. Stat. § 24-1106(2) (Reissue 2008).

(Emphasis supplied.) The district court found this language to be ambiguous, and the Bank argues that the district court was right.

(i) Inclusion of Indemnitee's Negligence

[14,15] The Bank relies on the proposition that an indemnitee may be indemnified against his or her own negligence if the contract contains express language to that effect or contains clear and unequivocal language that that is the intention of the parties.[27] The parties to the contract are presumed to intend that the indemnitee shall not be indemnified for a loss occasioned by his or her own negligence unless the language of the contract affirmatively expresses an intent to indemnify for such loss.[28] The Bank argues that the language at issue in this case does not clearly set forth that Lauvetz should be indemnified for its own negligence.

[16,17] But the language at issue quite clearly requires the Bank to indemnify Lauvetz for something. And it is difficult to read the specific exclusion of "gross negligence" from indemnification as anything other than the inclusion of ordinary negligence.[29] An indemnity agreement is a contract to be construed according to the principles generally applied in construction or interpretation of other contracts.[30] And 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.[31] The specific exclusion of the Bank's ordinary negligence from Lauvetz' duty to indemnify it demonstrates that the parties were aware of the distinction and chose *not* to exclude ordinary negligence from the Bank's duty to indemnify Lauvetz.

[18] Paragraph 20 plainly requires the Bank to indemnify Lauvetz for any claim or damage arising out of *any* injury

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[27] See *Oddo v. Speedway Scaffold Co.*, 233 Neb. 1, 443 N.W.2d 596 (1989).

[28] See *Peter Kiewit Sons Co. v. O'Keefe Elevator Co., Inc.*, 191 Neb. 50, 213 N.W.2d 731 (1974).

[29] Cf. *Mahnke v. State*, 276 Neb. 57, 751 N.W.2d 635 (2008).

[30] *Oddo, supra* note 27.

[31] *State ex rel. Bruning v. R.J. Reynolds Tobacco Co.*, 275 Neb. 310, 746 N.W.2d 672 (2008).

occurring in the building to a customer of the Bank, except for claims arising from Lauvetz' "gross negligence or willful misconduct." Gross negligence is great or excessive negligence, which indicates the absence of even slight care in the performance of a duty.[32] If "any injury" within the meaning of paragraph 20 did not include the indemnitee's negligence, it would have been unnecessary to specifically exclude the Bank's negligence and Lauvetz' gross negligence. Because paragraph 20 places a duty on the Bank to indemnify Lauvetz for any injury other than gross negligence, it clearly still includes negligence that is less than gross,[33] just as Lauvetz' duty to indemnify the Bank does not.

(ii) Meaning of "Invitee"

The Bank also argues that paragraph 20 is ambiguous because it is circular. The Bank argues that a customer of the Bank is also, logically, an invitee of Lauvetz.[34] Therefore, the Bank contends that a customer of the Bank is an invitee of both the Bank and Lauvetz, and the parties would be required to indemnify one another. The Bank argues that because this is an illogical result, paragraph 20 must be unenforceable. We disagree. As noted above, a contract must be given a reasonable construction, which, if possible, gives effect to every part of the contract.[35] The Bank's construction of paragraph 20 is contrary to that well-established proposition.

To begin with, even if paragraph 20 was ambiguous about whose injuries were to be indemnified, it would still be clear about the duty to indemnify, and the inclusion of Lauvetz' negligence within that duty. In other words, paragraph 20 would

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[32] *Bennett v. Labenz*, 265 Neb. 750, 659 N.W.2d 339 (2003).

[33] See, e.g., *Law v. Reading Company*, 312 F.2d 841 (3d Cir. 1963); *Blue Grass Restaurant Company v. Franklin*, 424 S.W.2d 594 (Ky. 1968); *Leonard L. Farber Company, Inc. v. Jaksch*, 335 So. 2d 847 (Fla. App. 1976).

[34] See, e.g., *Ginn v. Lamp*, 234 Neb. 198, 450 N.W.2d 388 (1990); *Van Avery v. Platte Valley Land & Investment Co.*, 133 Neb. 314, 275 N.W. 288 (1937).

[35] See *R.J. Reynolds Tobacco Co., supra* note 31.

still be unambiguous on the points that are necessary in order for it to be enforceable. But more fundamentally, we disagree with the premise of the Bank's argument, that paragraph 20 is circular.

[19-21] An "invitee," in the common sense of the word, is simply "one who is invited."[36] More particularly, in tort law, an invitee is a person who goes on the premises of another in answer to the express or implied invitation of the owner or occupant on the business of the owner or occupant or for their mutual advantage.[37] (We note that the lease in this case was executed before the tort-law distinction between invitees and licensees was abolished in Nebraska.[38]) A landlord has a duty to keep the common areas of leased premises, such as areas under his or her control and areas used by more than one tenant, reasonably safe.[39] And guests and invitees of the tenant derive their right to enter upon the premises leased through the tenant and have the same but no greater right to proceed against the landlord for personal injuries resulting from alleged defects than the tenant has.[40]

In this case, there is no dispute that Hasebrook was primarily a customer and invitee of the Bank. Any status he might have had as an invitee of Lauvetz was derived through the Bank.[41] And this is not a tort action—the question is not the scope of Hasebrook's right to sue, but the meaning of paragraph 20 of the lease. Even if an invitee of the Bank has derivative status as an invitee of Lauvetz for purposes of premises liability, it is entirely possible—and reasonable—to distinguish primary invitees of the Bank from primary invitees of Lauvetz when construing paragraph 20. The obvious intent of paragraph 20 is to require each party to be responsible for injuries to its own

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[36] 8 The Oxford English Dictionary 54 (2d ed. 1989).

[37] *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996).

[38] See *id.*

[39] See *Tighe v. Cedar Lawn, Inc.*, 11 Neb. App. 250, 649 N.W.2d 520 (2002).

[40] See *Ginn, supra* note 34.

[41] See *id.*

visitors. Except for the rare instance in which the same visitor has business with both Lauvetz and the Bank, it should not be difficult to determine—as in this case—who an injured person was in the building to see. Under such circumstances, paragraph 20 is not difficult to apply.

Simply put, paragraph 20 is part of a lease agreement that was negotiated at arm's length between sophisticated business entities.[42] The Bank was certainly capable of examining the lease and recognizing paragraph 20 as an indemnity clause. The lease, in fact, connotes the unmistakable intent of the parties to indemnify,[43] excepting only claims arising from the Bank's ordinary negligence, Lauvetz' gross negligence, or the willful misconduct of either. We find no merit to the Bank's argument that paragraph 20 is ambiguous. And accordingly, we find merit to Lauvetz' argument that the district court erred in that regard.

(b) § 25-21,187(1)

As an alternative, the Bank relies on § 25-21,187(1), which provides in relevant part:

> In the event that a public or private contract or agreement for the construction, alteration, repair, or maintenance of a building, structure, highway bridge, viaduct, water, sewer, or gas distribution system, or other work dealing with construction or for any moving, demolition, or excavation connected with such construction contains a covenant, promise, agreement, or combination thereof to indemnify or hold harmless another person from such person's own negligence, then such covenant, promise, agreement, or combination thereof shall be void as against public policy and wholly unenforceable.

The Bank argues that the lease, which discusses the parties' respective obligations to maintain the premises, is a contract for the "maintenance of a building" within the meaning of § 25-21,187(1). Thus, the Bank argues that paragraph 20 is

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[42] See *Hogeland v Sibley, Lindsay*, 42 N.Y.2d 153, 366 N.E.2d 263, 397 N.Y.S.2d 602 (1977).

[43] See *id.*

void to the extent that it purports to require the Bank to indemnify Lauvetz for Lauvetz' own negligence.

Statutes like § 25-21,187(1) are not uncommon, but are generally applied to construction contracts. The purpose of such statutes is to prohibit avoidance by parties to construction contracts of all risks created by their own fault associated with contract performance, to require employers to provide employees with a safe place to work, and to preclude delegating to subcontractors such duty.[44] Authority is sparse regarding the application of such provisions to leases of real property. Some courts have, without much discussion, applied comparable statutes to real property leases.[45]

More fully reasoned opinions, however, have held comparable statutory language to be inapplicable to circumstances beyond the construction or building activity to which the statute was intended to apply.[46] At common law, a party could protect itself from the consequences of its own negligence by contract, and because the statutory language changes the common law with respect to construction contracts, it should be strictly construed.[47] And by specifically addressing indemnity clauses in the construction industry, the Legislature showed an intention that the practice *not* be barred in other industries, such as the leasing of commercial property.[48]

Thus, courts have concluded that the statutory language was simply not intended to protect parties to transactions outside

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[44] See, generally, 42 C.J.S. *Indemnity* § 9 (2007).

[45] See, *Borg-Warner v. Executive Park Ventures*, 198 Ga. App. 70, 400 S.E.2d 340 (1990); *Lawlor v. MFD 1251 Americas Corp.*, No. 93 Civ. 1862 (SWK), 1995 WL 110090 (S.D.N.Y. Mar. 14, 1995).

[46] See, *Smith v. Seaboard Coast Line R. Co.*, 639 F.2d 1235 (5th Cir. 1981); *Kole v. Amfac, Inc.*, 665 F. Supp. 1460 (D. Haw. 1987); *Kone, Inc. v. Robinson*, 937 So. 2d 238 (Fla. App. 2006); *McNiff v. Millard Maintenance Service Co.*, 303 Ill. App. 3d 1074, 715 N.E.2d 247, 239 Ill. Dec. 802 (1999); *Phoenix Ins. Co. v. Town of Vernon*, No. HHDX07CV044025148, 2007 WL 196405 (Conn. Super. Jan. 5, 2007).

[47] *Smith, supra* note 46.

[48] See *Phoenix Ins. Co., supra* note 46.

the construction industry.[49] In particular, courts have rejected the arguments that general janitorial services[50] and elevator repair[51] are "maintenance" within the meaning of comparable statutory language, because the statute was intended to apply to construction services. In short, given the statute's purpose, it has been held that its scope should not be extended beyond its intended limits to activity with only a tenuous connection with any construction activity.[52]

[22] That reasoning is persuasive, and consistent with both the history and intent of § 25-21,187(1) and our basic principles of statutory construction. The principal objective of construing a statute is to determine and give effect to the legislative intent of the enactment.[53] And a court may examine the legislative history of the act in question in order to ascertain the intent of the Legislature.[54] The legislative history of § 25-21,187(1) clearly establishes that its intent was to "prohibit the use by architects and engineers of hold harmless clauses in *construction contracts*."[55] The statute is simply meant to provide that on construction projects, parties such as contractors and architects remain responsible for their own negligence.[56]

[23,24] And under the ejusdem generis canon of construction, when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed.[57] In other words, specific terms modify and restrict

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[49] See *Kole, supra* note 46.

[50] See *McNiff, supra* note 46.

[51] See *Kone, Inc., supra* note 46.

[52] *Smith, supra* note 46.

[53] See *Mason v. State*, 267 Neb. 44, 672 N.W.2d 28 (2003).

[54] *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006).

[55] Statement of Intent, L.B. 288, Banking, Commerce & Insurance Committee, 86th Leg., 1st Sess. (Feb. 26, 1979) (emphasis supplied).

[56] See *id.*

[57] *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007), *cert. denied* 552 U.S. 1065, 128 S. Ct. 715, 169 L. Ed. 2d 560; *Nebraska Liq. Distrib. v. Nebraska Liq. Cont. Comm.*, 269 Neb. 401, 693 N.W.2d 539 (2005).

the interpretation of general terms when they are used in a sequence.[58] Here, ejusdem generis principles suggest that the word "maintenance" in § 25-21,187(1) is intended to encompass activity of the same general type as, though not specifically embraced within, "construction, alteration, [or] repair."[59] Section § 25-21,187(1) is also in derogation of the common law, and as such, should be strictly construed.[60]

[25] Based on those principles, and well-reasoned authority from other jurisdictions, we hold that "maintenance of a building," within the meaning of § 25-21,187(1), does not encompass the ordinary activities associated with management of commercial property. To hold otherwise would be to expand the scope of § 25-21,187(1) to void indemnity clauses in contracts well beyond the Legislature's intent. We find no merit to the Bank's argument that paragraph 20 of the lease is contrary to § 25-21,187(1).

(c) Common Liability

Finally, the Bank argues that it cannot be liable to indemnify Lauvetz, because Lauvetz and the Bank do not share a common liability to Hasebrook. But the Bank's argument does not account for the differences between indemnity and contribution and among different types of indemnity. And the Bank's argument is incorrect because in this case, the basis of Lauvetz' claim to indemnity is contractual.

[26-28] First, it is important to distinguish between principles of contribution and indemnification. Contribution is defined as a sharing of the cost of an injury as opposed to a complete shifting of the cost from one to another, which is indemnification.[61] Common liability is required between a party seeking

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[58] See, *Coral Prod. Corp. v. Central Resources*, 273 Neb. 379, 730 N.W.2d 357 (2007); *Nebraska Liq. Distrib., supra* note 57; *Jensen v. Board of Regents*, 268 Neb. 512, 684 N.W.2d 537 (2004).

[59] See *Columbia Nat. Ins. v. Pacesetter Homes*, 248 Neb. 1, 532 N.W.2d 1 (1995).

[60] See, *Smith, supra* note 46; *Tadros v. City of Omaha*, 273 Neb. 935, 735 N.W.2d 377 (2007).

[61] *Estate of Powell v. Montange*, 277 Neb. 846, 765 N.W.2d 496 (2009); *Cerny, supra* note 16.

contribution and the party from whom it is sought.[62] Contrary to the Bank's suggestion, principles of indemnification and contribution are not interchangeable. Indemnification is distinguishable from the closely related remedy of contribution in that the latter involves a sharing of the loss between parties jointly liable.[63]

[29-31] An obligation to indemnify, however, may grow out a liability imposed by law *or* a contractual relation.[64] Indemnity may occur when an active or primary tort-feasor is held liable for injuries proximately caused by the passive negligence of a joint tort-feasor.[65] But indemnity may also occur when a party expressly contracts for it.[66] The most common example of indemnity arising from express contract is simple—an insurance contract.[67] Taken at face value, the logical implication of the Bank's argument is that liability insurance policies would be unenforceable unless the insurer was independently liable to the injured party. Obviously, that cannot be the case.

Simply stated, while a common liability between an active and passive tort-feasor is one way for indemnity to arise, it is not the only way.[68] Indemnity can also be based on an express contract, as it is here. The Bank's argument that indemnity cannot occur without common liability is without merit.

3. Lauvetz' Motion for Summary Judgment

For the reasons explained above, we find merit to Lauvetz' argument that the district court erred in sustaining the Bank's

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[62] See *Estate of Powell, supra* note 61.

[63] See *Warner, supra* note 16.

[64] See *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 232 Neb. 763, 443 N.W.2d 872 (1989). See, also, *Harsh International v. Monfort Indus.*, 266 Neb. 82, 662 N.W.2d 574 (2003); *Motor Club Ins. Assn. v. Fillman*, 5 Neb. App. 931, 568 N.W.2d 259 (1997).

[65] See, *Harsh International, supra* note 64; *Hiway 20 Terminal, Inc., supra* note 64.

[66] See, e.g., *Oddo, supra* note 27.

[67] See *First Trust Co. v. Airedale Ranch & Cattle Co.*, 136 Neb. 521, 286 N.W. 766 (1939).

[68] See, e.g., *Hysell v. Iowa Public Service Co.*, 534 F.2d 775 (8th Cir. 1976).

motion for summary judgment and concluding as a matter of law that the indemnity clause in paragraph 20 was ambiguous and unenforceable. Therefore, the judgment will be reversed, and the cause remanded for further proceedings. But we do not agree with Lauvetz' suggestion that we should enter an order granting its motion for summary judgment.

[32] We recognize that when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions.[69] But here, as discussed above, there is no evidence establishing that Lauvetz was liable to Hasebrook, or for what. And because the parties' attention has been focused on whether paragraph 20 was enforceable at all, there has been little discussion of other issues—for instance, whether Lauvetz might have committed gross negligence, which would be excepted. Therefore, we conclude that directing the entry of summary judgment would be inappropriate. Instead, the cause will be remanded for further proceedings consistent with this opinion.

V. CONCLUSION

The Court of Appeals erred by dismissing this appeal as moot, because the burden had not yet been placed on Lauvetz to prove damages, and the record does not foreclose the possibility that Lauvetz was liable to Hasebrook. The district court erred in concluding that paragraph 20 was ambiguous, and we find no merit to the Bank's alternative reasons why paragraph 20 was purportedly unenforceable. The judgment of the Court of Appeals is reversed, and the cause is remanded to the Court of Appeals with directions to reverse the judgment of the district court and remand the cause to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

CONNOLLY and MCCORMACK, JJ., not participating.

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[69] See *Jones v. Shelter Mut. Ins. Cos.*, 274 Neb. 186, 738 N.W.2d 840 (2007).

MORTGAGE EXPRESS, INC., AND JEFF ROTHLISBERGER, APPELLANTS, V. TUDOR INSURANCE COMPANY ET AL., APPELLEES.

771 N.W.2d 137

Filed August 28, 2009. No. S-08-728.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts, or as to the ultimate inferences that may be drawn from those facts, and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question.
4. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.
5. **Insurance: Contracts.** Coverage under an insurance policy or contract is generally understood to consist of two separate and distinct obligations: the duty to defend any suit filed against the insured party and the duty to pay, on behalf of the insured, sums for which the insured shall become legally obligated to pay because of injury caused to a third party by acts of the insured.
6. **Insurance: Contracts: Liability.** An insurer's duty to defend is broader than its duty to indemnify. Moreover, an insurer's duty to defend is usually a contractual duty, rather than one imposed by operation of law.
7. **Insurance: Contracts.** The nature of the duty to defend is defined by the insurance policy as a contract.
8. **Insurance: Pleadings.** An insurer's duty to defend an action against the insured must, in the first instance, be measured by the allegations of the petition against the insured.
9. **Insurance: Liability.** In determining its duty to defend, an insurer must not only look to the petition or complaint filed against its insured, but must also investigate and ascertain the relevant facts from all available sources.
10. ____: ____. An insurer is obligated to defend if (1) the allegations of the complaint, if true, would obligate the insurer to indemnify, or (2) a reasonable investigation of the actual facts by the insurer would or does disclose facts that would obligate the insurer to indemnify. An insurer, therefore, bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy.

11. **Insurance: Contracts: Liability: Pleadings.** If, according to the facts alleged in a pleading and ascertained by an insurer, the insurer has no potential liability to its insured under the insurance agreement, then the insurer may properly refuse to defend its insured. And although an insurer is obligated to defend all suits against the insured, even if groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside the coverage of the policy.
12. **Insurance: Contracts.** An insurance policy is a contract between the insurance company and the insured, and as such, the insurance company has the right to limit its liability by including those limitations in the policy definitions. If those definitions are clearly stated and unambiguous, the insurance company is entitled to have those terms enforced.
13. **Security Interests.** A security interest is an interest in personal property or fixtures which secures payment or performance of an obligation.
14. **Insurance: Agents: Contracts: Negligence: Proximate Cause: Liability: Damages.** An insurance agent who agrees to obtain insurance for another but negligently fails to do so is liable for the damage proximately caused by such negligence. The measure of damages is the amount that would have been due under the policy if it had been obtained by the agent.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

Larry E. Welch, Jr., and Damien J. Wright, of Welch Law Firm, P.C., for appellants.

Thomas A. Grennan and Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., for appellee Cincinnati Insurance Company.

Gerald L. Friedrichsen and Carla Heathershaw Risko, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellee Tudor Insurance Company.

Patrick G. Vipond and John M. Walker, of Lamson, Dugan & Murray, L.L.P., for appellee Peterson Brothers Insurance, Inc.

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

MCCORMACK, J.

I. NATURE OF CASE

In this declaratory judgment action, Mortgage Express, Inc., and Jeff Rothlisberger, its sole shareholder (collectively Mortgage Express), seek a declaration that Mortgage Express'

liability insurers, Tudor Insurance Company (Tudor) and Cincinnati Insurance Company (Cincinnati) are obligated to defend Mortgage Express in a suit brought against it by a third party, Village Campground (Village). Alternatively, Mortgage Express brought a claim against its insurance broker, Peterson Brothers Insurance, Inc. (Peterson), for failure to obtain adequate insurance in the event the insurance policies do not provide coverage. In December 2006, the court entered summary judgment in favor of Tudor and Cincinnati, thereby dismissing Mortgage Express' action, and Mortgage Express appealed. On February 23, 2007, the Nebraska Court of Appeals dismissed that appeal, case No. A-07-009, for lack of jurisdiction, because the court's December 2006 order did not dispose of the case as to Peterson. On April 12, 2007, the court filed another order amending its December 2006 order to include a brief statement intending to certify the order as a final, appealable order pursuant to Neb. Rev. Stat. § 25-1315 (Reissue 2008). Mortgage Express appealed again on April 30, 2007, and the Court of Appeals dismissed that appeal, case No. A-07-494, on February 7, 2008, pursuant to Neb. Ct. R. App. P. § 2-107, because the court's order failed to properly certify the case for appeal. The court filed another order dismissing Peterson, properly certifying the case as a final, appealable order, and Mortgage Express filed this appeal. We affirm.

II. BACKGROUND

The underlying action in this case involves a dispute between Mortgage Express and Village regarding certain financial transactions which affect the remaining balance of a promissory note held by Mortgage Express and are secured by real property owned by Village. On August 20, 1998, Mortgage Express purchased and was assigned a promissory note and its collateralizing liens for the sum of $252,744.38. Several time-share receivables and multiple mortgages secured the note, but only two of the mortgages are relevant to this case.

One of the two relevant mortgages securing the note included certain real estate located in Washington County, Nebraska (the Nebraska property). The Nebraska property consists of a house and 12 acres and a separate but contiguous parcel of 38 acres.

Shortly after Mortgage Express purchased the note, Mortgage Express bid on and purchased the Nebraska property at a trustee's sale for $195,000, subject to the first mortgage and property taxes. The record indicates that Mortgage Express purchased the Nebraska property at the trustee's sale, but that almost immediately after the sale, title to the Nebraska property was transferred to Rothlisberger.

The other mortgage securing the note included certain real estate located in Spencer County, Kentucky (the Kentucky property), which consists of a campground. The Kentucky property was foreclosed upon, and Village purchased the Kentucky property from the foreclosure sale. After acquiring the Kentucky property, Village discovered that the attorney hired to handle the foreclosure proceedings and to conduct the title search failed to find the lien held by Mortgage Express. As such, Mortgage Express was not made part of the foreclosure sale.

Following this discovery, on May 14, 2001, Village initiated a quiet title action against Mortgage Express in the Spencer County, Kentucky, circuit court (the original action). The complaint was later amended, asserting additional causes of action. In the original action, Village asked the court to quiet title in its favor, free from all liens and encumbrances that Mortgage Express holds. On July 1, 2002, the Kentucky court ruled in favor of Mortgage Express in the original action, concluding that the mortgage secured by the note was not extinguished in the foreclosure and that the mortgage remained a valid lien against the Kentucky property. Mortgage Express did not seek a defense from either of its insurers regarding the original action.

Thereafter, a dispute arose between Village and Mortgage Express regarding the amount due to satisfy Mortgage Express' mortgage. Mortgage Express initially maintained that the outstanding and unsatisfied balance due on the note was $340,153.36. Village attempted to settle the outstanding balance remaining on the note because it wished to sell the Kentucky property, but Mortgage Express refused. As a result of Mortgage Express' refusal, Village claims it could not sell the Kentucky property for its fair market value. During the

ordinary course of business, Village learned that Mortgage Express bid on and won the Nebraska property but that the bid amount had not been credited to the outstanding note. Rothlisberger explained that he did not credit the sale of the Nebraska property to the note because he thought that until the property was liquidated by reselling it to a third party, he did not have to credit the note.

After Mortgage Express learned that the sale of the Nebraska property should have been credited to the note, Mortgage Express' counsel sent a letter to Village's counsel regarding the mistake. The letter indicated that after crediting the $195,000 to the note, the remaining balance was $101,565.52. Additionally, the letter stated:

> I received your message that you are going to file suit against my client for sanctions. I will file our response to your suit, as well as a motion for a judgment and order of sale. Your threatened suit for slander of title is without merit since my client's lien still has a sizable balance due.
>
> It appears that we will not be able to settle this matter, and we will need to proceed through the court in Spencer County.

This letter was sent by both U.S. mail and facsimile, and although it appears that the letter was faxed on March 4, 2003, the letter is undated.

The dispute over the balance of the note led to Village's amending its complaint in June 2003 to seek damages from Mortgage Express. In its second amended complaint, Village claimed fraudulent misrepresentation, slander of title, and abuse of judicial process, and it asserted a Kentucky statutory claim for failure to release its lien. Specifically, Village alleged that Mortgage Express misrepresented the balance remaining due on the promissory note by failing to credit Mortgage Express' bid on the Nebraska property to the balance of the promissory note. Mortgage Express maintains that this error was, at worst, a mistake and that it did not constitute fraudulent misrepresentation. Through motions for summary judgment, the Kentucky court determined that the only viable claim against Mortgage Express was for fraud.

Mortgage Express sought a defense to the above-mentioned claims brought by Village under its liability insurance policies with Tudor and Cincinnati. Tudor and Cincinnati denied that the policies required the insurance companies to defend Mortgage Express in the Village lawsuit. Mortgage Express then brought this declaratory judgment action in Douglas County District Court seeking a determination from the court that Tudor and Cincinnati are required to defend Mortgage Express against the claims Village alleged in its second amended complaint. In the event that the court determined that neither insurance policy provided coverage, Mortgage Express brought an alternative claim against Peterson alleging that Peterson was liable to Mortgage Express for failing to procure proper insurance.

Peterson, acting on behalf of Mortgage Express, obtained quotes for the insurance policies at issue. Mortgage Express requested insurance coverage for rendering professional services in "processing and closing mortgage loans for all types of residential housing, in-house loan underwriting." Peterson maintains that Mortgage Express never requested insurance coverage for transactions in which Rothlisberger had a personal financial interest as a buyer or seller of real property.

1. Tudor Policy

On March 4, 2003, Mortgage Express applied for errors and omissions insurance coverage by and through its insurance broker, Peterson. Consequently, Tudor issued to Mortgage Express a renewal claims-made policy referred to as "Specialty Professional Liability Policy" for the period of April 20, 2003, through April 20, 2004. The Tudor policy is a claims-made policy. A claims-made policy is defined as "[a]n agreement to indemnify against all claims made during a specified period, regardless of when the incidents that gave rise to the claims occurred."[1] The retroactive date of the policy is April 20, 1998.

The Tudor policy contains certain conditions precedent to coverage. The first section of the Tudor policy provides, in pertinent part:

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[1] Black's Law Dictionary 821 (8th ed. 2004).

> **I. INSURING AGREEMENTS**
> **A. COVERAGE: CLAIMS MADE CLAUSE**
>
> The Company will pay on behalf of the Insured all sums in excess of the deductible that the Insured shall become legally obligated to pay as damages because of claims first made against the Insured and reported to the Company during the policy period. This policy applies to actual or alleged negligent acts, errors or omissions arising solely out of professional services rendered for others as designated in Item 3 of the Declarations.
>
> For this coverage to apply, all of the following conditions must be satisfied:
>
> 1. the negligent act, error or omission arising from professional services took place subsequent to the Retroactive Date stated in Item 7. [sic] of the Declarations;
>
> 2. the Insured had no knowledge prior to the effective date of this policy of such actual or alleged negligent act, error, omission or circumstance likely to give rise to a claim;
>
> 3. claim is first made against the Insured and reported to the Company during the policy period.

Additionally, the Tudor policy contains limitations and exclusions that preclude coverage under certain circumstances. The policy provides that coverage is not provided for any loss arising out of or involving any dishonest, fraudulent, criminal, or malicious act or omission of the insured. Additionally, the policy contains "Endorsement #5," which excludes coverage for any claim based upon or arising out of "any transaction in which the Insured has a financial interest as a buyer or seller or [sic] of real property." The Tudor policy also provides that coverage is not applicable:

> in connection with or arising out of or in any way involving:
>
> . . . .
>
> F. Any act, error or omission occurring prior to the effective date of this policy if there is other insurance applicable or the Insured at the effective date of this policy knew or could have reasonably foreseen that such act, error or omission might be the basis for claim or suit.

Tudor denied coverage because a condition precedent to coverage had not been fulfilled and based on certain exclusions found in its policy.

2. Cincinnati Policy

Mortgage Express also held a commercial general liability coverage policy with Cincinnati. The Cincinnati policy became effective on July 15, 2001, through July 15, 2004. Pursuant to "**SECTION I**," "**COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY**," of the Cincinnati policy, Cincinnati agreed to pay those sums that the insured becomes legally obligated to pay as damages because of "'personal injury'" or "'advertising injury'" to which the insurance applies.

Under "**Section V—Definitions**," the policy states:

> "Personal injury" means injury, other than "bodily injury", arising out of one or more of the following offenses:
>
> . . . .
>
> **c.** The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor;
>
> **d.** Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
>
> **e.** Oral or written publication of material that violates a person's right of privacy.

Mortgage Express argues that Cincinnati's policy definition of personal injury, specifically subsection **d.**, includes litigation that amounts to slander of an organization's goods, products, or services. And because the claim against Mortgage Express is premised on slander of title, the claim is covered under the Cincinnati policy. Alternatively, Mortgage Express argues that the Cincinnati policy's definition of personal injury includes damages stemming from the invasion of the right to private occupancy of premises, and Mortgage Express argues that its lien is exactly that—a claim of interest in the campground that through foreclosure would dispossess the owner from the property.

3. Procedural History of This Declaratory Judgment Action

Tudor and Cincinnati filed motions for summary judgment, and Mortgage Express filed a cross-motion for summary judgment. The court held a hearing regarding the summary judgment motions, and on December 14, 2006, the court entered an order granting summary judgment in favor of Tudor and Cincinnati, concluding that the insurance policies did not provide an obligation to defend the claims presented in the Village lawsuit and dismissed Tudor and Cincinnati.

The district court entered summary judgment in favor of Tudor based on the following four conclusions: First, the court concluded that Mortgage Express was not providing a professional service for others because Rothlisberger actually acted in his own behalf in the transactions in question. Second, the court concluded that "Endorsement #5," which provides that the Tudor policy does not apply to any claim based upon or arising out of "any transaction in which the Insured has a financial interest as a buyer or seller or [sic] of real property," precludes coverage under the facts of this case. Third, the court concluded that the Tudor policy does not provide coverage because the only viable claim remaining in the Village suit is based on fraudulent conduct. Finally, the court concluded that Mortgage Express had knowledge of the disagreement regarding the amount due under the promissory note prior to the effective date of the Tudor policy, which removes the claim from coverage.

As to Cincinnati, the district court concluded that under the terms of the Cincinnati policy, there was no duty to defend. In so concluding, the court determined that Village's claims against Mortgage Express, including slander of title, do not fit within the policy definitions. Additionally, the court reasoned that coverage was not provided because Village's claim against Mortgage Express seeks damages based on fraud, which the Cincinnati policy specifically excludes from coverage.

Subsequent to the district court's order granting summary judgment in favor of Tudor and Cincinnati and against Mortgage Express, the remaining defendant, Peterson, filed a motion for summary judgment. On June 4, 2008, the court

entered summary judgment in favor of Peterson and against Mortgage Express. Mortgage Express appeals.

III. ASSIGNMENTS OF ERROR

Mortgage Express alleges, restated, that the district court erred in granting summary judgment in favor of Tudor, concluding that the Tudor policy did not provide an obligation for Tudor to defend Mortgage Express in the Village lawsuit because it found that (1) Mortgage Express was not rendering professional services for others, (2) Mortgage Express had a financial interest as the buyer and seller of the Nebraska property, (3) Mortgage Express had knowledge of the claim prior to the effective date of the Tudor policy, and (4) the Tudor policy excludes coverage for dishonest, fraudulent, or malicious acts.

Mortgage Express also alleges, restated, that the district court erred in granting summary judgment in favor of Cincinnati, concluding that the Cincinnati policy did not provide an obligation to defend it in the Village lawsuit because the suit did not fall within the policy definitions of bodily injury, property damage, personal injury, or advertising injury and because the policy excluded claims arising out of statements made by the insured that were knowingly false when made.

Finally, Mortgage Express argues that in the event this court concludes that the Tudor policy excludes coverage because the transaction at issue did not fall within the scope of the policy or, in other words, that the transaction did not constitute processing and closing mortgage loans for all types of residential housing and in-house loan underwriting, then the district court erred in granting summary judgment in favor of Peterson by concluding that there is no genuine issue of material fact.

IV. STANDARD OF REVIEW

[1,2] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts, or as to the ultimate inferences that may be drawn from those facts, and that the moving party is entitled to judgment as a matter of law.[2] In

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[2] *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008).

reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.[3]

[3] When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question.[4]

[4] The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.[5]

V. ANALYSIS

1. General Principles Regarding Duty to Defend and Indemnify

[5-7] Coverage under an insurance policy or contract is generally understood to consist of two separate and distinct obligations: the duty to defend any suit filed against the insured party and the duty to pay, on behalf of the insured, sums for which the insured shall become legally obligated to pay because of injury caused to a third party by acts of the insured.[6] An insurer's duty to defend is broader than its duty to indemnify.[7] Moreover, an insurer's duty to defend is usually a contractual duty, rather than one imposed by operation of law.[8] The nature

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[3] *Jardine v. McVey*, 276 Neb. 1023, 759 N.W.2d 690 (2009).

[4] *Neff Towing Serv. v. United States Fire Ins. Co.*, 264 Neb. 846, 652 N.W.2d 604 (2002).

[5] *Hillabrand v. American Fam. Mut. Ins. Co.*, 271 Neb. 585, 713 N.W.2d 494 (2006); *Neff Towing Serv. v. United States Fire Ins. Co., supra* note 4.

[6] *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006); *Chief Indus. v. Great Northern Ins. Co.*, 268 Neb. 450, 683 N.W.2d 374 (2004).

[7] *Peterson v. Ohio Casualty Group, supra* note 6; *John Markel Ford v. Auto-Owners Ins. Co.*, 249 Neb. 286, 543 N.W.2d 173 (1996).

[8] *Peterson v. Ohio Casualty Group, supra* note 6; *Chief Indus. v. Great Northern Ins. Co., supra* note 6.

of the duty to defend is defined by the insurance policy as a contract.[9]

[8-10] An insurer's duty to defend an action against the insured must, in the first instance, be measured by the allegations of the petition against the insured.[10] In determining its duty to defend, an insurer must not only look to the petition or complaint filed against its insured, but must also investigate and ascertain the relevant facts from all available sources.[11] An insurer is obligated to defend if (1) the allegations of the complaint, if true, would obligate the insurer to indemnify, or (2) a reasonable investigation of the actual facts by the insurer would or does disclose facts that would obligate the insurer to indemnify.[12] An insurer, therefore, bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy.[13]

[11] But if, according to the facts alleged in a pleading and ascertained by an insurer, the insurer has no potential liability to its insured under the insurance agreement, then the insurer may properly refuse to defend its insured.[14] And although an insurer is obligated to defend all suits against the insured, even if groundless, false, or fraudulent, the insurer is not bound to defend a suit based on a claim outside the coverage of the policy.[15]

(a) Tudor's Duty to Defend and Indemnify

We first address Mortgage Express' argument that the district court erred in finding that the Tudor policy does not

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[9] *Id.*

[10] *Peterson v. Ohio Casualty Group, supra* note 6; *Millard Warehouse, Inc. v. Hartford Fire Ins. Co.*, 204 Neb. 518, 283 N.W.2d 56 (1979).

[11] See *Neff Towing Serv. v. United States Fire Ins. Co., supra* note 4.

[12] *Peterson v. Ohio Casualty Group, supra* note 6; *Mapes Indus. v. United States F. & G. Co.*, 252 Neb. 154, 560 N.W.2d 814 (1997).

[13] See *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981).

[14] See *Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 243 Neb. 779, 502 N.W.2d 484 (1993).

[15] *Peterson v. Ohio Casualty Group, supra* note 6; *Neff Towing Serv. v. United States Fire Ins. Co., supra* note 4.

provide coverage because Mortgage Express had knowledge of the negligent act giving rise to Village's claim, as our resolution of this issue is dispositive of this appeal concerning Tudor. Tudor alleges, among other things, that its claims-made policy does not provide coverage because Mortgage Express had knowledge of circumstances likely to give rise to a claim prior to the effective date of the Tudor policy.

[12] An insurance policy is a contract between the insurance company and the insured.[16] As such, the insurance company has the right to limit its liability by including those limitations in the policy definitions.[17] If those definitions are clearly stated and unambiguous, the insurance company is entitled to have those terms enforced.[18]

Mortgage Express submitted its application for renewal of errors and omissions liability insurance on March 4, 2003. The Tudor policy declarations page shows that the renewal policy period became effective on April 20, 2003, through April 20, 2004. A condition precedent to coverage under the Tudor policy is that the insured have no knowledge prior to the effective date of the policy of the actual or alleged negligent act, error, omission, or circumstance likely to give rise to a claim. In this case, Mortgage Express clearly had knowledge of its alleged negligent act giving rise to Village's claims prior to the effective date of the Tudor policy. Mortgage Express became aware of the error, at the very latest, on March 4, 2003, as evidenced by the letter from Mortgage Express' counsel to Village's counsel. Mortgage Express argues that it did not have reason to know of the claims and that the letter was merely "sparring between attorneys."[19] We find this argument unpersuasive.

The letter clearly and definitely expressed the intentions of Mortgage Express to settle the dispute with Village in court. Moreover, the letter specifically acknowledged receiving notice

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[16] *Hillabrand v. American Fam. Mut. Ins. Co., supra* note 5.

[17] *Id.*

[18] *Id.*

[19] Brief for appellants at 31.

of Village's intent to amend its complaint, including a request for sanctions and asserting slander of title against Mortgage Express. There is no genuine issue as to the fact Mortgage Express was unaware, prior to the effective date of the Tudor policy, of the circumstances leading up to the claims asserted in Village's amended complaint. Therefore, the Tudor policy does not provide coverage for the defense sought by Mortgage Express. Accordingly, we conclude that the district court properly entered summary judgment in favor of Tudor.

We note Mortgage Express' argument that because it was covered under the prior Tudor policy at the time it became aware of the claims asserted in the amended complaint, Tudor was not prejudiced by Mortgage Express' failure to give reasonable notice. This argument is misplaced because our conclusion is that Mortgage Express failed to meet a condition precedent to coverage—that it had no knowledge prior to the effective date of the renewal policy of the circumstances giving rise to the amended complaint.

Our conclusion that there is no coverage under the Tudor policy because Mortgage Express was aware of its negligent act giving rise to Village's claim prior to the effective date of the Tudor policy is dispositive of this appeal regarding claims against Tudor. Therefore, we need not address Mortgage Express' remaining assignments of error regarding coverage under the Tudor policy.[20]

(b) Cincinnati's Duty to Defend and Indemnify

Mortgage Express argues that Cincinnati was required to provide a defense because slander of title fits within the definition of personal injury in subsection **d.** of the policy. Subsection **d.** of the Cincinnati policy defines personal injury as an "injury, other than 'bodily injury', arising out of one or more of the following offenses: . . . **d.** Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services . . . ."

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[20] See *Cass Cty. Bank v. Dana Partnership*, 275 Neb. 933, 750 N.W.2d 701 (2008).

Whether slander of title fits within the definition of personal injury is an issue of first impression for this court. However, other courts have considered the issue and concluded that title to real estate is not a good, product, or service.[21]

In *Bank One v. Breakers Development, Inc.*,[22] condominium owners sued an insured for slander of title arising out of errors in the legal description of the condominium property, and the insured sought coverage from its commercial general liability insurer. The court construed policy language identical to the policy language contained in Cincinnati's policy and concluded that slander of title was not one of the offenses that gave rise to "personal injury" as defined in the commercial liability policy.[23] The court explained that a reasonable person would not liken a title to real estate as a "good" or "product" and that the terms "good" or "product" referred to tangible property.[24]

In another case, *Acme Const. Co., Inc. v. Continental Nat. Indem. Co.*,[25] an excavator filed a declaratory judgment action against its insurer seeking a determination from the court that its insurance contract provided coverage over a lawsuit with a property owner. The insurance policy in *Acme Const. Co., Inc.* defined advertising injury and personal injury as "'[o]ral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services.'"[26] The court concluded that a slander of title claim did not fall within "'personal injury'" or "'advertising injury'" as defined by the policy, thus the insurer had no duty to defend. In so concluding, the court reasoned that "title to real estate is not a person, organization,

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[21] See, *Nationwide Mut. Ins. Co. v. Lake Caroline, Inc.*, 515 F.3d 414 (5th Cir. 2008); *Bank One v. Breakers Development, Inc.*, 208 Wis. 2d 230, 559 N.W.2d 911 (Wis. App. 1997); *Acme Const. Co., Inc. v. Continental Nat. Indem. Co.*, No. 81402, 2003 WL 194879 (Ohio App. Jan. 30, 2003) (unpublished opinion).

[22] *Bank One v. Breakers Development, Inc., supra* note 21.

[23] *Id.*

[24] *Id.*

[25] *Acme Const. Co., Inc. v. Continental Nat. Indem. Co., supra* note 21.

[26] *Id.* at *7.

good, product, or service as those terms are commonly understood," thus, slander of title did not fall within the policy coverage.[27]

We find the reasoning of the foregoing cases persuasive and applicable to this case. We thus reject Mortgage Express' argument that Village's slander of title claim falls within subsection **d.** of the definition of personal injury found in the Cincinnati policy.

Mortgage Express' remaining argument is that Cincinnati must defend it in the underlying action because its lien is an invasion of the right to private occupancy of the premises as defined in subsection **c.** of the definition of personal injury, which states that "[p]ersonal injury" is "[t]he wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord or lessor." Mortgage Express provides little in the way of authority to support its contention that slander of title falls within subsection **c.** of the definition of personal injury.

Although this case is not directly on point, it provides guidance. In *Columbia Nat. Ins. v. Pacesetter Homes*,[28] the developer of a housing subdivision was sued by nearby property owners because the construction caused "noise, dust, ground vibration, diminution in the value of their property, loss of trees, and increased traffic volume."[29] The developer's comprehensive general liability insurer brought a declaratory judgment action to determine whether it had a duty to defend the developer.[30] The developer's insurance policy defined personal injury as "'wrongful entry or eviction or other invasion of the right of private occupancy.'"[31] The developer contended that this clause insured it against liability from the nuisance and

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[27] *Id.*

[28] *Columbia Nat. Ins. v. Pacesetter Homes*, 248 Neb. 1, 532 N.W.2d 1 (1995).

[29] *Id.* at 14, 532 N.W.2d at 9.

[30] *Columbia Nat. Ins. v. Pacesetter Homes, supra* note 28.

[31] *Id.* at 14, 532 N.W.2d at 9.

trespass suits brought by the nearby property owners.[32] We held that the personal injury provisions did not create a duty to defend and stated that "the right of private occupancy is the legal right to occupy premises, not the right to *enjoy* occupying those premises."[33]

[13] Mortgage Express merely asserted that it held a valid, unsatisfied security interest against the property. A security interest is an interest in personal property or fixtures which secures payment or performance of an obligation.[34] Mortgage Express' security interest on Village's property does not provide Mortgage Express with either legal title or the right to possession.[35] Rather, Village, as the mortgagor, retains both legal title and the right of possession.[36] Therefore, because the security interest held by Mortgage Express does not interfere with Village's legal right to occupy the premises, Mortgage Express' security interest does not fit within the subsection **c.** definition of personal injury. As such, Cincinnati has no duty to defend Mortgage Express and was properly granted judgment as a matter of law.

2. Peterson's Liability

[14] Mortgage Express argues that if we find that the Tudor policy excludes coverage because the transaction at issue did not fall within the scope of the policy or, in other words, that the transaction did not constitute processing and closing mortgage loans for all types of residential housing and in-house loan underwriting, then Peterson was negligent in procuring coverage on behalf of Mortgage Express. An insurance agent who agrees to obtain insurance for another but negligently fails to do so is liable for the damage proximately caused by such negligence; the measure of damages is the amount that

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[32] *Columbia Nat. Ins. v. Pacesetter Homes, supra* note 28.

[33] *Id.* at 15, 532 N.W.2d at 9 (emphasis in original).

[34] See Neb. U.C.C. § 1-201(37) (Reissue 2001).

[35] See *24th & Dodge Ltd. Part. v. Acceptance Ins. Co.*, 269 Neb. 31, 690 N.W.2d 769 (2005).

[36] See *id.*

would have been due under the policy if it had been obtained by the agent.[37]

In the present case, coverage is excluded under the Tudor policy based on Mortgage Express' failure to satisfy the conditions precedent to coverage, specifically that it must have no knowledge of the negligent act giving rise to a claim prior to the effective date of the policy. As such, we need not determine whether the transaction constituted "professional services" because even if it does, coverage would still be denied. Therefore, Peterson is not liable to Mortgage Express based upon claims that it failed to obtain adequate insurance. The district court properly entered summary judgment in favor of Peterson based on Mortgage Express' claim that Peterson failed to procure proper insurance.

We note that Mortgage Express did not assign as error the district court's grant of summary judgment in favor of Peterson based on its failure to procure insurance under the Cincinnati policy. As such, we do not need to address this issue.[38]

VI. CONCLUSION

In sum, we conclude that the record discloses no genuine issues of material facts and that Tudor, Cincinnati, and Peterson were entitled to judgment as a matter of law.

AFFIRMED.

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[37] *Broad v. Randy Bauer Ins. Agency*, 275 Neb. 788, 749 N.W.2d 478 (2008).

[38] See *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (2001).

STATE OF NEBRASKA, APPELLEE, V.
JOHN L. LOTTER, APPELLANT.
771 N.W.2d 551

Filed September 4, 2009. Nos. S-08-449 through S-08-451.

1. **Postconviction.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.
2. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.

3. **Postconviction.** States are not obligated to provide a postconviction relief procedure.
4. **Postconviction: Constitutional Law.** The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008), provides a defendant in custody with a civil procedure by which, at any time, the defendant can present a motion alleging there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States.
5. **Postconviction.** Postconviction relief under Neb. Rev. Stat. § 29-3001 (Reissue 2008) is a very narrow category of relief.
6. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.
7. **Constitutional Law: Due Process: Trial.** A fair trial before a fair and impartial jury is a basic requirement of constitutional due process guaranteed by the Constitutions of the United States and the State of Nebraska.
8. **Criminal Law: Testimony.** Where the testimony is in any way relevant to a case, the knowing use of perjured testimony by the prosecution deprives a criminal defendant of his or her right to a fair trial.
9. **Due Process: Witnesses.** When the reliability of a given witness may be determinative of guilt or innocence, nondisclosure of evidence affecting credibility violates due process, irrespective of the good faith or bad faith of the prosecution.
10. **Postconviction.** The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.
11. **Postconviction: Appeal and Error.** It is fundamental that a motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal.
12. ____: ____. An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion.
13. **Witnesses: Collateral Attack.** Perjury per se is not a ground for collateral attack on a judgment.
14. **Due Process: Trial: Verdicts.** The Due Process Clause guarantees a procedurally fair trial, but does not guarantee that the verdict will be factually correct.
15. **Constitutional Law: Postconviction: Motions for New Trial.** Unlike postconviction relief, relief under Neb. Rev. Stat. § 29-2103 (Reissue 2008) is not strictly limited to constitutional claims.
16. **Postconviction: Motions for New Trial: Time: Evidence.** A motion for postconviction relief cannot be used to obtain, outside of the 3-year time limitation under Neb. Rev. Stat. § 29-2103 (Reissue 2008), what is essentially a new trial based on newly discovered evidence.
17. **Convictions: Presumptions.** Once a defendant has been afforded a fair trial and convicted of the offense for which the defendant was charged, the presumption of innocence disappears.
18. **Constitutional Law: Criminal Law: Homicide: Death Penalty.** Even if a defendant has not actually killed a victim, substantial participation in the felony

committed, combined with reckless indifference to human life, is sufficient to satisfy the constitutional culpability requirement for a conviction of first degree murder and to support a constitutional application of the death penalty.

19. **Trial: Due Process: Prosecuting Attorneys.** It is prosecutorial misconduct and a violation of a defendant's due process right to a fair trial to obtain testimony through violence.
20. **Constitutional Law: Criminal Law: Witnesses: Death Penalty.** A witness' testimony is not the result of unconstitutional coercion simply because it is motivated by a legitimate fear of a death sentence.
21. **Witnesses: Immunity: Plea Bargains.** It is permissible for the State to make promises of immunity or pardon to witnesses in return for testimonial confessions and to make promises of reduced charges or reduced sentences tendered to defendants and potential defendants by plea bargains in return for judicial admission of guilt.

Appeals from the District Court for Richardson County: DANIEL E. BRYAN, JR., Judge. Affirmed.

Andre R. Barry, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellant.

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ., and INBODY, Chief Judge, and CARLSON, Judge.

MCCORMACK, J.

I. NATURE OF CASE

John L. Lotter was convicted of three counts of first degree murder and sentenced to death. The evidence at trial was that Thomas M. Nissen, also known as Marvin T. Nissen, and Lotter planned the murders together, but Nissen testified that it was Lotter who actually killed the victims. Fourteen years after the crimes were committed, Nissen signed an affidavit stating that he committed perjury at Lotter's trial and that he, not Lotter, actually killed the victims. Lotter appeals from the district court's order denying his second pro se motion for postconviction relief.

II. BACKGROUND

In May 1995, Lotter was convicted of three counts of first degree murder, three counts of use of a weapon to commit

a felony, and one count of burglary in connection with the December 1993 deaths of Teena Brandon, Lisa Lambert, and Phillip DeVine in Richardson County, Nebraska. Lotter was sentenced to death for each count of first degree murder and to incarceration on the burglary and use of a weapon convictions.

Before Lotter's trial, Nissen was convicted in a separate trial of first degree murder in the death of Brandon and second degree murder in the deaths of Lambert and DeVine.[1] While Nissen's sentencing hearing was pending, Nissen entered into a plea agreement with the State. The agreement provided that Nissen would testify truthfully against Lotter at Lotter's trial and that, in exchange, the State would not pursue the death penalty against Nissen for Brandon's murder.

At Lotter's trial, Nissen testified that he and Lotter traveled to Lambert's house, where they knew Brandon was staying, in order to kill Brandon. Nissen and Lotter had previously raped Brandon, and they were angry that she had reported the rape to the police. Nissen testified that he and Lotter agreed they would also kill anyone else they found there. Nissen testified that he stabbed Brandon, but that Lotter fired the shots that killed all three victims.

In addition to Nissen's testimony, other evidence at trial established that on the night of the murders, Lotter stole the gun used to murder the victims and that Lotter obtained the knife and the yellow work gloves worn during the crimes. Just before the killings, both Nissen and Lotter were seen wearing gloves. The evening of the murders, Lotter told a witness he wanted to kill someone. And after the murders, Nissen and Lotter sought to obtain alibis from Nissen's wife and Lotter's girlfriend. Finally, there was evidence indicating that Lotter had traveled to Lincoln, Nebraska, looking for Brandon in order to murder her.

Lotter testified in his own defense and denied any participation in either the planning or the perpetration of the murders. Lotter stated he was not present when the murders were committed. He testified that Nissen had not been truthful in his

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[1] See *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997).

testimony regarding Lotter's involvement in the crimes and that other witnesses who gave incriminating testimony against him were either lying or mistaken.

In sentencing Lotter to the death penalty, the sentencing panel found the following aggravating circumstances to be applicable. For Lambert and DeVine, the panel found in each case that "'[t]he murder was committed in an apparent effort . . . to conceal the identity of the perpetrator of a crime'"[2] and that "'[a]t the time the murder was committed, the offender also committed another murder.'"[3] As to the murder of Brandon, the panel found that at the time the murder was committed, the offender also committed another murder[4] and that "'[t]he crime was committed to disrupt or hinder . . . the enforcement of the laws.'"[5]

When comparing Lotter's and Nissen's participation in the homicides, the sentencing panel stated that the evidence, based largely upon Nissen's testimony, was that Lotter fired all the shots that killed the three victims. But the panel explained that even if it was Nissen, and not Lotter, who actually killed Brandon by stabbing her, "there is no appreciable difference in degree of culpability between these Co-Defendants during the actual commission of the homicides."[6] In comparing the actions of Nissen and Lotter after the commission of the crimes, however, the sentencing panel stated that Nissen's statements to investigators, as well as Nissen's agreement to testify against Lotter at trial, distinguished his conduct from Lotter's.

Lotter's convictions were affirmed on direct appeal.[7] Lotter then moved for postconviction relief, was appointed counsel,

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[2] *State v. Lotter*, 266 Neb. 758, 771, 669 N.W.2d 438, 448 (2003). See, also, Neb. Rev. Stat. § 29-2523(1)(b) (Reissue 2008).

[3] *State v. Lotter, supra* note 2, 266 Neb. at 771, 669 N.W.2d at 448. See, also, § 29-2523(1)(e).

[4] See *id.*

[5] *State v. Lotter, supra* note 2, 266 Neb. at 771, 669 N.W.2d at 448. See, also, § 29-2523(1)(h).

[6] *State v. Lotter, supra* note 2, 266 Neb. at 772, 669 N.W.2d at 449.

[7] *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified on denial of rehearing* 255 Neb. 889, 587 N.W.2d 673 (1999).

and was granted an evidentiary hearing in 1999. In this motion, Lotter alleged that Nissen, not Lotter, had shot and killed the three victims and that the State knew or should have known Nissen's testimony was perjured. In support of this assertion, Lotter relied on an affidavit of Jeff Haley, an inmate incarcerated with Nissen. Haley averred that Nissen told him that he had fired the shots and that, as Nissen shot the victims, Lotter was "'freaking out and running around,'" saying "'What are you doing?'"[8] According to Haley, Nissen stated that he should have shot Lotter as well and then there would have been no witnesses. Lotter also filed a motion for writ of error coram nobis and a motion for new trial based on the statements allegedly made by Nissen to Haley.

At the evidentiary hearing, Nissen pled the Fifth Amendment and refused to answer any questions. The district court concluded that Haley's testimony as to what Nissen had allegedly said to him was inadmissible hearsay. And the district court found that the inadmissible hearsay did not fall within the penal interest exception to the hearsay rule,[9] because there were no corroborating circumstances clearly indicating the trustworthiness of the testimony.[10]

Having no admissible evidence before it to support Lotter's claims, the district court denied all relief, and we affirmed. We agreed that the district court properly excluded Haley's testimony and that thus, such statements could not form the basis of any claim that Nissen's trial testimony was perjured. Since Lotter failed to present any other evidence that was unavailable during direct appeal that could show the State knew Nissen's testimony was perjured, we held that the court properly denied postconviction relief. For similar reasons, we concluded that the court was correct to deny Lotter's motions for new trial and writ of error coram nobis.

In 2001, Lotter filed a pro se motion for postconviction DNA testing pursuant to the DNA Testing Act.[11] Evidence at

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[8] *State v. Lotter*, 266 Neb. 245, 252, 664 N.W.2d 892, 902 (2003).

[9] See Neb. Rev. Stat. § 27-804(2)(c) (Reissue 2008).

[10] *State v. Lotter, supra* note 8.

[11] See Neb. Rev. Stat. § 29-4116 et seq. (Reissue 2008).

Lotter's trial had indicated that the yellow work gloves worn by Nissen at the time of the crime contained two areas that tested positive for blood. The blood had never been subjected to DNA testing. Lotter claimed that if the blood on the gloves and other clothing worn by Nissen that night was shown to be caused by high-velocity blood spatter from Brandon, as opposed to blood from stabbing, or if the blood was shown to be from Lambert and/or DeVine, then it would establish that Nissen was not in the locations he testified he was in during the crime and that Nissen was the shooter, not Lotter.

We upheld the district court's decision to deny the motion.[12] We explained that there would be no way to establish the manner in which the blood had been deposited on the clothing, as opposed to whose blood it was. And since there were any number of ways in which the victims' blood could have been deposited on Nissen's clothing during the crime, whose blood it was would not be probative of whether Nissen was the shooter. Thus, the testing would not result in noncumulative, exculpatory evidence relevant to the claim that he was wrongfully convicted, as required by the DNA Testing Act.[13]

We also rejected Lotter's claim that the DNA evidence could produce noncumulative, exculpatory evidence relevant to the claim that Lotter was wrongfully sentenced, explaining: "As the sentencing panel correctly concluded, the record is barren of any evidence that Lotter was merely an accomplice or that his participation was relatively minor. There was no appreciable difference in the degree of culpability between Nissen and Lotter during the actual commission of the murders."[14] And we stated, again, that the presence of the victims' DNA on the items sought to be tested would not be inconsistent with Nissen's testimony and could not indicate whether Lotter was the shooter.[15]

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[12] See *State v. Lotter, supra* note 2.

[13] See § 29-4120.

[14] *State v. Lotter, supra* note 2, 266 Neb. at 773, 669 N.W.2d at 449.

[15] See *id.*

In 2007, Nissen signed an affidavit averring that his testimony in Lotter's trial regarding "who fired the gun" was false. Nissen stated that he, and not Lotter, shot Brandon, Lambert, and DeVine. Nissen did not recant any other portion of his testimony concerning Lotter's involvement in the murders.

Lotter then filed a second pro se motion for postconviction relief, which is the subject of this appeal. The second postconviction motion alleged that Nissen was a critical witness for the State and that during Lotter's trial, Nissen "testified falsely that it was [Lotter] who conceived the idea of killing Lambert, Brandon, and DeVine, and that [Lotter] shot all three of them."

Lotter alleged that his constitutional rights were violated because the State knew or should have known that Nissen was lying at trial. In particular, Lotter alleged that the State was in possession of evidence that Nissen was a "'world class liar'" and a "'con artist.'" In particular, the State was aware of a prior, unrelated incident in which it was documented that Nissen had lied to authorities. The motion further alleged that the State had asked Nissen to take a polygraph test in connection with the plea agreement, but that Nissen had refused. This information indicating Nissen's reputation as a liar was allegedly withheld from Lotter "until after the conclusion of his trial."

Citing *Ortega v. Duncan*,[16] Lotter also asserted that the State's use of Nissen's perjured testimony, regardless of its knowledge that it was perjured, violated Lotter's constitutional rights because without Nissen's testimony, Lotter "most likely would not have been convicted or sentenced to death."

Finally, citing *Brown v. Mississippi*,[17] Lotter asserted that the use of Nissen's testimony violated Lotter's constitutional rights because Nissen's testimony was procured by threat of death by electrocution, a punishment this court has deemed cruel and unusual in *State v. Mata*.[18]

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[16] *Ortega v. Duncan*, 333 F.3d 102 (2d Cir. 2003).

[17] *Brown v. Mississippi*, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936).

[18] *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

Attached to the second motion for postconviction relief was Nissen's affidavit, the aforementioned affidavit of his cellmate Haley, statements to police by a family member describing Nissen as a liar, and police reports relating to an incident in 1989 where Nissen cut himself with a razor and blamed someone else so the accused would get arrested. Also attached was a newspaper article detailing Nissen's previous run-ins with the police and descriptions of Nissen's reputation as a liar. The district court concluded that no evidentiary hearing was warranted by any of the allegations made by Lotter, and Lotter appeals.

III. ASSIGNMENTS OF ERROR

Lotter asserts that the district court erred in failing to grant him a new trial or, at a minimum, hold an evidentiary hearing to determine (1) whether Nissen gave perjured testimony at Lotter's trial and (2) whether the prosecution knew or should have known about Nissen's perjury at the time of Lotter's trial. Lotter asserts that the district court also erred in not granting postconviction relief on the ground that his testimony was coerced by the threat of cruel and unusual punishment.

IV. STANDARD OF REVIEW

[1] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.[19]

[2] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.[20]

V. ANALYSIS

[3-5] States are not obligated to provide a postconviction relief procedure.[21] Nevertheless, the Nebraska Postconviction Act[22] provides a defendant in custody with a civil procedure by which, "at any time," the defendant can present a motion

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[19] *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009).

[20] *State v. Parker*, 276 Neb. 661, 757 N.W.2d 7 (2008).

[21] See *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993).

[22] Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008).

alleging "there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States."[23] Although there is no time limit to bringing the motion, postconviction relief under § 29-3001 is a very narrow category of relief, available only to remedy prejudicial constitutional violations.[24] Absent a factual circumstance whereby the judgment is void or voidable under the state or U.S. Constitution, the court has no jurisdiction to grant postconviction relief.[25]

[6] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.[26] But, this court has consistently required that a defendant make specific allegations instead of mere conclusions of fact or law in order to receive an evidentiary hearing for postconviction relief.[27] And postconviction relief without an evidentiary hearing is properly denied when the files and records affirmatively show that the prisoner is entitled to no relief.[28]

1. Alleged Perjured Testimony

Lotter's primary focus for this postconviction claim is the allegation that Nissen's trial testimony against him was perjured. Specifically, Lotter alleged in his motion that Nissen "testified falsely that it was [Lotter] who conceived the idea

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[23] § 29-3001.

[24] See, *State v. Harris*, 274 Neb. 40, 735 N.W.2d 774 (2007); *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999).

[25] *State v. Murphy*, 15 Neb. App. 398, 727 N.W.2d 730 (2007). See, also, *Danforth v. Minnesota*, 552 U.S. 264, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008); *State v. Shepard*, 208 Neb. 188, 302 N.W.2d 703 (1981); *State v. Whited*, 187 Neb. 592, 193 N.W.2d 268 (1971); *State v. Reizenstein*, 183 Neb. 376, 160 N.W.2d 208 (1968).

[26] *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002).

[27] *Id.*

[28] § 29-3001. See, also, *State v. Dean, supra* note 26; *State v. Sims, supra* note 19.

of killing Lambert, Brandon, and DeVine, and that [Lotter] shot all three of them." The fact that Nissen was lying at trial would presumably have been known to Lotter at the time of the trial, and this issue was previously the subject of motions for a new trial, writ of error coram nobis, and postconviction relief. But Lotter points out that this is his first opportunity to actually prove the perjury by virtue of Nissen's partial recantation. Lotter argues that the use of the perjured testimony at his trial violated due process of law and that his convictions and sentences should be rendered void.

(a) Prosecutorial Misconduct

[7] We first address Lotter's assertion that his right to a fair trial was violated because, at the time of trial, the State knew or should have known that Nissen's testimony was perjured. A fair trial before a fair and impartial jury is a basic requirement of constitutional due process guaranteed by the Constitutions of the United States and the State of Nebraska.[29]

[8,9] Where the testimony is in any way relevant to a case, the knowing use of perjured testimony by the prosecution deprives a criminal defendant of his or her right to a fair trial.[30] Also, when the reliability of a given witness may be determinative of guilt or innocence, nondisclosure of evidence affecting credibility violates due process, irrespective of the good faith or bad faith of the prosecution.[31] For, if evidence probative of innocence is in the prosecutor's file, then the prosecutor should be presumed to recognize its significance even if he or

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[29] U.S. Const. amend. XIV, § 1; Neb. Const. art. I, § 11. See, also, *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993); *State v. Menuey*, 239 Neb. 513, 476 N.W.2d 846 (1991); *Simants v. State*, 202 Neb. 828, 277 N.W.2d 217 (1979).

[30] *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). See, also, *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); *Alcorta v. Texas*, 355 U.S. 28, 78 S. Ct. 103, 2 L. Ed. 2d 9 (1957); *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935); *State v. Ford*, 187 Neb. 353, 190 N.W.2d 787 (1971).

[31] See, *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); *Napue v. Illinois, supra* note 30.

she actually overlooked it.[32] The requirements of due process are not satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception.[33] And the nondisclosure of exculpatory evidence corrupts the truth-seeking function of the trial process and helps shape a trial that bears heavily on the defendant.[34]

But in this case, the recently discovered recantation by Nissen is in no way probative of whether the State knew or should have known Nissen's testimony was perjured at the time of Lotter's trial or whether it failed to disclose exculpatory evidence with regard to Nissen's testimony. In fact, Lotter's allegation that the State knew or should have known of Nissen's perjury at the time of trial stems not from the recantation affidavit, but from information known to the State that Nissen had lied several times in the past and had refused the State's request that he take a lie detector test before testifying.

The problem is that Lotter fails to allege that this evidence was unavailable before any of the numerous challenges already made to his convictions and sentences. None of the facts alleged in the current motion could prove the State knowingly used perjured testimony against Lotter. And, even assuming that a due process claim can rest on the State's negligent failure to know that testimony is perjured,[35] Lotter is procedurally barred from raising his current allegations.

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[32] *United States v. Agurs, supra* note 30; *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). See, also, *State v. Boppre, supra* note 29.

[33] *United States v. Agurs, supra* note 30.

[34] See *Mooney v. Holohan, supra* note 30. See, also, *United States v. Agurs, supra* note 30; *Brady v. Maryland, supra* note 32.

[35] See, *U.S. v. Perkins*, 94 F.3d 429 (8th Cir. 1996); *People v. Cornille*, 95 Ill. 2d 497, 448 N.E.2d 857, 69 Ill. Dec. 945 (1983). See, also, *Giglio v. United States, supra* note 31. But see *Smith v. Black*, 904 F.2d 950 (5th Cir. 1990), *abrogated on other grounds, Stringer v. Black*, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992).

[10-12] The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.[36] Therefore, it is fundamental that a motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal.[37] Similarly, an appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion.[38] On its face, Lotter's motion for postconviction relief failed to affirmatively show that he could not have raised these issues either on direct appeal or during prior motions for new trial and postconviction relief.

(b) Perjury Per Se

We next address Lotter's claim that the mere presence of perjured testimony, regardless of the State's knowledge that it was perjured, violated his rights to due process. Since this is the first time that admissible evidence is available regarding Nissen's recantation, such a claim is arguably not procedurally barred. However, we hold that Nissen's recantation, even if proved true, does not present a constitutional claim amendable to postconviction relief. Therefore, postconviction relief on this basis was properly denied without an evidentiary hearing.

[13,14] Perjury per se is not a ground for collateral attack on a judgment. The guilt or innocence determination in a procedurally fair trial is "'a decisive and portentous event.'"[39] The Due Process Clause guarantees a procedurally fair trial, but does not guarantee that the verdict will be factually correct.[40] The U.S. Supreme Court, while holding that affirmative prosecutorial involvement in perjured testimony may interfere

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[36] *State v. Sims, supra* note 19.

[37] *State v. Ryan, supra* note 24.

[38] *State v. Sims, supra* note 19.

[39] *Herrera v. Collins*, 506 U.S. 390, 401, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993).

[40] *Herrera v. Collins, supra* note 39.

with the fairness of the trial process,[41] has never held that the prosecution's unknowing reliance at trial on perjured testimony violates any constitutional right.[42]

Other courts, more directly confronted with the issue, have concluded that perjury itself, absent prosecutorial misconduct surrounding the perjury, does not constitute an independent constitutional claim.[43] For instance, the court in *Luna v. Beto*[44] rejected the defendant's claim that a conviction on perjured testimony was a constitutional violation even absent state complicity, explaining that the unknowing use of perjured testimony is simply an evidentiary mistake. In *Luna v. Beto*, the court stated:

> [F]or an otherwise valid state conviction to be upset years later on federal habeas, surely something more than an evidentiary *mistake* must be shown. If *mistake* is enough, then never, simply never, will the process of repeated, prolonged, postconviction review cease. For in every trial, or at least nearly every trial, there will be, there are bound to be, some mistakes.[45]

We agree. A defendant has a due process right to a trial process in which the truth-seeking function has not been corrupted. But it is axiomatic that the truth-seeking process is not defective simply because not all evidence weighed by the trier of fact was actually true. The protections of a "fair trial" granted the defendant in the criminal process are there precisely because some of the evidence against the defendant may be disputed.

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[41] See, e.g., *Napue v. Illinois, supra* note 30; *United States v. Agurs, supra* note 30; *Alcorta v. Texas, supra* note 30; *Mooney v. Holohan, supra* note 30.

[42] See *Jacobs v. Scott*, 513 U.S. 1067, 115 S. Ct. 711, 130 L. Ed. 2d 618 (1995) (Stevens, J., dissenting from denial of certiorari; Ginsburg, J., joins).

[43] See, e.g., *Black v. United States*, 269 F.2d 38 (9th Cir. 1959). See, also, *Burks v. Egeler*, 512 F.2d 221 (6th Cir. 1975).

[44] *Luna v. Beto*, 395 F.2d 35 (5th Cir. 1968).

[45] *Id.* at 40 (Brown, C.J., concurring specially; Gewin, Bell, Thornberry, Coleman, Ainsworth, Simpson, and Clayton, Circuit Judges, join).

Lotter relies on *Ortega v. Duncan*,[46] wherein the U.S. Court of Appeals for the Second Circuit held that regardless of prosecutorial knowledge of the perjury, due process is violated when a court is left with the firm belief that but for a witness' perjured testimony, the defendant would most likely not have been convicted. In *Ortega v. Duncan*, the defendant was granted habeas relief when a key witness placing the defendant at the scene of the murder later recanted.

The majority of the federal circuits, however, reject the Second Circuit's conclusion that affirmative prosecutorial involvement is not a necessary element of a due process violation based on perjured testimony.[47] While some state courts allow such a claim, many do so under postconviction relief statutes that do not limit relief to constitutional claims rendering the judgment void or voidable.[48]

[15,16] In Nebraska, postconviction relief is strictly prescribed. In a different statute, the Legislature has provided defendants with the ability to file a motion for new trial based on newly discovered evidence showing that the defendant was wrongfully convicted.[49] Unlike postconviction relief, relief under § 29-2103 is not strictly limited to constitutional claims. But a motion under § 29-2103 must be filed within 3 years of the date of the verdict.[50] We have repeatedly held that a motion for postconviction relief cannot be used to obtain, outside of the 3-year time limitation, what is essentially a new trial based

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[46] *Ortega v. Duncan, supra* note 16.

[47] See, *Smith v. Gibson*, 197 F.3d 454 (10th Cir. 1999); *Reddick v. Haws*, 120 F.3d 714 (7th Cir. 1997); *Jacobs v. Singletary*, 952 F.2d 1282 (11th Cir. 1992); *Smith v. Black, supra* note 35; *Stockton v. Com. of Va.*, 852 F.2d 740 (4th Cir. 1988); *Burks v. Egeler, supra* note 43; *White v. Hancock*, 355 F.2d 262 (1st Cir. 1966); *United States v. Maroney*, 271 F.2d 329 (3d Cir. 1959); *Pina v. Cambra*, 171 Fed. Appx. 674 (9th Cir. 2006); *Billman v. Warden*, 197 Md. 683, 79 A.2d 540 (1951).

[48] See, e.g., *In re Carpitcher*, 47 Va. App. 513, 624 S.E.2d 700 (2006); *State v. Workman*, 111 S.W.3d 10 (Tenn. Crim. App. 2002); *Downes v. State*, 771 A.2d 289 (Del. 2001).

[49] Neb. Rev. Stat. § 29-2103 (Reissue 2008).

[50] *Id*. See *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000).

on newly discovered evidence.[51] This can be no less true for a recently discovered recantation than for any other newly discovered evidence material to the defendant. It has been said that there is no form of proof so unreliable as recanting testimony.[52] "'The opportunity and temptation for fraud are so obvious that courts look with suspicion upon such an asserted repudiation of the testimony of a witness for the prosecution, and this is so even though the repudiation be sworn to.'"[53]

"'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.'"[54] We will not set aside that decision more than a decade after it was made based only on the recent recantation of some portion of a key witness' testimony against Lotter. The 3-year limitation of § 29-2103 reflects 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.[55] We do not grant postconviction relief in the absence of a constitutional violation, and the presence of perjury by a key witness does not, in and of itself, present a constitutional violation.

(c) Actual Innocence

[17] Nevertheless, in *State v. El-Tabech*,[56] it was observed that in the "rare case of actual innocence," there might be a claim that the continued incarceration of such an innocent person, without affording an opportunity to present newly discovered compelling evidence, is a denial or infringement of a

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[51] See, *id.*; *State v. Dabney*, 183 Neb. 316, 160 N.W.2d 163 (1968).

[52] *People v. Shilitano*, 218 N.Y. 161, 112 N.E. 733 (1916). See, also, *Dobbert v. Wainwright*, 468 U.S. 1231, 105 S. Ct. 34, 82 L. Ed. 2d 925 (1984) (Brennan, J., dissenting; Marshall, J., joins); *Hysler v. Florida*, 315 U.S. 411, 62 S. Ct. 688, 86 L. Ed. 932 (1942).

[53] *Fout v. Commonwealth*, 199 Va. 184, 192, 98 S.E.2d 817, 823 (1957).

[54] *Herrera v. Collins, supra* note 39, 506 U.S. at 401.

[55] See *id.*

[56] *State v. El-Tabech*, *supra* note 50, 259 Neb. at 529, 610 N.W.2d at 750 (Gerrard, J., concurring).

constitutional right that would render the judgment void or voidable. The U.S. Supreme Court, in *Herrera v. Collins*,[57] while noting the "elemental appeal" of the premise that the Constitution prohibits the execution of an innocent person, concluded that such execution was not an independent constitutional violation. However, the Court recognized that it was not actually presented with the "truly persuasive demonstration of 'actual innocence,'"[58] which, assuming any such constitutional claim could exist, would be required. For, the Court explained, once a defendant has been afforded a fair trial and convicted of the offense for which the defendant was charged, the presumption of innocence disappears.[59]

[18] Since *Herrera*, some state courts have held that deprivation of life or liberty, in the face of persuasive evidence of the person's actual innocence, violates fundamental concepts of either procedural or substantive due process of law.[60] But we need not decide in this case whether and how a claim of actual innocence is cognizable under Nebraska's postconviction relief statutes, because Nissen's recantation fails to present an issue of Lotter's actual innocence. According to Lotter, Nissen's affidavit proves he lied about who fired the shots that killed the victims and who "conceived" the idea of killing them. But even if a defendant has not actually killed a victim, substantial participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the constitutional culpability requirement for a conviction of first degree murder[61] and to support a constitutional application of the death penalty.[62]

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[57] *Herrera v. Collins, supra* note 39, 506 U.S. at 398.

[58] *Id.*, 506 U.S. at 417.

[59] See *id.*

[60] See, e.g., *In re Bell*, 42 Cal. 4th 630, 170 P.3d 153, 67 Cal. Rptr. 3d 781 (2007); *People v. Washington*, 171 Ill. 2d 475, 665 N.E.2d 1330, 216 Ill. Dec. 773 (1996).

[61] See *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982).

[62] *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987); *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Ryan, supra* note 24.

Nothing in the allegations presented by the postconviction motion, even if true, refutes the evidence at trial that Nissen and Lotter, wearing gloves, traveled to Lambert's house in order to kill Brandon and anyone else they found there. The recantation does not refute the evidence that Lotter stole the gun used to murder the victims and that Lotter obtained the knife and the gloves worn during the crimes. It does not refute the testimony of a witness that on the evening of the murders, Lotter told the witness he desired to kill someone and that after the murders, Lotter sought to obtain an alibi. As we indicated in Lotter's appeal from the denial of his motion for DNA testing,[63] because of the joint participation in the felony and the reckless indifference to human life, it is irrelevant to the degree of culpability by whose hand the victims actually died. And certainly, determination of this question does not make a showing of actual innocence of the crimes for which Lotter was convicted and sentenced. As such, postconviction relief based upon Nissen's recent recantation was properly denied without an evidentiary hearing.

2. Coercion by Threat of Electrocution

Finally, Lotter alleges that he should have been granted postconviction relief, because Nissen's testimony against him was coerced by the threat of death by electrocution. In this regard, Lotter argues that there are no issues of fact in dispute and that the court simply should have granted postconviction relief with or without an evidentiary hearing.

[19] It is prosecutorial misconduct and a violation of a defendant's due process right to a fair trial to obtain testimony through violence.[64] Recently, in *State v. Mata*, we considered evolving standards of decency and concluded that death by electrocution resulted in "'unnecessary pain, suffering, and torture' for some condemned prisoners" and was unconstitutional.[65] Lotter derives from this that Nissen's testimony

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[63] *State v. Lotter, supra* note 2.

[64] *Davis v. North Carolina*, 384 U.S. 737, 86 S. Ct. 1761, 16 L. Ed. 2d 895 (1966); *Brown v. Mississippi, supra* note 17.

[65] *State v. Mata, supra* note 18, 275 Neb. at 65, 745 N.W.2d at 277.

pursuant to a plea bargain, wherein the State agreed not to pursue the death penalty (at that time, through electrocution), was unconstitutionally coerced by the threat of torture.

[20,21] A witness' testimony is not the result of unconstitutional coercion simply because it is motivated by a legitimate fear of a death sentence.[66] True promises of leniency are not proscribed when made by persons authorized to make them.[67] Thus, it is permissible for the State to make promises of immunity or pardon to witnesses in return for testimonial confessions and to make promises of reduced charges or reduced sentences tendered to defendants and potential defendants by plea bargains in return for judicial admission of guilt.[68] At the time of Nissen's plea agreement with the State, death by electrocution was considered constitutional[69] and the State's promise not to pursue that punishment was thus a legitimate promise of leniency. And, at trial, Lotter was permitted to thoroughly cross-examine Nissen regarding his motivation to testify against him, including his fear of death by electrocution. We find no merit to Lotter's argument that Nissen's testimony was unconstitutionally coerced.

VI. CONCLUSION

Even if we assume the allegations of Lotter's second motion for postconviction relief are true, he has failed to present any claim that is not procedurally barred and which presents a constitutional violation rendering the judgment against him void or voidable. Therefore, the district court did not err in denying relief without an evidentiary hearing.

AFFIRMED.

WRIGHT and MILLER-LERMAN, JJ., not participating.

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[66] *Poindexter v. Wolff*, 403 F. Supp. 723 (D. Neb. 1975). See, also, *U.S. v. Vest*, 125 F.3d 676 (8th Cir. 1997).

[67] *People v. Andersen*, 101 Cal. App. 3d 563, 161 Cal. Rptr. 707 (1980).

[68] *Id.*

[69] *State v. Ryan, supra* note 24.

THE LAMAR COMPANY, LLC, A LOUISIANA LIMITED LIABILITY COMPANY, DOING BUSINESS AS THE LAMAR COMPANIES, APPELLANT AND CROSS-APPELLEE, V. CITY OF FREMONT, A MUNICIPALITY, ET AL., APPELLEES AND CROSS-APPELLANTS, AND NELSEN ENTERPRISES, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS VICTOR OUTDOOR ADVERTISING, APPELLEE.

771 N.W.2d 894

Filed September 4, 2009. No. S-08-590.

1. **Judgments: Appeal and Error.** On a question of law, an appellate court reaches a conclusion independent of the court below.
2. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case, because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.
3. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
4. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
5. **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.
6. **Zoning: Words and Phrases.** The right to maintain a legal nonconforming use "runs with the land," meaning it is an incident of ownership of the land, and is not a personal right.
7. **Standing: Proof.** In order for a party to establish standing to bring suit, it is necessary to show that the party is in danger of sustaining direct injury as a result of anticipated action, and it is not sufficient that one has merely a general interest common to all members of the public.
8. **Standing: Jurisdiction: Justiciable Issues.** As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.
9. **Standing: Municipal Corporations.** Generally, in order to have standing to bring suit to restrain an act of a municipal body, the persons seeking such action must show some special injury peculiar to themselves aside from a general injury to the public, and it is not sufficient that they have merely a general interest common to all members of the public.

10. **Constitutional Law: Property.** A claim that a regulation "goes too far" and deprives an individual or entity of a vested property right should be analyzed under the Takings Clause of the Fifth Amendment to the U.S. Constitution and article I, § 21, of the Nebraska Constitution.
11. **Constitutional Law: Contracts: Governmental Subdivisions.** In order to determine whether a governmental entity unconstitutionally interfered with a contract, a court engages in a three-part analysis. The court must examine (1) whether there has been an impairment of the contract; (2) whether the governmental entity's actions, in fact, operated as a substantial impairment of the contractual relationship; and, if so, (3) whether that impairment was nonetheless a permissible, legitimate exercise of the governmental entity's sovereign powers.
12. **Torts: Intent: Proof.** In order to establish a claim for tortious interference with a business relationship or expectancy, a claimant 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.
13. **Torts: Intent.** One of the basic elements of tortious interference with a business relationship requires an intentional act which induces or causes a breach or termination of the relationship.
14. **Conspiracy: Words and Phrases.** A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.
15. **Conspiracy: Torts.** A conspiracy is not a separate and independent tort in itself, but, rather, is dependent upon the existence of an underlying tort.
16. **Attorney Fees.** Neb. Rev. Stat. § 25-824 (Reissue 2008) provides generally that the district court can award reasonable attorney fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense that a court determines is frivolous or made in bad faith.

Appeal from the District Court for Dodge County: JOHN E. SAMSON, Judge. Affirmed.

Amy S. Geren, of Geren Law, and, on brief, Aimee J. Haley, of Fullenkamp, Doyle & Jobeun, for appellant.

Daniel J. Epstein and Michael F. Kinney, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee City of Fremont.

Thomas B. Thomsen, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy & Nick, for appellees Larsen International, Inc., et al.

David C. Mitchell, of Yost, Schafersman, Lamme, Hillis, Mitchell & Schulz, P.C., L.L.O., for appellee Nelsen Enterprises, Inc.

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

MILLER-LERMAN, J.

NATURE OF THE CASE

Appellant, The Lamar Company, LLC, doing business as The Lamar Companies (Lamar), had nonconforming billboard signs situated on land in Fremont, Nebraska, pursuant to periodic lease agreements with appellee landowners. In 2003, the Fremont city ordinances were amended to allow replacement of nonconforming signs, and the landowners leasing to Lamar discontinued their leases with Lamar and leased the space to a different sign company. Lamar filed an action in the district court for Dodge County against various landowners, entities, and the City of Fremont (the City). Lamar challenged the constitutionality of the ordinance and alleged that, although it was a mere lessee, it had a vested property right in the nonconforming structures and that this vested property right was not the landowners' to transfer. The district court generally found in favor of appellees on the merits. Lamar appeals, and certain appellees have filed cross-appeals. Because we conclude that Lamar lacked standing to challenge the constitutionality of the ordinance and that the rights to the nonconforming use run with the land, we reject Lamar's arguments on appeal. Further, we find no merit to some issues raised on cross-appeal and do not reach the substance of others. We, therefore, affirm the judgment entered by the district court.

STATEMENT OF FACTS

In 2001, Lamar acquired leaseholds on off-premise advertising signs in Fremont, including signs on property owned by the following appellees: Melvin Schwanke and Green Key II, Inc. (collectively Schwanke); Larsen International, Inc., John Larsen, and Michelle Larsen (collectively Larsen); and Fontanelle Hybrid Seed Co. and Nebraska Irrigated Seeds, LLC (collectively Fontanelle). Lamar purchased the signs from Bellows Outdoors. Bellows Outdoors had acquired the signs which were located on the Schwanke and Fontanelle properties in 1969, and built two signs at the Larsen property in 1991 and 1999. These signs became nonconforming with

the adoption of the City's zoning code in the fall of 2000. The billboard signs were nonconforming when Lamar purchased them in 2001.

In 2002, Bruce Nelsen formed Nelsen Enterprises, Inc., doing business as Victor Outdoor Advertising (Victor). In November and December 2002, Nelsen, on behalf of Victor, approached the owners of the Larsen and Schwanke properties and proposed to replace the nonconforming signs owned by Lamar. Also, in December 2002, Nelsen and Victor's attorney approached the City with proposed changes to the City's zoning code. Thereafter, an outside consultant drafted a proposed ordinance based on the changes suggested by Nelsen and Victor's attorney.

The proposed ordinance amended article 10, § 1003(h), of the Fremont city ordinances, which governed sign regulations. The proposed amendment allowed for the replacement of nonconforming signs, provided that the size of the new sign did not exceed the sign area of the existing sign which was being replaced and that the new sign structure utilized a monopole structure design. The new ordinance also repealed the 15-year sunset provision for nonconforming outdoor advertising signs. The issue of the amended ordinance was placed on the planning commission's agenda, and notices of the meetings were published.

From January through March 2003, the City's planning commission and the city council held public meetings regarding the requested changes to the City's zoning regulations. There is no dispute that notices of the time and place of the hearings were made consistent with state law. The City sent a letter to Lamar prior to the city council's March 25, 2003, hearing, enclosing a copy of the proposed revisions to the sign code. On March 25, the city passed ordinance No. 4032 and amended § 1003(h).

Prior to the enactment of ordinance No. 4032, Schwanke and Larsen entered into lease agreements with Victor to replace Lamar's signs. On June 6, 2003, Fontanelle entered into a lease with Victor to replace Lamar's sign. Beginning in April 2003, pursuant to ordinance No. 4032, Victor and the landowners applied to the City for replacement permits to allow

Victor to replace Lamar's signs. The City issued the replacement permits.

Prior to the enactment of ordinance No. 4032, Lamar operated and maintained its nonconforming signs at each property by virtue of periodic lease agreements with appellee landowners. The parties agree that even before the March 25, 2003, passage of ordinance No. 4032, the landowners could have terminated Lamar's leases with appropriate notice. On March 28, Schwanke sent notice to Lamar via facsimile that Schwanke was terminating Lamar's leases. In June, Fontanelle notified Lamar that it was terminating its leases with Lamar in November. Larsen terminated its leases with Lamar in May and September of 2004.

Having received notice of the landowners' decisions to terminate the leases, Lamar removed its structures from appellee landowners' properties. After Lamar's leases were terminated, Victor erected signs replacing Lamar's signs. Lamar agrees that the leases were terminated by their terms, but argues that Victor did not have the right to erect new signs.

After removing its signs, Lamar brought this action in the district court for Dodge County alleging 14 causes of action, including constitutional challenges to ordinance No. 4032. Named as defendants, and appearing herein as appellees, were the following: the City, Victor, Larsen International, Melvin Schwanke, Fontanelle Hybrid Seed Co., American National Bank of Fremont, Green Key II, John Larsen, Michelle Larsen, and Nebraska Irrigated Seeds.

On February 22, 2006, the district court entered an order granting partial summary judgment in favor of appellees and denying a partial summary judgment sought by Lamar. In its ruling, the court noted that when the leases were effectively and lawfully terminated, Lamar's nonconforming use rights for its signs were also extinguished.

The remaining matters came on for a hearing on October 26, 2006. On January 11, 2007, the district court entered an order granting the motions for summary judgment filed by appellees and denying the amended motions for summary judgment filed by Lamar. In its order, the district court held, inter alia, that ordinance No. 4032 was not arbitrary and capricious, nor

was it facially unconstitutional. The court further concluded that Lamar did not have standing to challenge the validity of a facially constitutional ordinance on an "as applied" basis to signs that were no longer situated on the land. The district court denied Lamar's remaining claims.

Lamar appealed on February 6, 2007, in case No. A-07-144. On February 27, 2008, the Court of Appeals remanded the cause for lack of jurisdiction, because the district court had not entered an order on appellee landowners' motion for attorney fees. After entry of an order denying appellee landowners' request for attorney fees, Lamar once again appealed. Certain appellees have filed cross-appeals.

ASSIGNMENTS OF ERROR

We have summarized and restated certain of Lamar's assignments of error, which resolve this appeal. Lamar claims that the district court erred in (1) stating that "the right to maintain a nonconforming use does not depend upon ownership or tenancy of the land on which the use is situated. It is not personal to the current owner or tenant, but attaches to the land itself"; (2) concluding that Lamar lacked standing to assert an "as applied" challenge to ordinance No. 4032; (3) concluding that ordinance No. 4032 was constitutional on its face; (4) granting summary judgment in favor of appellees on Lamar's takings claims; (5) granting summary judgment in favor of appellees on Lamar's claim of constitutional impairment of Lamar's contracts or rights; (6) granting summary judgment in favor of appellee the City on Lamar's claim under 42 U.S.C. § 1983 (2006); (7) granting summary judgment in favor of appellee Victor on Lamar's claim of tortious interference with contract; and (8) granting summary judgment in favor of appellees on Lamar's conspiracy claim.

The cross-appellant landowners claim that Lamar's action was frivolous and that the district court erred by failing to award them attorney fees pursuant to Neb. Rev. Stat. § 25-824 (Reissue 2008).

Appellee the City, relying on statutes and case law, cross-appeals the district court's denial of its motion for summary judgment, based on its argument that it was immune from

Lamar's suit. Given our resolution of Lamar's appeal, it is not necessary to reach this cross-appeal.

STANDARDS OF REVIEW

[1] On a question of law, we reach a conclusion independent of the court below. *Pierce v. Douglas Cty. Civil Serv. Comm.*, 275 Neb. 722, 748 N.W.2d 660 (2008).

[2] Standing is a jurisdictional component of a party's case, because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court. *In re Estate of Dickie*, 261 Neb. 533, 623 N.W.2d 666 (2001).

[3,4] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *OMNI v. Nebraska Foster Care Review Bd.*, 277 Neb. 641, 764 N.W.2d 398 (2009).

[5] 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. *In re Estate of Chrisp*, 276 Neb. 966, 759 N.W.2d 87 (2009).

ANALYSIS

The District Court's Ruling Is Consistent With the Legal Proposition That Nonconforming Use Rights Run With the Land.

For its first assignment of error, Lamar contends that the district court erred by stating that "the right to maintain a nonconforming use does not depend upon ownership or tenancy of the land on which the use is situated. It is not personal to the current owner or tenant, but attaches to the land itself." Given the substance of its ruling against Lamar, we understand

the district court's statement to mean that the right to a nonconforming use runs with the land and we agree with the legal proposition.

[6] While this court has not previously addressed the issue, upon review of the jurisprudence of other jurisdictions and the treatises addressing nonconforming use rights, we are persuaded that the right to maintain a legal nonconforming use "runs with the land," meaning it is an incident of ownership of the land, and is not a personal right. Therefore, a change in the ownership or tenancy of a nonconforming business or structure which takes advantage of the nonconforming rights does not affect the current landowner's right to continue the nonconforming use. See 83 Am. Jur. 2d *Zoning and Planning* § 587 (2003). See, also, *Budget Inn of Daphne v. City of Daphne*, 789 So. 2d 154 (Ala. 2000); *S & S v. Zoning Bd. for Stratford*, 373 N.J. Super. 603, 862 A.2d 1204 (2004). The rationale for this rule is amply explained in 4 Rathkopf's The Law of Zoning and Planning § 72:20 at 72-56 (Edward H. Ziegler, Jr., ed. 2005), which states:

> It is obvious that if the right to continue a nonconforming use were not considered one of the "bundle of rights" which together constitute the attributes of ownership of the land, exercisable by [a landowner who] had the possessory interest therein, it would prevent a purchaser [of the land] from using the land for any purpose other than one permitted by the ordinance in effect at the time of transfer. The owner of the land would be unable to sell all of his rights in the land and in the use thereof, and, being out of possession of the land, could not exercise the right to the nonconforming use.

Lamar contends that while the nonconforming use rights may "run with the land," the rights vest in the individual or entity currently using those rights and that, therefore, once such use is terminated, the legal nonconforming rights remain with the individual or entity which had used the nonconforming right and such rights cannot be transferred without the authority of this individual or entity. We believe Lamar's proposed proposition of law is not sound. Indeed, such a holding could lead to

the very problem identified in the Rathkopf treatise, wherein a landowner is divested of the ability to transfer the nonconforming use rights associated with his or her real property and, further, the proposed purported owner of the nonconforming use rights, having been separated from the real property on which the nonconforming rights had been used, would be unable to utilize such rights.

We reject Lamar's suggestion and conclude that the better proposition of law is, as stated above, that the right to maintain and use a legal nonconforming use "runs with the land" and is an incident of ownership of the land. Based on this holding, we affirm the district court's initial order granting partial summary judgment in favor of appellees and conclude that when Lamar's leases were terminated, any rights it had with respect to the nonconforming use of the land were extinguished.

Standing Requires a Special Injury: Lamar Lacked Standing to Challenge the Constitutionality of Ordinance No. 4032.

Lamar's second and third assignments of error, condensed and summarized, claim that the district court erred in concluding Lamar lacked standing to assert an "as applied" constitutional challenge to ordinance No. 4032 and that the district court erred in concluding that ordinance No. 4032 was constitutional on its face.

In its order, the district court concluded that once Lamar's leasehold interests were lawfully terminated, it had no ownership interest in the nonconforming use rights. Therefore, Lamar lacked standing to challenge ordinance No. 4032 as it applied to the nonconforming signs on appellee landowners' properties. The district court further concluded that Lamar did have standing to raise a facial challenge to the ordinance, because it owned other nonconforming signs in Fremont.

As explained below, we agree with the district court that once Lamar's leaseholds were terminated, Lamar no longer had a legal interest in the nonconforming use rights and, therefore, could not show that it was in danger of sustaining direct injury as a result of the enactment of ordinance No. 4032 as it applied

to the nonconforming signs at issue in this case. Unlike the district court, however, we further conclude that Lamar lacked standing to make a facial challenge to ordinance No. 4032, because Lamar failed to establish that it was in danger of sustaining any direct injury as a result of the enactment of ordinance No. 4032.

[7-9] We have repeatedly held that in order for a party to establish standing to bring suit, it is necessary to show that the party is in danger of sustaining direct injury as a result of anticipated action, and it is not sufficient that one has merely a general interest common to all members of the public. *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002). Indeed, as an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf. *McClellan v. Board of Equal. of Douglas Cty.*, 275 Neb. 581, 748 N.W.2d 66 (2008). Generally, in order to have standing to bring suit to restrain an act of a municipal body, the persons seeking such action must show some special injury peculiar to themselves aside from a general injury to the public, and it is not sufficient that they have merely a general interest common to all members of the public. *Id.* Further, in order to maintain an action to enforce private rights, the plaintiff must show that he will be benefited by the relief to be granted. *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. 887, 327 N.W.2d 595 (1982) (citing *Stahmer v. Marsh*, 202 Neb. 281, 275 N.W.2d 64 (1979)). Thus, in seeking to challenge ordinance No. 4032, Lamar must show that the enactment of the ordinance resulted in some special injury peculiar to it, and this injury must be separate from a general injury to the public.

In this case, Lamar has not established that it will endure any such special injury. The district court noted that Lamar owns other nonconforming signs in Fremont, but the owning of nonconforming signs alone does not establish that Lamar has or will suffer some sort of special injury as a result of the enactment of ordinance No. 4032. Indeed, neither the district

court nor Lamar has indicated how the enactment of ordinance No. 4032 will injure Lamar. While it is conceivable that Lamar may have other signs replaced under the ordinance, the record before us does not indicate any such facts have occurred or are likely to occur. Moreover, it is also conceivable that Lamar could benefit from the ordinance by replacing its competitors' nonconforming signs.

Based on the record before us, we conclude that Lamar lacked standing to assert its "as applied" or facial challenge to ordinance No. 4032, and, although our reasoning differs from that of the district court, we affirm the district court's grant of summary judgment with respect to the constitutional challenge.

Lamar Cannot Establish Its Takings Claims.

Lamar argues that the district court erred in granting summary judgment on its claims of regulatory taking, because genuine issues of material fact existed. Specifically, Lamar argues that there were genuine issues of material fact whether ordinance No. 4032 destroyed the value of Lamar's property to such an extent that it constituted a regulatory taking of Lamar's property rights by eminent domain.

[10] A claim that a regulation "goes too far" and deprives an individual or entity of a vested property right should be analyzed under the Takings Clause of the Fifth Amendment and the Nebraska Constitution. See, *Scofield v. State*, 276 Neb. 215, 753 N.W.2d 345 (2008); U.S. Const. amend. V.; Neb. Const. art. I, § 21. To establish a takings claim under either the U.S. or Nebraska Constitution, it is axiomatic that the claimant must have been deprived of some property right.

Lamar bases its takings claim on the notion that it had a vested property right in the nonconforming use of its billboard signs. However, earlier in this opinion, we concluded that any rights Lamar had with respect to the nonconforming use were extinguished when its leases were terminated. Therefore, because Lamar had no property rights to take, Lamar's takings claims fail. The district court did not err in concluding that there were no genuine issues of material fact as to Lamar's takings claims.

There Were No Genuine Issues of Material Fact Concerning Whether Lamar's Contract Rights Were Constitutionally Impaired.

Next, Lamar argues that ordinance No. 4032, as enacted, violates U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, because it is a law that invalidates Lamar's contract rights. We reject this argument.

[11] In *Miller v. City of Omaha*, 253 Neb. 798, 573 N.W.2d 121 (1998), this court set forth the three-part analysis to determine whether a contract has been unconstitutionally interfered with. Under *Miller*, we examine (1) whether there has been an impairment of the contract; (2) whether the City's actions, in fact, operated as a substantial impairment of the contractual relationship; and, if so, (3) whether that impairment was nonetheless a permissible, legitimate exercise of the City's sovereign powers. Because Lamar cannot establish the first prong of the *Miller* analysis, we do not consider the remaining prongs.

As stated earlier in this opinion, once Lamar's leaseholds were terminated, all rights Lamar had in the nonconforming use of its billboards were extinguished. The landowners and Lamar agree that the leases permitting Lamar to place its billboards on their lands were terminated under the terms of the periodic lease agreements. The lease agreements were entered into prior to the enactment of ordinance No. 4032. Therefore, Lamar's contracts were not impaired by the enactment of ordinance No. 4032, because Lamar received all the benefit of the bargained-for contract. The district court properly granted summary judgment in favor of appellees and dismissed this claim.

Lamar Cannot Establish a Claim Under 42 U.S.C. § 1983.

Lamar next claims that based on the enactment of ordinance No. 4032, there were genuine issues of material fact whether the City deprived Lamar of its "'rights, privileges or immunities secured by the Constitution or laws of the United States,'" in violation of 42 U.S.C. § 1983. Brief for appellant at 42. Again, based on our initial conclusion, once Lamar's leaseholds were

properly terminated, all rights it had in the nonconforming use of its signs were extinguished. Thus, Lamar had no rights of which to be deprived and this claim is without merit.

There Were No Genuine Issues of Material Fact Whether Victor Tortiously Interfered With Lamar's Contractual Rights.

Next, Lamar claims that the district court erred in granting appellees' motion for summary judgment, because there were genuine issues of material fact whether Victor tortiously interfered with its contractual relationship with appellee landowners. This assignment of error is without merit.

[12] In order to establish a claim for tortious interference with a business relationship or expectancy, a claimant 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. See *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 748 N.W.2d 626 (2008).

[13] One of the basic elements of tortious interference with a business relationship requires an intentional act which induces or causes a breach or termination of the relationship. See *id*. An intentional, but justified, act of interference will not subject the interferer to liability. See *Matheson v. Stork*, 239 Neb. 547, 477 N.W.2d 156 (1991) (citing and clarifying *Miller Chemical Co., Inc. v. Tams*, 211 Neb. 837, 320 N.W.2d 759 (1982). See, also, Restatement (Second) of Torts § 770 (1979).

In *Miller Chemical Co., Inc.*, this court quoted the Restatement of Torts § 768 (1939) with respect to when competition is a proper or improper interference, stating:

> "(1) 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 (a) the relation concerns a matter involved in the competition between the actor and the competitor, and (b) the actor does not employ improper means, and (c) the actor does not intend thereby to create

> or continue an illegal restraint of competition, and (d) the actor's purpose is at least in part to advance his interest in his competition with the other."

211 Neb. at 842, 320 N.W.2d at 762. The court also noted that "[t]he fact that hatred or desire for revenge was part of the reason is insufficient to make interference improper if the conduct is directed at least in part to advancement of [a party's] own competitive interest and social benefits arising therefrom." *Id.* at 843, 320 N.W.2d at 763.

The district court rejected Lamar's tortious interference claim and found that Victor was protected in its actions of soliciting business from appellee landowners and replacing Lamar's signs by virtue of the "competitor privilege." The district court noted in its order that "Lamar acknowledges that [Victor is] in the outdoor advertising business competing directly against Lamar in the Fremont market . . . ." The court further noted that by their terms, Lamar's leases were subject to termination.

We agree that Lamar has failed to establish a claim for tortious interference with a business relationship. However, for completeness, we note that although *Miller Chemical Co., Inc.* used the term "privilege," we have since clarified that an intentional, but justified, act of interference, such as valid competition, cannot be the basis for a tortious interference claim. See *Matheson v. Stork, supra*.

The undisputed facts in this case are that Victor and Lamar are both in the sign business and that both conduct business in the Fremont area. The record further shows that Lamar's leases were terminated by their terms. Even giving all inferences in favor of Lamar, there is nothing in the record to indicate that Victor employed improper means to replace Lamar's leases, and there is no evidence that Victor will restrain further competition.

Lamar suggests that the enactment of the ordinance and the replacing of its signs were the result of ill will between Lamar and some of the appellees. But as noted in *Miller Chemical Co., Inc., supra*, even if part of the motivation for replacing Lamar's signs was based on ill will, as a competitor in the sign business, Victor is allowed to make efforts to advance its sign business, including efforts to recruit new customers

for its sign business. Victor's actions were not an improper interference. Lamar has failed to establish a claim for tortious interference of a business relationship, and in the absence of a genuine issue of material fact, the district court's ruling in favor of appellees on the motion for summary judgment was not error.

There Were No Genuine Issues of Material Fact as to Lamar's Claim of Civil Conspiracy.

Finally, Lamar argues that genuine issues of material fact existed with respect to Lamar's claim of civil conspiracy. Lamar contends that Victor and appellee landowners conspired against Lamar to deprive it of its nonconforming property rights.

[14,15] A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means. *Eicher v. Mid America Fin. Invest. Corp.*, 275 Neb. 462, 748 N.W.2d 1 (2008). We have previously stated that a "conspiracy" is not a separate and independent tort in itself, but, rather, is dependent upon the existence of an underlying tort. *Brummels v. Tomasek*, 273 Neb. 573, 731 N.W.2d 585 (2007). Without such an underlying tort, there can be no claim for relief for a conspiracy to commit the tort. *Id.*

Again, as we noted earlier in this opinion, once Lamar's leases were properly terminated, any rights it had in the nonconforming use of the signs were extinguished. Furthermore, we affirmed the district court's denial of Lamar's claim for tortious interference with a business relationship. Therefore, based on the record in this case, we conclude that Lamar has not established any predicate tort to support its claim of civil conspiracy, and therefore, the district court did not err in granting appellees' motion for summary judgment on this claim.

The District Court Did Not Abuse Its Discretion by Denying Cross-Appellants Attorney Fees.

[16] For their cross-appeal, appellee landowners claim that the district court erred in denying their motion for attorney fees sought under § 25-824. Section 25-824 provides generally that the district court can award reasonable attorney fees and court costs against any attorney or party who has brought or

defended a civil action that alleges a claim or defense that a court determines is frivolous or made in bad faith. See *Stewart v. Bennett*, 273 Neb. 17, 727 N.W.2d 424 (2007).

The district court denied appellees' motion for attorney fees, concluding that "the Court cannot say that [Lamar's] lawsuit was without rational argument based on law and evidence to support [Lamar's] position in the lawsuit." The court further noted that Lamar's attorneys were always thoroughly prepared and that it was evident that the attorneys had spent substantial time and effort in researching and investigating the claims.

We will not disturb a district court's rulings on attorney fees absent an abuse of discretion. After reviewing the history of this case, we conclude that the trial court did not abuse its discretion in determining that this case was not frivolous or brought in bad faith. Therefore, the district court's denial of attorney fees is affirmed.

CONCLUSION

The district court properly concluded that when Lamar's leases were terminated by their terms, Lamar's rights with respect to the nonconforming use of the signs were extinguished and remained with the current landowner. Furthermore, Lamar lacked standing to raise its "as applied" and facial challenges to ordinance No. 4032 and the district court was not in error in granting summary judgment in favor of appellees on Lamar's remaining claims. Further, the district court did not err in denying the cross-appellants' request for attorney fees.

AFFIRMED.

ROGER JOHNSON, APPELLANT, V. KATHRYN L. ANDERSON AND ROBERT BROBERG, COPERSONAL REPRESENTATIVES OF THE ESTATE OF ANER ANDERSON, DECEASED, APPELLEES.

771 N.W.2d 565

Filed September 4, 2009. No. S-08-811.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.

2. **Actions: Trusts: Equity.** An action to impose a constructive trust sounds in equity.
3. **Trusts: Proof.** A party seeking to have a constructive trust imposed has the burden to establish by clear and convincing evidence the factual foundation required for a constructive trust.
4. **Wills: Proof.** A lost will may be proved by secondary evidence that is clear and convincing.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Affirmed.

George H. Moyer, Jr., of Moyer, Egley, Fullner & Montag, for appellant.

Mark D. Fitzgerald, of Fitzgerald, Vetter & Temple, for appellees.

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

WRIGHT, J.

NATURE OF CASE

Roger Johnson (Roger) appeals the decision of the Madison County District Court, which granted summary judgment in favor of Kathryn L. Anderson (Kathryn) and Robert Broberg (Robert), copersonal representatives of the estate of Aner Anderson (Aner). The court found that Roger had not produced evidence sufficient to establish the existence of a contract to make a will pursuant to Neb. Rev. Stat. § 30-2351 (Reissue 2008). We affirm the decision of the district court.

SCOPE OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence. *In re Estate of Ronan*, 277 Neb. 516, 763 N.W.2d 704 (2009).

FACTS

Aner died testate on August 9, 2005. A will dated September 18, 2003, was admitted into probate, and pursuant to that will, Kathryn and Robert were appointed as copersonal

representatives. Roger objected to the probate of that will on the ground that he believed Aner had executed a joint and mutual will in 1982 with his wife, Mildred Anderson (Mildred), which contained a contract that the will would not be revoked. When Roger's objections to the probate of the September 2003 will were unsuccessful, he sought to impose a constructive trust on the assets of the estate for the beneficiaries of the 1982 will.

Roger is the nephew of Aner and Mildred, both deceased. Roger had resided with Aner and Mildred in Tilden, Nebraska, while he attended high school from 1949 to 1953. After graduation, Aner paid for Roger to attend mortuary school and eventually invested in Roger's mortuary businesses in Wisner and Wayne, Nebraska. Aner and Mildred visited Roger's home for holidays, christenings, and the birthdays of Roger's children.

Roger testified that in 1982, Aner and Mildred brought two envelopes—one sealed and one unsealed—to him for safekeeping. He stated that they represented that the sealed envelope contained their will and that the unsealed envelope contained an unsigned copy of the will. Roger said that in their presence, he read the unsigned copy, which appointed him as the personal representative of the estate, devised one-half of the residue of the estate to Roger and his immediate family, and devised the other half of the residue to Aner's surviving brothers and sisters.

The unsealed envelope's return address was that of the law firm of "Brogan & Stafford, P.C.," in Norfolk, Nebraska. Attorney Thomas E. Brogan prepared all of Aner's subsequent wills and powers of attorney. Brogan testified that the copy of the 1982 will was printed on paper that he used, but that he did not remember the 1982 will and that "[i]t probably was never signed" and "it probably was never executed."

Mildred died in 1996, but no will was presented for probate. Roger testified that in 1998, Aner retrieved the sealed envelope he had given Roger in 1982. Roger said Aner gave him another sealed envelope containing what Aner represented to be a new will. In the 1998 will, Kathryn, who is of no relation to Aner, was made a copersonal representative with Roger. Kathryn

was employed at a financial investment company, and she met Aner when he was executor of his sister's estate. Later, Aner retrieved the 1998 will from Roger. Aner did not ask Roger to keep any subsequent wills.

Aner made three wills in 2003. In April, Aner changed his will to make Kathryn the residual beneficiary. In July, he changed the personal representatives from Kathryn and Roger to Kathryn and Aner's cousin Robert. Finally, in September, Aner made a third will, in which he reduced the amount left to Roger and his family members to $1,000 each. Aner died on August 9, 2005. Despite Roger's objections, the September 2003 will was declared to be valid and admitted to formal probate.

Roger filed a complaint on October 22, 2007, naming the personal representatives of Aner's estate, Kathryn and Robert, as defendants. He asked the district court to find that Aner breached his contract with Mildred to make a joint, mutual, and contractual will when Aner revoked the 1982 will by executing subsequent wills. Roger also asked the court to impose a trust on Aner's estate for the beneficiaries named in the 1982 will.

An amended complaint was filed on October 29, 2007, and another motion to amend the complaint was filed in April 2008, seeking to add other affected beneficiaries as parties and to frame the complaint as one in equity instead of at law. The district court overruled the motion for leave to file an amended complaint; however, the court considered the claim as an equitable action. It determined that the facts required to establish a contract to not revoke a will pursuant to § 30-2351 were not present and granted the personal representatives' motion for summary judgment.

ASSIGNMENTS OF ERROR

Roger assigns as error the district court's summary judgment in favor of the copersonal representatives. He also claims the court erred in not permitting the filing of a second amended complaint and in failing to join necessary parties. Because we conclude that summary judgment was proper, we do not address the remaining assigned errors.

ANALYSIS

Summary Judgment

Roger sought to impose a constructive trust on the assets of Aner's estate based on an alleged 1982 contract to make a will between Aner and Mildred. He claimed that Aner breached this contract by destroying the 1982 will and executing subsequent wills after Mildred's death. Roger alleged that the 1982 will was a joint and mutual will in which Aner and Mildred (1) devised one-half of their residuary estate to Roger and his family and (2) agreed to not revoke or change the will upon the death of the other spouse. The question is whether Roger presented sufficient evidence to prove the existence of such a contract between Aner and Mildred.

[2,3] An action to impose a constructive trust sounds in equity. *Eggleston v. Kovacich*, 274 Neb. 579, 742 N.W.2d 471 (2007). A party seeking to have a constructive trust imposed has the burden to establish by clear and convincing evidence the factual foundation required for a constructive trust. *Pruss v. Pruss*, 245 Neb. 521, 514 N.W.2d 335 (1994). Because Roger alleges a contractual agreement between Aner and Mildred not to revoke their joint and mutual will as the basis for the constructive trust, he has the initial burden of proving that Aner and Mildred entered into such a contract. See *id.*

Contracts to make wills are governed by § 30-2351, which states:

> A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after January 1, 1977, can be established only by (1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

Section 30-2351, part of the Nebraska Probate Code, is identical to § 2-514 of the Uniform Probate Code (UPC). See, Neb. Rev. Stat. §§ 30-2201 to 30-2902 (Reissue 2008); Unif. Probate Code, rev. art. II, § 2-514, 8 (part I) U.L.A. 159

(1998). The purpose of UPC § 2-514 is to "tighten the methods by which contracts concerning succession may be proved." Unif. Probate Code, *supra*, comment, 8 (part I) U.L.A. at 160. Section 2-514 seeks to avoid the litigation generated by oral contracts not to revoke wills and allows oral testimony only if the will references the contract. *Id.* In order to prevail, Roger must meet the requirements of one of the three subsections of § 30-2351.

Undisputedly, Roger cannot produce an executed will stating the material provisions of the contract as required by § 30-2351(1). An unsigned copy of the 1982 will includes the following paragraph:

> SIXTH, Each of us solemnly promises the other that he or she will not revoke or change this Will or make any disposition of his or her property by Will, contract, gift or otherwise without at least two days' notice in writing to the other of his or her intention to do so; that any disposition of his or her property in violation of this provision shall be void. No change of any kind shall be made by the survivor affecting the disposition of this property after the first to die.

Although this language would supply the material terms of the purported contract, Roger cannot produce any evidence that Aner and Mildred actually executed the will.

Except as provided for holographic wills and wills within § 30-2331, a will must be in writing, signed by the testator, and signed by at least two individuals who witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will. See § 30-2327. Despite the fact that there is no evidence of a 1982 will which met the statutory requirements for execution, Roger attempts to explain this lack of evidence with his testimony that in 1998, Aner retrieved the sealed envelope that allegedly contained an executed copy of the 1982 will.

[4] A lost will may be proved by secondary evidence that is clear and convincing. *In re Estate of Mecello*, 262 Neb. 493, 633 N.W.2d 892 (2001). However, such evidence is completely lacking in this case. Roger offers his testimony that

Aner and Mildred gave him the copy of the 1982 will and the sealed envelope, which he claims creates the inference that the sealed envelope contained a properly executed will. We disagree. No one, not even Roger, claims to have seen an executed copy of the 1982 will or Aner's signature on the document. Brogan, whose law firm's name appeared on the envelope containing the copy of the will and who drafted all of Aner's later wills, testified that he did not remember the 1982 will and that "[i]t probably was never signed" and "it probably was never executed."

Furthermore, Roger cannot identify anyone who claims to have witnessed the 1982 will. In *In re Estate of Mecello*, we noted that even though it is not necessary to establish the identity of the two witnesses to a will, it must be proved by clear and convincing evidence that, in fact, two individuals did witness the signing of the will or the acknowledgments of the signatures. See, also, *In re Estate of Thompson*, 214 Neb. 899, 336 N.W.2d 590 (1983). Roger's testimony that he assumed the now-missing sealed envelope contained a properly witnessed will is not evidence that two witnesses signed the 1982 will. Because Roger did not present evidence that the 1982 will was duly executed, he has not established a contract pursuant to § 30-2351(1).

Section 30-2351(2) provides that a contract may be established by an express reference in a will to a contract and extrinsic evidence proving the terms of the contract. As this method also requires a duly executed will, Roger has not proved that Aner and Mildred entered into a contract to make a will pursuant to this subsection for the same reasons as discussed above.

The third and final method of proving a contract according to § 30-2351 is through a writing signed by the decedent evidencing the contract. See § 30-2351(3). It is undisputed that Roger cannot physically produce a writing signed by Aner evidencing the contract. Instead, Roger claims he can prove a lost contract. Roger asserts that his testimony creates the following inferences: (1) The sealed envelope contained a copy of the 1982 will that included the clause promising not to revoke, (2) Aner

and Mildred had signed the document, and (3) Aner destroyed the will after he retrieved it from Roger. Roger acknowledges that this evidence is insufficient to prove an executed will but claims that it is sufficient to establish a lost contract.

In support of his claim that his oral testimony can be used as proof of a signed writing evidencing the contract, Roger cites the comment to UPC § 2-514, which states that "[o]ral testimony regarding the contract is permitted if the will makes reference to the contract, but this provision of the statute is not intended to affect normal rules regarding admissibility of evidence." Unif. Probate Code, rev. art. II, § 2-514, comment, 8 (part I) U.L.A. at 160 (1998).

Roger's reliance on the comment to UPC § 2-514 is misplaced. The comment states that the purpose of § 2-514 is to *tighten* the methods by which contracts to make a will may be proved. It is explicit that oral testimony regarding the contract is permitted only "*if the will makes reference to the contract*." *Id.* (emphasis supplied). As discussed above, Roger cannot produce a will; therefore, pursuant to the statute, he cannot rely on his oral testimony to infer a contract. Without an executed will, Roger cannot establish a contract unless he produces a writing signed by the decedent. He has failed to provide such a writing.

Section 30-2351 specifically states that the *only* way to prove the existence of a contract to make a will or not to revoke a will or devise is by satisfying one of the three subsections. Considering the evidence in the light most favorable to Roger, there is no will or signed writing that satisfies § 30-2351. Conclusions based on guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment. *Recio v. Evers, ante* p. 405, 771 N.W.2d 121 (2009); *Marksmeier v. McGregor Corp.*, 272 Neb. 401, 722 N.W.2d 65 (2006).

Therefore, the evidence did not warrant the imposition of a constructive trust on Aner's estate. The district court did not err in granting summary judgment in favor of the copersonal representatives of Aner's estate, and we affirm the judgment of the district court.

Amendment of Pleadings

Roger sought leave to file a second amended complaint in order to reframe his claim as one in equity rather than at law and to add all of the beneficiaries of Aner's September 2003 will as parties. Although pled as a breach of contract claim, the district court acknowledged that the claim was an equitable action to impose a constructive trust and analyzed the matter as such. Because we conclude that Roger did not meet his burden of proof to overcome summary judgment, the absence of the beneficiaries of Aner's most recent will as defendants is immaterial as well. Allowing Roger to file a second amended complaint to correct this defect would serve no purpose.

CONCLUSION

Viewing the evidence in the light most favorable to Roger, we conclude that he did not present sufficient evidence to satisfy one of the three ways to establish a contract to make a will as provided by § 30-2351. Accordingly, we affirm the order of summary judgment by the district court.

Affirmed.

Nancy Conley and Todd Conley, appellants, v. Thomas Brazer and Kathy Brazer, husband and wife, et al., appellees.

772 N.W.2d 545

Filed September 4, 2009. No. S-08-974.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Appeal and Error.** The interpretation of statutes presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

4. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
5. **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 such discretion a factor in determining admissibility.
6. **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.
7. **Statutes: Words and Phrases.** The word "may," when used in a statute, will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.
8. **Constitutional Law: Jurisdiction: Injunction.** The jurisdiction of the district court to hear suits for injunction cannot be legislatively limited or controlled.
9. **Summary Judgment.** As a procedural equivalent to a trial, a summary judgment is an extreme remedy because a summary judgment may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion for summary judgment is directed.
10. ____. Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.
11. **Summary Judgment: Appeal and Error.** Where ambiguity exists in a summary judgment proceeding, an appellate court resolves such matters in favor of the nonmoving party.
12. **Appeal and Error.** An appellate court will not consider an issue on appeal that the trial court has not decided.
13. ____. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. It may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.
14. **Pretrial Procedure: Evidence: Proof.** A party that seeks to claim another party's admission, as a result of that party's failure to respond properly to a request for admission, must prove service of the request for admission and the served party's failure to answer or object to the request and must also offer the request for admission as evidence. If the necessary foundational requirements are met and no motion is sustained to withdraw an admission, the trial court is obligated to give effect to the provisions of Neb. Ct. R. Disc. § 6-336.

Appeal from the District Court for Douglas County: W. RUSSELL BOWIE III, Judge. Reversed and remanded for further proceedings.

Brian C. Doyle and, on brief, Aimee J. Haley, of Fullenkamp, Doyle & Jobeun, for appellants.

Alan M. Thelen, Deputy Omaha City Attorney, for appellee City of Omaha.

Donald P. Dworak, of Stinson, Morrison & Hecker, L.L.P., for appellees Thomas and Kathy Brazer and Paradise Pet Suites, LLC.

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

STEPHAN, J.

I. NATURE OF THE CASE

Appellants, Nancy Conley and Todd Conley, and appellees Thomas Brazer and Kathy Brazer are adjacent landowners in Douglas County, Nebraska. The Brazers applied for and received a building permit from Douglas County to construct a kennel on their property. The Conleys brought an action in the Douglas County district court to enjoin the Brazers' proposed construction. The Conleys alleged that the building permit was invalid due to deficiencies in the Brazers' application and that the county's extensions of the expiration date of the permit were not valid and effective. The district court found that the Douglas County building permit was "presumptively" valid and that therefore, the Conleys' proper recourse was to appeal to the Douglas County Board of Adjustment, not to the district court. The court granted the Brazers' motion to dismiss, and the Conleys timely appealed.

II. BACKGROUND

1. PARTIES AND PROPERTIES

The Brazers own and reside on property consisting of approximately 9.21 acres located in Douglas County. The Conleys' residential property is located immediately south of the Brazer property.

Since 1997, the Brazers have operated a dog grooming and breeding business on their property. In 2002, the business was expanded to include dog boarding; on average, one or two dogs were boarded per day. In 2003, the Brazers began developing plans to expand the boarding and grooming operation, and in 2006, they formed Paradise Pet Suites, LLC, for the purpose

of developing and operating their expanded business. By 2007, the Brazers had decided to develop a business which would include pet grooming services, a pet daycare, and private boarding services.

In February 2007, the Brazers applied for and were issued a Douglas County building permit in order to construct a new kennel on their property. At that time, their property was within the zoning jurisdiction of Douglas County. On March 1, 2007, the City of Omaha annexed Elkhorn, Nebraska, and as a result, Omaha's extraterritorial zoning jurisdiction was enlarged to include the Conley and Brazer properties. On April 18, a "Memorandum of Understanding" (MOU) was executed by a City of Omaha building official and the Douglas County director of environmental services. The MOU addresses building permits issued by Douglas County which, as of the date of annexation, were "still active" in that the projects authorized by them were in various stages of completion. The MOU provided that Douglas County inspectors would complete the inspection process on any and all permits that Douglas County issued prior to March 1, 2007, and that the City of Omaha would review requests for permits made after March 1 and issue all new permits.

2. Commencement of Litigation and Temporary Restraining Order

On March 13, 2008, soon after they first learned of the Brazers' construction plans, the Conleys filed an action in the district court for Douglas County seeking declaratory and injunctive relief to prevent any construction pursuant to the Douglas County building permit. Named defendants included the Brazers, Paradise Pet Suites, certain parties having financial interests in the Brazer property, and the construction company retained by the Brazers to build the kennel. In an amended complaint, the City of Omaha and Douglas County were added as defendants.

The Conleys alleged that the building permit issued by Douglas County was invalid for various reasons and that to proceed with their proposed construction, the Brazers were required to obtain necessary permits from the City of Omaha,

because its extraterritorial zoning jurisdiction had expanded to include the Brazer property as a result of the Elkhorn annexation. On March 14, 2008, the Conleys moved for an ex parte temporary restraining order prohibiting the Brazers from engaging in any construction activities pursuant to the permit. The district court granted the Conleys' motion and ordered that the Brazers cease and desist any construction pursuant to the February 2007 building permit issued by Douglas County.

3. Temporary Injunction

The Conleys also moved for a temporary injunction, and the district court conducted an evidentiary hearing on the motion. The following facts were established by the evidence received at that hearing:

(a) Douglas County Building Permit

On February 8, 2007, the Brazers submitted an application for a building permit to Douglas County for the construction of a "Building & Fence For Kennel." On February 9, Douglas County building inspector Mark Ekberg issued building permit No. 6664 in response to the Blazers' application.

The Douglas County zoning regulations in effect at the time of the Brazers' application required applications for building permits to be accompanied by two copies of the site plan, which should depict existing and proposed water and sanitary sewer facilities. The building permit application states that two sets of building plans and well and septic permits are required.

As a building inspector for Douglas County, Ekberg receives all building applications and conducts all building inspections and plan reviews. According to Ekberg, when an application for a building permit is received, the permit is issued even if all of the required information has not been submitted. If an incomplete application is submitted, Ekberg conducts a "plan review," which results in a document that states all the items that must be addressed prior to actual commencement of construction. If the items on a plan review are not addressed prior to construction, Ekberg "issue[s] a stop order."

Ekberg's plan review for the Brazer project, which bears the same date as the building permit, notes that the permit

was conditional upon the completion of several items, including a requirement that the Brazers obtain well and sanitary sewer permits through the Douglas County Health Department. Ekberg testified that the Brazers did not prepare and submit any site plans for their project, nor did they submit any proof of a septic permit, even though the application states that site plans and permits were required.

The supervisor of sanitary engineering for the Douglas County Health Department testified that he supervises permits for septic systems and wells and that no permit has been applied for or issued for the Brazer property. According to the supervisor, there is no septic system available on the Brazers' site, and a septic permit would be required to construct one. He testified that according to Douglas County zoning regulations, "the septic and well permit has to be issued before any building permit" so that his department "can review the public health implications" of construction. The planning and zoning coordinator for Douglas County Environmental Services, who is Ekberg's supervisor, also testified that Douglas County zoning regulations require the septic permit to be issued prior to the issuance of a building permit.

Douglas County regulations, the building permit application, and the building permit issued to the Brazers state that issued permits expire after 90 days if the work described in the permit has not begun and expire after 1 year if the work has not been completed. Ekberg testified that the Brazers did not do any construction on the kennel project referred to in the permit during 2007 and did not complete the project on or before February 9, 2008. Douglas County has adopted the 2000 International Building Code, which provides that extensions of permits can be made when a written extension request demonstrates "justifiable cause." Entries in the Douglas County Environmental Services Department's "Permit Record Report" reflect that the Brazers were granted permit extensions on May 1, July 2, and December 21, 2007, and February 5, 2008. Ekberg acknowledged that the requests for extensions were made verbally by the Brazers and their contractor and that Ekberg made written notations indicating the requests were granted.

(b) Rezoning

In February 2007, the Conley property was zoned "Agriculture - Farming 2" or AF-2. The Brazer property was zoned "Agriculture - Farming 1" or AF-1. Douglas County zoning regulations in effect as of June 14, 2005, permit private and commercial kennels in an AF-1 zone, provided the facilities are at least 100 feet from the property line and 300 feet from any AF-2 zone.

On November 30, 2007, the Brazers applied to the City of Omaha for rezoning of their property from Douglas County AF-1 to City of Omaha "Development Reserve," or DR district. With a conditional use permit, a kennel is permitted in a DR district. On December 3, the Brazers applied to the City of Omaha Zoning Board of Appeals for a waiver to split their 9.21 acres of real property into two lots. The first proposed lot was 2.01 acres and included the existing Brazer residence and outbuildings. The second proposed lot was 7.20 acres; it contained no improvements and is the site of the Brazers' proposed construction. The waiver application stated that the Brazers were "[r]equesting a lot split that doesn't meet the code under Douglas County Regs but does under City of Omaha DR zoning." Both applications were approved by the City of Omaha. The property was rezoned to a DR district and split into two lots. On December 31, the Brazers deeded the second lot to Paradise Pet Suites.

Following the evidentiary hearing, the district court entered an order finding that "the Conleys may be entitled to the relief sought." The court entered a temporary injunction in order to maintain the status quo, which it described as "not having a kennel built on . . . the Brazer's [sic] property pending the outcome of the litigation." The court conditioned the temporary injunction on the Conleys' posting a bond in the amount of $1,000.

4. Motions to Dismiss

The City of Omaha and Douglas County were joined in the case as defendants in an amended complaint filed after entry of the temporary injunction. The City of Omaha filed an answer in which it admitted that the Brazer property fell

within its 3-mile extraterritorial zoning jurisdiction by virtue of its annexation of Elkhorn on March 1, 2007. Douglas County filed an answer asserting various defenses, including that the Conleys' claim was barred by their failure to file an appeal to the Douglas County Board of Adjustment pursuant to Neb. Rev. Stat. § 23-168.02 (Reissue 2007). The county also raised this issue in a motion to dismiss.

The Brazers and Paradise Pet Suites, hereafter collectively referred to as "the Brazers," moved to dismiss on the grounds that the Conleys failed to state a claim upon which relief can be granted and that the district court was without subject matter jurisdiction because the Conleys had not "exhausted the requisite administrative remedies and appeal process." The Brazers also filed a motion to vacate the temporary injunction and determine damages resulting from its issuance and filed a motion to increase the amount of the bond.

The district court conducted an evidentiary hearing on the motions filed by the Brazers and the county. The Brazers offered evidence relating to all three motions. This evidence included affidavits of Kathy Brazer, Ekberg, and the president of the construction company retained by the Brazers. The Conleys objected to this evidence, and the court reserved ruling. The Brazers also offered five exhibits which had been received at the temporary injunction hearing, which the court received.

The Conleys offered several exhibits, including exhibit 65, a copy of a conditional use permit application submitted by the Brazers to the City of Omaha on May 12, 2008. The Brazers objected on grounds of relevance, hearsay, and lack of foundation, and the district court reserved ruling. The Conleys also offered a transcript of testimony from the temporary injunction hearing and all exhibits received at that hearing. The Brazers' counsel, who said he had not yet seen the transcript, objected on grounds of hearsay, lack of foundation, and legal conclusion, and the court reserved ruling. No parties objected to the offer of exhibits previously received, and while the record is somewhat ambiguous, it is our understanding that they were received. The Conleys requested and were given leave to conduct additional discovery and offer additional evidence in

response to the motions. The court granted the Conleys' motion and continued the hearing, noting that the Brazers' motion to dismiss should be treated as a motion for summary judgment, because evidence had been offered in support of the motion to dismiss and all parties should have an opportunity to offer evidence pertinent to the motion.

At the close of this hearing, the court took the county's motion to dismiss under advisement. In an order entered July 14, 2008, the court overruled this motion, concluding that an appeal pursuant to § 23-168.02 was not the Conleys' exclusive remedy for the reasons discussed in our opinion in *Johnson v. Knox Cty. Partnership*[1] and the authority provided by Neb. Rev. Stat. § 23-114.05 (Reissue 2007).

At the continued hearing on the Brazers' motions held on August 12, 2008, the Conleys offered additional evidence, including an affidavit of their attorney stating that the Brazers had not responded to requests for admissions, copies of which were attached to the affidavit. The Brazers objected on the ground of relevance, and the court reserved ruling.

In an order entered on September 5, 2008, the district court received certain exhibits on which it had reserved ruling, including the transcript of testimony at the temporary injunction hearing. The order stated that the court would not receive two exhibits offered by the Conleys: exhibit 65, the conditional use permit application, and exhibit 68, the affidavit of counsel regarding requests for admissions. The court granted the Brazers' motion to dismiss, reasoning that the Conleys did not appeal the issuance of the building permit pursuant to § 23-168.02, that the building permit was "presumptively valid" on the date that Omaha's zoning jurisdiction was extended by the Elkhorn annexation, and that the Brazers had met their burden of demonstrating no genuine issue of material fact and entitlement to judgment as a matter of law. The district court therefore vacated the temporary injunction and dismissed the case as to all defendants.

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[1] *Johnson v. Knox Cty. Partnership*, 273 Neb. 123, 728 N.W.2d 101 (2007).

The Conleys perfected this timely appeal, which we moved to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[2]

III. ASSIGNMENTS OF ERROR

The Conleys assign, restated and consolidated, that the district court erred in (1) granting summary judgment to the Brazers and dismissing their complaint, (2) finding that after March 1, 2007, the Douglas County Board of Adjustment had authority over the Brazers' building permit and authority to hear the Conleys' appeal, (3) finding that the Conleys were required to appeal to the Douglas County Board of Adjustment, (4) finding that the building permit issued by Douglas County was valid and created grandfather rights for the Brazers, (5) finding that the building permit allowed for retail sales and pet grooming, (6) finding that the MOU between Douglas County and the City of Omaha was valid, (7) dissolving the temporary injunction granted to the Conleys, (8) finding there was no evidence of zoning violations by the Brazers, and (9) refusing to admit exhibits 65 and 68.

IV. STANDARD OF REVIEW

[1,2] The district court correctly treated the Brazers' motion to dismiss as a motion for summary judgment, because evidence was presented by the parties and received by the court.[3] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[4] In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted,

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[2] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

[3] See, *Crouse v. Pioneer Irr. Dist.*, 272 Neb. 276, 719 N.W.2d 722 (2006); *Wise v. Omaha Public Schools*, 271 Neb. 635, 714 N.W.2d 19 (2006).

[4] *Jardine v. McVey*, 276 Neb. 1023, 759 N.W.2d 690 (2009).

and gives that party the benefit of all reasonable inferences deducible from the evidence.[5]

[3] The interpretation of statutes presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[6]

[4] An action for injunction sounds in equity. In an appeal of an equity action, an appellate court tries the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.[7]

[5,6] 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 such discretion a factor in determining admissibility.[8] 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.[9]

V. ANALYSIS

1. Appeal to Douglas County Board of Adjustment Not Required

The Brazers argue that Neb. Rev. Stat. §§ 23-168.01 to 23-168.04 (Reissue 2007), which generally address the authority of county boards of adjustment, provide the exclusive procedure for challenging decisions relating to building permits. They argue that to challenge the validity of a building permit, one must first file a complaint with a zoning enforcement officer, whose decision may be appealed to a board of

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[5] *Id.*

[6] *Vokal v. Nebraska Acct. & Disclosure Comm.*, 276 Neb. 988, 759 N.W.2d 75 (2009).

[7] *Hogelin v. City of Columbus*, 274 Neb. 453, 741 N.W.2d 617 (2007).

[8] *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008); *Rankin v. Stetson*, 275 Neb. 775, 749 N.W.2d 460 (2008).

[9] *Sturzenegger v. Father Flanagan's Boys' Home, supra* note 8; *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 748 N.W.2d 626 (2008); *Law Offices of Ronald J. Palagi v. Howard*, 275 Neb. 334, 747 N.W.2d 1 (2008).

adjustment, which decision in turn may be appealed to the district court.

[7] Section 23-168.02(1) states that "[a]n appeal to the board of adjustment *may* be taken by any person or persons aggrieved . . . by any decision of an administrative officer or planning commission." (Emphasis supplied.) The word "may," when used in a statute, will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.[10] The plain language of § 23-114.05 establishes that an appeal to a board of adjustment is not the exclusive remedy for challenging a land use alleged to be in violation of zoning regulations. Section 23-114.05 states in relevant part:

> *In addition to other remedies*, the county board or the proper local authorities of the county, as well as any owner or owners of real estate within the district affected by the regulations, may institute any appropriate action or proceedings to prevent such unlawful construction . . . or to prevent the illegal act, conduct, business, or use in or about such premises.

(Emphasis supplied.)

Our prior decisions support the view that an aggrieved party may use § 23-114.05 to seek injunction of land use in violation of regulations. In *Johnson v. Knox Cty. Partnership*,[11] landowners brought an action against the operator of a nearby cattle confinement facility and the owner of the land on which it operated, alleging that the facility violated county zoning regulations and constituted a private nuisance. While the landowners did not specifically invoke § 23-114.05, we noted that their complaint "includes factual allegations which, if proved, would entitle them to relief under this statutory remedy."[12] However, we agreed with the determination of the district court that the evidence did not support recovery under this theory.

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[10] *Pepitone v. Winn*, 272 Neb. 443, 722 N.W.2d 710 (2006); *State v. County of Lancaster*, 272 Neb. 376, 721 N.W.2d 644 (2006).

[11] *Johnson v. Knox Cty. Partnership, supra* note 1.

[12] *Id.* at 130, 728 N.W.2d at 107.

Similarly, in *Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc.*,[13] the Omaha Fish and Wildlife Club, Inc., filed a petition in district court seeking to enjoin the establishment by Community Refuse, Inc., of a solid waste disposal area on land owned by the county but not zoned for such a purpose. Community Refuse argued that the court was divested of jurisdiction by Nebraska's Environmental Protection Act, which governs operations relating to solid waste disposal. We disagreed, stating:

> The statute pertaining to injunctions against a violation of a county zoning ordinance is clear. There must be such a procedure, because § 23-114.05 enacts it. In this way, county zoning ordinances are self-policing. Not only can the county officials begin a suit, but other "affected" owners of real estate also can do so.[14]

[8] As "affected" owners of real estate, the Conleys were authorized by § 23-114.05 to bring an action to enjoin what they alleged to be a violation of Douglas County zoning regulations by the Brazers, specifically, the construction of the kennel pursuant to a building permit which the Conleys alleged was improperly issued, had expired, or both. This remedy is independent of the remedies offered by §§ 23-168.01 to 23-168.04. Further, as we noted in *Omaha Fish and Wildlife Club, Inc.*, the jurisdiction of the district court to hear suits for injunction "cannot be legislatively limited or controlled."[15]

We briefly note that two cases cited by the Brazers do not support their position that the Conleys were required to appeal the issuance of the building permit to the Douglas County Board of Adjustment instead of or as a prerequisite to suing for an injunction. In *Hanchera v. Board of Adjustment*,[16] we discussed the limited scope of judicial review of an appeal from a decision of a board of adjustment. The opinion does not

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[13] *Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc.*, 208 Neb. 110, 302 N.W.2d 379 (1981).

[14] *Id.* at 112, 302 N.W.2d at 380.

[15] *Id.*, citing Neb. Const. art. V, § 9.

[16] *Hanchera v. Board of Adjustment*, 269 Neb. 623, 694 N.W.2d 641 (2005).

address the question of whether an action for injunction could be maintained as an alternative remedy. The Brazers also argue that the legislative history discussed in *Niewohner v. Antelope Cty. Bd. of Adjustment*[17] shows that the Legislature intended that §§ 23-168.01 to 23-168.04 provide the exclusive procedure for challenging decisions relating to building permits. But the statements by the bill's introducer quoted in *Niewohner* refer to a board of adjustment as "'*an* avenue of appeal'" or "'*an* appeal mechanism.'"[18] The opinion itself and the legislative history quoted therein do not suggest boards of adjustment are the exclusive remedy for challenging zoning decisions or permits.

Accordingly, we conclude that the Conleys were not required to appeal issuance of the building permit to the Douglas County Board of Adjustment because under § 23-114.05, they may petition the district court for injunctive relief directly. Having determined that the Conleys' petition was properly before the district court, we now turn to the merits of their claim.

2. Genuine Issues of Material Fact Precluded Summary Judgment

[9-11] As a procedural equivalent to a trial, a summary judgment is an extreme remedy because a summary judgment may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion for summary judgment is directed.[19] Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.[20] Where ambiguity exists in a summary judgment proceeding, an appellate court resolves such matters in favor of the nonmoving

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[17] *Niewohner v. Antelope Cty. Bd. of Adjustment*, 12 Neb. App. 132, 668 N.W.2d 258 (2003) (superseded by statute).

[18] *Id.* at 137, 668 N.W.2d at 262, 263 (emphasis supplied).

[19] *State ex rel. Wagner v. Gilbane Bldg. Co.*, 276 Neb. 686, 757 N.W.2d 194 (2008); *Fossett v. Board of Regents*, 258 Neb. 703, 605 N.W.2d 465 (2000).

[20] *Sweem v. American Fidelity Life Assurance Co.*, 274 Neb. 313, 739 N.W.2d 442 (2007).

party.[21] Mindful of these principles and our standard of review requiring that we consider the evidence in a light most favorable to the nonmoving parties, in this case the Conleys, we conclude that there are genuine issues of material fact which preclude summary judgment.

(a) Issuance of Building Permit

Section 24 of the Douglas County zoning regulations in effect at the time of the Brazers' application states that written application for building permits "shall be accompanied by plans in duplicate, drawn to scale, showing . . . existing and proposed water and sanitary sewer facilities, as may be necessary to determine and provide for the enforcement of this regulation." The building permit application states: "Include drawing of proposed building - dwelling requires two sets of plans (well & septic permit also required)."

Ekberg testified that the Brazers submitted a "set of plans" for the building with their building permit application, but did not prepare and submit any site plans. A May 1, 2007, comment in the "Permit Record Report" for the Brazers' permit notes that someone from the construction company came to the permit office to request an extension of the building permit and that while there, "present[ed] a site plan version of project." The record does not reflect whether this "site plan version" would have been sufficient to meet the building permit application requirements, and the site plan presented at that time is not in the record.

A series of Douglas County authorities, including Ekberg, his supervisor, and the supervisor of sanitary engineering for the Douglas County Health Department, testified that well and sewer permits were required prior to the issuance of a building permit. Ekberg testified that the Brazers did not submit any proof of obtaining a septic permit with their building permit application, and the supervisor of sanitary engineering testified that no permit has been applied for or issued for the Brazer property.

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[21] *Controlled Environ. Constr. v. Key Indus. Refrig.*, 266 Neb. 927, 670 N.W.2d 771 (2003).

According to Ekberg, building permits are granted as a matter of course when an application is made and any deficiencies in the application result in a "plan review." In the Brazers' case, Ekberg's plan review noted that the Brazers needed to obtain well and sanitary sewer permits through the Douglas County Health Department, among other things. Despite Ekberg's testimony that it was customary for his office to issue a building permit before all preliminary requirements were met with the understanding that no construction would begin until that time, Douglas County zoning regulations do not specifically provide for such a system.

Viewing these facts in the light most favorable to the Conleys, we conclude that a material issue of fact exists as to whether the Douglas County building permit was valid when issued.

(b) Extension of Building Permit

Section 24 of the Douglas County zoning regulations states:

> Except where an extension has been obtained in writing from the Building Inspector, permits issued shall expire within ninety (90) days if the work described in the permit has not begun or the use applied for has not been established and within one year if the work has not been completed.

The building permit application includes a similar statement. Section 105.3.2 of the 2000 International Building Code adopted by Douglas County states that a "building official is authorized to grant one or more extensions of time for additional periods not exceeding 90 days each. The extension shall be requested in writing and justifiable cause demonstrated."

The Brazers' builder testified that no construction took place in 2007 and that construction was set to commence in March 2008, but was halted by the injunction. Ekberg testified that the Brazers did not do any construction under the permit in 2007 and did not complete the project on or before February 9, 2008, 1 year after the building permit had been issued. Ekberg's testimony regarding requests for extension of the building permit is at best ambiguous, but can be construed to mean that he received only oral requests for extensions of the building permit from the Brazers' contractor. Viewing these facts in the light most favorable to the Conleys, we conclude that a

material issue of fact exists as to whether the Douglas County permit was validly extended by the Brazers.

(c) Alleged Zoning Violations

According to the Douglas County zoning regulations in effect at the time of the Brazers' permit application, "Private and Commercial kennel and facilities for the raising, breeding and boarding of dogs and other small animals" are permitted in an AF-1 zone "provided that all buildings and facilities be at least 100 feet from the property line and 300 feet from any AF-2 . . . District." Ekberg testified that when reviewing an application for a building permit, he will not "normally" issue a building permit to someone who has an existing zoning violation on their property. He also testified that at the time he issued the building permit to the Brazers, he was not aware that they had an existing kennel and grooming operation in their home within 300 yards of an AF-2 zone. He explained that had he been aware of a violation at the time, he would have issued the building permit only if the existing violation was eliminated.

A plat prepared by a surveyor at the request of the Brazers suggests their grooming and boarding operation, as it existed at the time they applied for the building permit, was located within 200 feet of the southern Brazer-Conley property line. This evidence presents a genuine issue of material fact bearing upon whether the building permit was lawfully issued and extended. Viewed in a light most favorable to the Conleys, there is evidence from which an inference could be drawn that the Brazers were in violation of zoning regulations at the time of the issuance of the building permit.

In summary, we conclude that the district court erred in granting a summary judgment of dismissal because there are genuine issues of material fact which preclude the extreme remedy of summary judgment.

3. Other Assignments of Error

[12] An appellate court will not consider an issue on appeal that the trial court has not decided.[22] We do not read the order

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[22] *Pennfield Oil Co. v. Winstrom*, 276 Neb. 123, 752 N.W.2d 588 (2008).

of the district court as ruling on the legality or applicability of the Douglas County-City of Omaha MOU, and we therefore do not reach that issue.

[13] An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. It may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.[23] Because we have determined that entry of summary judgment was reversible error, we are not obligated to address the Conleys' remaining assignments of error. However, we exercise our discretion to address the issues involving the admissibility of counsel's affidavit regarding the failure of the Brazers to respond to requests for admission.

According to Neb. Ct. R. Disc. § 6-336(a),

> [t]he matter is admitted unless, within thirty days after service of the request [for admissions], or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter . . . .

Section 6-336(b) states in part, "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission."

[14] A party that seeks to claim another party's admission, as a result of that party's failure to respond properly to a request for admission, must prove service of the request for admission and the served party's failure to answer or object to the request and must also offer the request for admission as evidence.[24] If the necessary foundational requirements are met and no motion is sustained to withdraw an admission, the trial court is obligated to give effect to the provisions of § 6-336.[25]

In *City of Ashland v. Ashland Salvage*,[26] we determined that a copy of the requests for admissions and an affidavit of one

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[23] *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004).

[24] *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006).

[25] *Id.*

[26] *Id.*

of the city's attorneys setting forth (1) the date on which the city served its requests and (2) the appellant's failure to provide timely responses to these requests were sufficient foundation. The same foundation was offered here.

On July 10, 2008, the Conleys served their first set of interrogatories, requests for production of documents, and requests for admissions. On August 7, the Brazers filed a motion for a 30-day extension of discovery deadlines to respond to interrogatories, requests for production of documents, and the requests for admissions which are the subject of exhibit 68. On August 12, at the summary judgment hearing, the Conleys' attorney offered as exhibit 68 her affidavit stating the date on which the requests were served and that as of August 12, no response had been made. The Brazers' motion for an extension of discovery deadlines was pending when the district court entered its final order, in which it denied the Brazers' motion as moot.

The Brazers objected to the affidavit on the ground of relevance. The district court's order states that exhibit 68 was not received, without providing any explanation for its ruling. We cannot determine from the record whether the relevance objection pertained to the subject matter of the requests for admission or to a contention that the matters were not deemed admitted because of the pending motion for extension of time to respond, or for any other reason. As to the former, we note that some or all of the matters on which the Conleys requested admissions are clearly relevant to the issues in this case. We express no opinion as to whether those matters are deemed admitted by the fact that the Brazers had not responded to the requests for admission as of the date of the affidavit. That determination should be made by the district court in the first instance on remand.

The Conleys also assign as error the district court's dissolution of its temporary injunction enjoining the Brazers from proceeding with their planned construction. The district court dissolved the temporary injunction based on the same reasoning that supported its entry of summary judgment. As explained above, we find that reasoning was erroneous. But whether the injunction should be reinstated is a question that depends on

facts that may not be reflected in the record currently before us. Therefore, while we agree with the premise of the Conleys' argument, we decline to order that the injunction be reinstated. Instead, whether the temporary injunction should be reinstated is a matter left to the district court's discretion following remand, and we express no opinion on the matter.

VI. CONCLUSION

We conclude that the Conleys were entitled to seek injunctive relief without first resorting to the appeal procedure set forth in §§ 23-168.01 to 23-168.04. We further conclude that the district court erred in granting summary judgment to the Brazers, Paradise Pet Suites, Douglas County, the City of Omaha, and the other named defendants because there are genuine issues of material fact pertaining to the Conleys' requests for injunctive and declaratory relief. We therefore reverse the judgment of the district court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

McCORMACK, J., participating on briefs.
WRIGHT, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. KRISTINE D. CORCORAN FRYE, RESPONDENT.

771 N.W.2d 571

Filed September 4, 2009. No. S-09-139.

Original action. Judgment of suspension.

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

PER CURIAM.

INTRODUCTION

Respondent, Kristine D. Corcoran Frye, was admitted to the practice of law in the State of Nebraska on April 8, 1983, and at all times relevant, was engaged in the private practice of law

in Des Moines, Iowa. On February 9, 2009, the Counsel for Discipline filed formal charges against respondent. The formal charges set forth three counts that included charges that respondent violated the following provisions of the Nebraska Rules of Professional Conduct: Neb. Ct. R. of Prof. Cond. § 3-505.5 (unauthorized practice of law; multijurisdictional practice of law), § 3-508.1 (bar admission and disciplinary matters), and § 3-508.4 (misconduct). Respondent was also charged with violating Neb. Ct. R. § 3-321 (reciprocal discipline), as well as her oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 2007).

On May 18, 2009, respondent filed a conditional admission under Neb. Ct. R. § 3-313, in which she knowingly did not challenge or contest the facts set forth in the formal charges and waived all proceedings against her in connection therewith in exchange for a stated form of consent judgment of discipline outlined below. Upon due consideration, the court approves the conditional admission.

FACTS

In summary, the formal charges stated that respondent maintained an inactive membership in the Nebraska State Bar Association until December 31, 2003. In July 2004, the Nebraska Supreme Court suspended respondent from the practice of law in Nebraska for nonpayment of her bar association dues. The formal charges stated that on August 28, 2008, respondent filed four lawsuits in the district court for Lancaster County as follows: "*John Davis v. Jackie Luden*, CI-08-3849; *Tax Properties, Inc. v. Marcella Barber*, CI-08-3850; *Christine Frank v. Icye Herman*, CI-08-3851; and, *John Davis v. Edna M. Smith*, CI-08-3852." When the judges assigned to the cases became aware that respondent was a suspended member of the Nebraska bar, the judges dismissed the cases sua sponte.

Count I of the formal charges alleges that based on these facts, respondent had violated §§ 3-505.5 and 3-508.4 and her oath of office as an attorney licensed to practice law in the State of Nebraska.

After being advised of these facts, the Counsel for Discipline sent respondent a letter via certified mail on September 2,

2008, at her Des Moines office. The letter advised respondent that a grievance had been filed against her for engaging in the unauthorized practice of law. The Counsel for Discipline directed respondent to submit an appropriate written response to the grievance within 15 working days pursuant to Neb. Ct. R. § 3-309(E). This letter was signed as received on September 4. By October 10, respondent had not submitted any written response to the Counsel for Discipline, so a reminder letter was sent to her. By October 29, the respondent still had not replied to the Counsel for Discipline, so another reminder letter was sent via certified mail to her Des Moines office address. The return receipt for this letter was signed on October 31. As of February 9, 2009, the date the formal charges were filed, respondent had not responded to the Counsel for Discipline's request.

Count II of the formal charges alleges that respondent's failure to respond to the Counsel for Discipline's inquiries was in violation of §§ 3-309(E) and 3-508.1 and Neb. Ct. R. § 3-303(B), and a violation of her oath of office as an attorney licensed to practice in the State of Nebraska.

During the course of its investigation, the Counsel for Discipline became aware that respondent had been the subject of disciplinary actions in Iowa for failing to respond to inquiries by the Iowa Supreme Court Attorney Disciplinary Board and failing to comply with the Iowa Supreme Court's rules on continuing education. Respondent did not advise the Counsel for Discipline of the Nebraska Supreme Court of these disciplinary actions.

Count III of the formal charges alleges that the failure to advise the Counsel for Discipline of these disciplinary actions was in violation of § 3-321 and a violation of her oath of office as an attorney licensed to practice law in the State of Nebraska.

ANALYSIS

Section 3-313 provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated

> form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to her conditional admission, respondent knowingly does not challenge the allegations in the formal charges in exchange for a suspension of 90 days, and upon reinstatement, to probation for 1 year from the entry of the order of reinstatement, subject to monitoring by an attorney licensed to practice in the State of Nebraska who shall be approved by the Counsel for Discipline. Respondent agreed that her monitoring should be subject to the following terms:

(1) Respondent shall provide the monitor with a monthly list of cases for which respondent is currently responsible, which list shall include the following information for each case: (a) date attorney-client relationship began, (b) general type of case, (c) date of last contact with client, (d) last type and date of work completed on file, (e) next type of work and date that work should be completed on case, and (f) any applicable statute of limitations and its date.

(2) During the first 6 months of the probation, respondent will personally meet with the monitor on a monthly basis to review the case list and the status of the cases.

(3) Respondent will review with the monitor respondent's office practices and continue to work to develop efficient office procedures that protect the clients' interests.

(4) The monitor shall have the right to contact respondent with any questions the monitor may have regarding respondent's then-pending cases. If at any time the monitor believes respondent has violated the Nebraska Rules of Professional

Conduct or has failed to comply with the terms of probation, the monitor shall report such violation or failure to the Counsel for Discipline.

Pursuant to § 3-313, and given the conditional admission, we find that respondent knowingly does not challenge or contest the formal charges, which we now deem to be established facts, and we further find that respondent violated conduct rules §§ 3-505.5, 3-508.1, and 3-508.4, and disciplinary rules §§ 3-303(B), 3-309(E), and 3-321, as well as her oath of office as an attorney licensed to practice law in the State of Nebraska. Respondent has waived all additional proceedings against her in connection herewith, and upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Based on the conditional admission of respondent, the recommendation of the Counsel for Discipline, and our independent review of the record, we find by clear and convincing evidence that respondent has violated §§ 3-505.5, 3-508.1, and 3-508.4 of the Nebraska Rules of Professional Conduct, and §§ 3-303(B), 3-309(E), and 3-321 of the disciplinary rules, as well as her oath of office as an attorney, and that respondent should be and hereby is suspended from the practice of law for a period of 90 days, effective 30 days after the filing of this opinion, after which time respondent may apply for reinstatement. Should respondent apply for reinstatement, her reinstatement shall be conditioned on respondent's being on probation for a period of 1 year following reinstatement, subject to the terms agreed to by respondent and outlined above. Respondent shall comply with Neb. Ct. R. § 3-316, and upon failure to do so, she shall be subject to punishment for contempt of this court. Respondent is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323(B) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF SUSPENSION.

PATRICIA C. TOLLIVER AND BETSYE S. MANSER, INDIVIDUALLY AND AS COPERSONAL REPRESENTATIVES OF THE ESTATE OF FRANCES L. TOLLIVER, DECEASED, APPELLANTS, V. VISITING NURSE ASSOCIATION OF THE MIDLANDS, A NEBRASKA CORPORATION, ET AL., APPELLEES.

771 N.W.2d 908

Filed September 11, 2009. No. S-08-357.

1. **Damages.** While the amount of damages presents a question of fact, the proper measure of damages presents a question of law.
2. **Appeal and Error.** An appellate court resolves questions of law independently of the determination reached by the court below.
3. **Expert Witnesses: Testimony: Appeal and Error.** An appellate court reviews for abuse of discretion a trial court's decision whether to admit or exclude an expert's testimony under the appropriate standards.
4. **Fraud.** Although fraud is often a component of other torts, including torts involving negligent conduct, the distinct tort of fraud or misrepresentation is generally an economic tort against financial interests, asserted to recover pecuniary loss.
5. **Fraud: Liability: Damages.** One who makes a fraudulent or negligent misrepresentation in a business transaction is normally liable only for the recipient's pecuniary losses.
6. **Damages: Words and Phrases.** A pecuniary loss is a loss of money or of something having monetary value.
7. **Fraud: Liability: Damages.** For misrepresentation claims, a defendant's liability for pecuniary losses is generally limited to the plaintiff's out-of-pocket losses or sometimes benefit-of-the-bargain losses, depending upon the context and type of misrepresentation.
8. **Damages: Words and Phrases.** Economic losses can include more than out-of-pocket and benefit-of-the-bargain losses. They include monetary losses for medical expenses, loss of earnings and earning capacity, funeral costs, loss of use of property, costs of repair or replacement, costs of domestic services, loss of employment, and loss of business or employment opportunities.
9. ____: ____. Noneconomic losses are nonmonetary losses, which include pain, suffering, and other losses that cannot be easily expressed in dollars and cents.
10. ____: ____. Pain and suffering are neither a pecuniary loss nor an economic loss.
11. **Damages.** A party may not have double recovery for a single injury or be made more than whole by compensation which exceeds the actual damages sustained.
12. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
13. **Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.
14. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, a trial court's admission or exclusion of evidence must unfairly prejudice a substantial right of the litigant complaining about the ruling.

15. ____: ____: ____. When substantially similar evidence is admitted without objection, an improper exclusion of evidence is ordinarily not prejudicial.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Affirmed.

David A. Domina and Linda S. Christensen, of Domina Law Group, P.C., L.L.O., for appellants.

David L. Welch and Lisa M. Meyer, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellees.

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

CONNOLLY, J.

SUMMARY

The appellants, Patricia C. Tolliver and Betsye S. Manser, are the daughters of Frances L. Tolliver and the copersonal representatives of Frances' estate (collectively the estate). Frances died while residing at Hospice House. The estate sought damages for Frances' pain and suffering while residing there. It sued Hospice House; the Visiting Nurse Association (VNA), which provided hospice care in a joint venture with Hospice House; and Tiki Mumm, a registered nurse who worked for the VNA. The estate alleged that Hospice House was negligent in caring for Frances and that it misrepresented the type of care she would receive. The district court directed a verdict against the estate's misrepresentation claims because it concluded that in a fraud action, the damages are limited to pecuniary losses. On the negligence claim, the jury awarded the estate $12,500 in damages.

The estate asks this court to adopt the Restatement (Second) of Torts § 557A.[1] It contends that adopting § 557A would allow a party who is physically harmed by a defendant's misrepresentation to recover noneconomic damages. In addition, the estate claims that the trial court erred in excluding the testimony of one of its medical experts. We decline to adopt § 557A because the damages the estate seeks were available under its negligence

[1] Restatement (Second) of Torts § 557A (1977).

theory. We further conclude that the excluded expert testimony was cumulative to other experts' testimony. We affirm.

BACKGROUND

In 2004, at the age of 85, Frances was terminally ill with cancer. Her physician ordered hospice care for Frances. She chose to have the VNA provide hospice care for her at Hospice House.

In 2004, Hospice House was licensed to provide assisted living services, not inpatient hospice services. There is a difference. An assisted living facility provides supportive services for a person's comfort, personal care, and daily living and health maintenance activities.[2] In contrast, hospice service is defined as "a person or any legal entity which provides home care, palliative care, or other supportive services to terminally ill persons and their families."[3]

Hospice House represented in its brochure that it provided licensed practical nurses, certified nursing assistants, and volunteers "in conjunction with a Hospice Team." Hospice House required its residents to select from the VNA, "Methodist," or "Alegent" as their hospice agency or team. Hospice House's service agreement required residents to agree that they were choosing palliative, not curative, care. Residents also agreed that after they consulted with their physician, the chosen hospice agency would provide their professional medical and nursing services; these services included a registered nurse as a case manager. Each resident agreed to be transferred to an appropriate place if the resident's needs exceeded services provided by Hospice House staff or the resident's chosen agency. Neither the Hospice House brochure nor the service agreement explicitly stated whether registered nurses were present daily to assess or care for patients at Hospice House. The daughters testified that Frances and they believed the care at Hospice House would include registered nurses because of these documents and the Hospice House director's statements.

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[2] See Neb. Rev. Stat. § 71-406 (Reissue 2003).

[3] See Neb. Rev. Stat. § 71-418 (Reissue 2003).

The VNA provided hospice care for Frances in her home until a room became available at Hospice House. She was a patient at Hospice House for 23 days, from June 9 until July 1, 2004, the day she died.

The Complaint

In September 2006, the estate filed its operative complaint. It generally alleged that Hospice House had misrepresented that trained professionals would be providing hospice care. It also alleged that Frances and her daughters had reasonably relied on these misrepresentations.

The estate first claimed negligence against all defendants. Specifically, it made the following allegations: (1) In October 2004, the Nebraska Department of Health and Human Services had responded to its complaint and determined that the Hospice House staff had failed to follow Frances' physician's plan of care for Frances; (2) Frances had suffered excruciating pain from June 27 until her death on July 1 because the defendants had wrongfully withheld pain medications; (3) the final 22 days of Frances' life "were filled with unnecessary and avoidable distress, discomfort and pain because of the inappropriate and insufficient care she received"; (4) Mumm's negligence was imputed to the VNA and Hospice House under the doctrine of respondeat superior; and (5) the VNA and Hospice House were independently negligent in failing to appropriately train and supervise their personnel.

The estate also labeled its second claim "negligence," but we interpret the allegations as stating a claim for negligent misrepresentation. For this claim, the estate made these allegations: (1) The VNA and Hospice House had breached a duty to truthfully disclose that Hospice House was credentialed as an assisted living facility, and Hospice House had misrepresented that the defendants provided skilled hospice care for dying persons; (2) the defendants had breached a duty to disclose that Hospice House did not train its staff in the acute care of dying persons; (3) the defendants had misled the public by holding Hospice House out as a hospice care facility; and (4) Frances and her daughters had relied on its misrepresentations to their detriment. The estate's third claim alleged the same facts but claimed that the misrepresentation was intentional.

TRIAL

At trial, much of the estate's evidence focused on the conduct of Mumm. On July 27, 2004, without observing Frances, Mumm instructed the Hospice House staff to withhold one of Frances' pain medications and to reduce another. Two medical experts testified that Mumm's conduct in changing Frances' physician's orders for medications fell below the standard of caring for dying patients who have chosen palliative care. They also testified that Mumm's conduct had caused Frances to experience increased and severe pain. One of these experts was Frances' niece, Mary Kay Gamble. Gamble is a registered nurse and nurse practitioner, with a master's degree in geriatric nursing and expertise in hospice care. She had stayed with the family for several nights before Frances' death. She testified that she observed the following additional nursing deficiencies in Frances' care: (1) poor pain assessments; (2) poor administration of liquid narcotics, so that Frances drooled out most of her medication; and (3) poor repositioning of Frances.

The court excluded part of the testimony from a third expert, James Dube, Ph.D. Dube has a doctorate in pharmacy. He testified that the nurses had failed to consult with Frances' physician regarding changes to her condition and medications. The court also allowed him to testify that the nurses did not give Frances adequate amounts of medication. But the court excluded his opinion that Frances had suffered increased pain because the nurses had not given the prescribed amount of pain medication.

After the estate rested, the defendants moved for a directed verdict and a dismissal of all claims. In addition to arguing that the evidence was insufficient to submit the claims to the jury, the defendants argued that the law limited damages for both negligent and fraudulent misrepresentation to pecuniary loss. They contended that the estate had failed to show pecuniary damages. The estate responded that because of the misrepresentations, Frances had suffered damages that included conscious pain and suffering. But the court disagreed and concluded that case law limited damages for misrepresentation to pecuniary loss and that a plaintiff could not recover damages

for pain and suffering. It dismissed the negligent and fraudulent misrepresentation claims but overruled the motion regarding the negligence claim.

Jury Instructions

At the jury instruction conference, the court determined as a matter of law that Hospice House and the VNA were joint venturers. The estate did not object to the jury instructions, but it preserved its argument regarding the court's order dismissing its misrepresentation claims.

The instructions included an uncontroverted facts section. This section informed the jury that Frances' physician had developed a plan of care for Frances that included pain management through prescription drugs. It further stated that the VNA and Hospice House were to use this plan for Frances' hospice and palliative care. Finally, this section stated that on June 27, 2004, Mumm had instructed the Hospice House staff to withhold a narcotic skin patch from Frances and instead administer a liquid narcotic medication.

Regarding the estate's claims, instruction No. 2 stated that the estate claimed Mumm was professionally negligent and had caused Frances pain and suffering through the following conduct: (1) failing to follow Frances' plan of care and instructing the Hospice House staff to withhold a narcotic skin patch, without obtaining a physician's order and without observing Frances; (2) failing to understand the absorption properties of the skin patch; (3) failing to discuss changes in Frances' pain medications with her family; and (4) using only the liquid narcotic medication to treat Frances and failing to use the maximum dose permitted. Regarding the VNA's liability, the instruction stated that the estate claimed Mumm's negligence was imputed to the VNA as Mumm's employer. Regarding Hospice House's liability, the instruction stated that the estate claimed Mumm's negligence was imputed to Hospice House as a joint venturer with the VNA.

In short, the instructions tied each defendant's negligence liability to Mumm's conduct on or after June 27, 2004, instead of Hospice House's conduct during the entire time Frances resided at Hospice House. Instruction No. 9 specifically stated

that if the jury found that Mumm was liable, then the VNA and Hospice House were also liable.

Regarding damages, instruction No. 11 informed the jurors that if they returned a verdict for the plaintiffs, they should consider only those things proximately caused by the defendants' negligence. The only item listed for consideration was "[t]he reasonable value of the physical pain and mental suffering experienced by Frances . . . , the Deceased, during her time at Hospice House."

ASSIGNMENTS OF ERROR

The estate assigns three errors:

(1) The district court erred in sustaining the defendants' motion to dismiss the estate's intentional misrepresentation and concealment claims.

(2) The district court erred in sustaining the defendants' motion to dismiss the estate's negligent misrepresentation and concealment claims.

(3) The district court erred in excluding the estate's expert's testimony.

STANDARD OF REVIEW

[1-3] While the amount of damages presents a question of fact, the proper measure of damages presents a question of law.[4] We resolve questions of law independently of the determination reached by the court below.[5] And we review for abuse of discretion a trial court's decision whether to admit or exclude an expert's testimony under the appropriate standards.[6]

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[4] See, e.g., *Toscano v. Greene Music*, 124 Cal. App. 4th 685, 21 Cal. Rptr. 3d 732 (2004); *Jackson v. Morse*, 152 N.H. 48, 871 A.2d 47 (2005). Compare, *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008); *Braesch v. Union Ins. Co.*, 237 Neb. 44, 464 N.W.2d 769 (1991), *disapproved on other grounds, Wortman v. Unger*, 254 Neb. 544, 578 N.W.2d 413 (1998).

[5] *Evertson v. City of Kimball, ante* p. 1, 767 N.W.2d 751 (2009).

[6] See *King v. Burlington Northern Santa Fe Ry. Co.*, 277 Neb. 203, 762 N.W.2d 24 (2009).

ANALYSIS

Fraudulent and Negligent Misrepresentation Claims

The estate contends that the court erred when it dismissed the estate's claims for intentional misrepresentation and intentional concealment and its claims for negligent misrepresentation and negligent concealment.

In its brief, the estate synonymously uses the terms "misrepresentation" and "concealment." It has not cited any authority recognizing a claim of "negligent concealment" in a commercial context.[7] It is true that we have recognized a claim for fraudulent concealment in a business transaction.[8] But the estate did not allege separate claims of misrepresentation and concealment, nor did the court interpret the estate's complaint as alleging separate claims. And so we will consider only whether the court's order dismissing the estate's claims for fraudulent and negligent misrepresentation was reversible error.

[4-7] Although fraud is often a component of other torts, including torts involving negligent conduct, the distinct tort of fraud or misrepresentation is generally an economic tort against financial interests, asserted to recover pecuniary loss.[9] One who makes a fraudulent or negligent misrepresentation in a business transaction is normally liable only for the recipient's pecuniary losses.[10] And a pecuniary loss is a "loss of money or of something having monetary value."[11] For misrepresentation claims, a defendant's liability for pecuniary losses is generally limited to the plaintiff's out-of-pocket losses or sometimes

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[7] Compare *Nelson v. Cheney*, 224 Neb. 756, 401 N.W.2d 472 (1987).

[8] See *Streeks v. Diamond Hill Farms, Inc.*, 258 Neb. 581, 605 N.W.2d 110 (2000).

[9] See, *United States v. Neustadt*, 366 U.S. 696, 81 S. Ct. 1294, 6 L. Ed. 2d 614 (1961); *Walsh v. Ingersoll-Rand Co.*, 656 F.2d 367 (8th Cir. 1981); *Doe v. Dilling*, 228 Ill. 2d 324, 888 N.E.2d 24, 320 Ill. Dec. 807 (2008); 2 Dan B. Dobbs, Law of Remedies § 9.1 (1993); Restatement, *supra* note 1, ch. 22, scope note.

[10] See, *Walsh, supra* note 9; *Washington Mut. Bank v. Advanced Clearing, Inc.*, 267 Neb. 951, 679 N.W.2d 207 (2004); *Harsche v. Czyz*, 157 Neb. 699, 61 N.W.2d 265 (1953); Restatement, *supra* note 1, §§ 546 and 549.

[11] Black's Law Dictionary 1030 (9th ed. 2009).

benefit-of-the-bargain losses, depending upon the context and type of misrepresentation.[12] But the estate argues that permitting plaintiffs to recover only pecuniary losses for a misrepresentation claim is contrary to § 557A of the Restatement which provides: "One who by a fraudulent misrepresentation or nondisclosure of a fact that it is his duty to disclose causes physical harm to the person or to the land or chattel of another who justifiably relies upon the misrepresentation, is subject to liability to the other."[13]

Section 557A clearly imposes liability for physical harm caused by a person's fraudulent misrepresentation or nondisclosure. But it leaves open important questions: For what loss is the defendant liable? Is liability limited to pecuniary losses? We conclude that when read consistently with its comments and other Restatement sections, § 557A provides scant support for permitting noneconomic damages.

Section 557A first appeared in the 1965 tentative draft of the Restatement.[14] In a note to that tentative draft, the American Law Institute authors stated that this section was added to permit parties to maintain an action for deceit when a misrepresentation results in physical harm. But the authors have also stated that § 557A is subject to the rules for fraudulent misrepresentations stated in §§ 525 to 551, except for § 548A.[15] Section 548A is not applicable to our analysis. Section 549, however, does apply to claims under § 557A. Section 549 sets out the measure of damages for fraudulent misrepresentations. It limits a plaintiff's recovery to pecuniary losses. And pain and suffering are not a component of pecuniary loss.

It does appear that the American Law Institute authors intended to impose greater liability on defendants when their fraudulent misrepresentations result in physical harm. The Restatement's § 525 states the liability rule for fraudulent

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[12] See, *Streeks, supra* note 8; *Burke v. Harman*, 6 Neb. App. 309, 574 N.W.2d 156 (1998). See, also, Dobbs, *supra* note 9, § 9.2(2).

[13] Restatement, *supra* note 1, § 557A at 149.

[14] See Restatement (Second) of Torts (Tentative Draft No. 11, 1965).

[15] See, *id.*; Restatement, *supra* note 1, § 557A, comment *a*.

misrepresentations. But comment *h*. states that this is not the liability rule when a misrepresentation causes physical harm and refers the reader to § 557A. In distinguishing between the pecuniary losses permitted under § 525 and the general economic losses permitted under § 557A, comment *h*. provides in part:

> This Section (and this Chapter) covers pecuniary loss resulting from a fraudulent misrepresentation, and not physical harm resulting from the misrepresentation. As to the latter, see § 557A, which also covers the economic loss deriving from the physical harm. This type of economic loss is not intended to be included in the term, pecuniary loss, as used in this Chapter.[16]

Comment *a*. to § 557A similarly provides that when physical harm occurs to a person, land, or chattel because of a person's justifiable reliance on a fraudulent misrepresentation, the defendant's "liability also extends to the economic loss resulting from the physical harm."[17] By including liability for economic loss, the authors apparently meant that a defendant would be liable for the pecuniary loss normally allowed for misrepresentations *and* for other, additional economic losses.

[8-10] Economic losses can include more than out-of-pocket and benefit-of-the-bargain losses. They include monetary losses for medical expenses, loss of earnings and earning capacity, funeral costs, loss of use of property, costs of repair or replacement, costs of domestic services, loss of employment, and loss of business or employment opportunities.[18] But economic losses are still monetary losses. And nothing in § 557A or its comments extends a defendant's liability for a fraudulent misrepresentation to noneconomic losses. In contrast to economic losses, noneconomic losses are nonmonetary losses, which include pain, suffering, and other losses that cannot be easily

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[16] See Restatement, *supra* note 1, § 525, comment *h*. at 58.

[17] See *id.*, § 557A at 149.

[18] See Neb. Rev. Stat. § 25-21,185.08 (Reissue 2008). See, also, *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003) (Gerrard, J., concurring).

expressed in dollars and cents.[19] In sum, pain and suffering are neither a pecuniary loss nor an economic loss. And remember, the estate's claims are for Frances' pain and suffering.

We recognize that some courts have permitted plaintiffs to recover noneconomic damages under a theory of intentional fraud.[20] But we do not believe permitting pain and suffering damages for a misrepresentation theory is appropriate in this case for two reasons.

[11] First, "other theories of action have been sufficient to deal with non-pecuniary damage," and resort to theory of deceit is usually unnecessary.[21] For example, here, all of the damages the estate seeks under its misrepresentation claims were alleged under its negligence claim. Second, a party may not have double recovery for a single injury or be made more than whole by compensation which exceeds the actual damages sustained.[22] The estate did not specifically allege pain and suffering damages for its misrepresentation claims. If it had, those damages would have duplicated the pain and suffering damages it claimed under its negligence cause of action.

But the estate complains that the court's instruction limited damages for Frances' pain and suffering to that which occurred in the last 5 days of her life. It is true that the court's jury instructions on the estate's negligence claim limited the defendants' negligence liability to Mumm's conduct from June 27 until July 1, 2004, the day Frances died. In the negligence instruction, the court did not specifically instruct the jury that the estate claimed Hospice House's conduct had caused Frances pain and suffering for the entire time that she was a resident. But instruction No. 11 informed the jury that it could consider Frances' physical pain and mental suffering "during her time at Hospice House." Thus, the jury arguably

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[19] See, § 25-21,185.08; *Gourley, supra* note 18 (Gerrard, J., concurring). Compare, *Poppe v. Siefker*, 274 Neb. 1, 735 N.W.2d 784 (2007); *Nelson v. Dolan*, 230 Neb. 848, 434 N.W.2d 25 (1989).

[20] See Annot., 11 A.L.R.5th 88 (1993).

[21] W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 105 at 726 (5th ed. 1984).

[22] *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001).

considered Frances' pain and suffering for the entire time that she stayed at Hospice House. To the extent that the negligence instruction failed to specifically state that the estate claimed Hospice House had been negligent even before these final 5 days, the estate failed to object and seek a clearer instruction. It now seeks to piggyback Frances' pain and suffering damages for her entire stay onto its misrepresentation claims. But, as noted, the estate alleged these damages as part of its negligence claim.

In its negligence claim, the estate alleged Frances had suffered pain during the final 22 days of her life because of "the inappropriate and insufficient care she received." It further alleged that Hospice House had breached a duty to have trained staff for the care of terminally ill persons. Yet the court submitted its jury instructions to the parties for review and gave them an opportunity to object. And despite alleging that Hospice House's negligence had caused Frances pain and suffering during her entire stay, the estate did not object that it claimed liability for pain and suffering before the period from June 27 to July 1, 2004.

[12,13] Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.[23] An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.[24] Here, the estate's failure to object and request a clearer instruction on its negligence claim does not present a compelling reason for this court to recognize pain and suffering under a misrepresentation theory. While different facts could present a compelling reason to permit noneconomic damages, they are not present here. We decline to recognize noneconomic damages for a misrepresentation claim.

Exclusion of Dube's Causation Opinion Regarding Frances' Pain Was Not Reversible Error

Dube was a pharmacist with clinical experience. The record shows that he had been a consultant to the University of

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[23] *Houston v. Metrovision, Inc.*, 267 Neb. 730, 677 N.W.2d 139 (2004).

[24] *Id.*

Nebraska Medical Center's hospice team and director of pharmacy at the medical center. The court permitted Dube to testify that the nurses did not give Frances adequate amounts of medication. He also testified that they failed to consult Frances' physician about her condition before they changed his medication orders in the last 5 days of her life. But the court sustained the defendants' objections to Dube's opinion that the nurses' failure to administer adequate medication to Frances had caused her to suffer increased pain. The defendants had objected that Dube lacked expertise and factual knowledge.

The estate argues Dube was qualified to give his opinion that Hospice House's withholding of medication had caused Frances to suffer increased pain. The defendants concede that Dube had expertise in determining "which medications are effective for specific medical conditions."[25] But they contend that the estate failed to establish foundation for Dube's opinion that withholding medication had caused Frances increased pain and suffering. They first argue that the foundation for Dube's opinion was insufficient because Dube had not personally observed Frances. In support of their argument, the defendants rely on two of Dube's statements during direct examination: (1) No one could predict the effect of pain medications on a patient and (2) their effectiveness must be assessed by observing the patient.

Yet, the defendants concede that the court allowed another expert for the estate, June Eilers, Ph.D., to give her opinion without having observed Frances. She opined that withholding the medications had contributed to Frances' increased pain. But the defendants argue that Eilers had a Ph.D. in nursing, expertise in hospice care and pain management, and experience at hospice patients' bedsides. And so it argues that in contrast to Eilers, Dube did not have the experience and expertise to give his causation opinion. We disagree.

The defendants' argument lacks consistency. They concede that Eilers, a qualified expert, without having personally observed Frances, could give a causation opinion regarding Frances' increased pain. But they contend that in Dube's case,

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[25] Brief for appellees at 30.

he could not do so because he had not personally observed Frances' response to the medications. Dube's testimony that patients must be observed to know whether pain medications are effectively working did not preclude him from giving his opinion. Ample evidence in the record shows that nurses who did observe Frances reported that she was experiencing increased pain in the period after the staff had withheld her pain medications. Dube could rely on these records. And so the issue is whether Dube was qualified to give his opinion that the staff's withholding of pain medications had substantially contributed to the increased pain nurses observed in Frances.

First, we note that although Dube's testimony showed he had training in pharmacology, the estate did not present him as a pharmacology expert; this expertise differs from having expertise in pharmacy. Pharmacology is the study of the origin, nature, chemistry, uses, and effects of drugs.[26] Pharmacy is the study of the preparation, dispensing, and proper use of drugs.[27] But Eilers, whose opinion the court admitted, was also not presented as having expertise in pharmacology. Instead, both experts based their opinions on their extensive clinical experience in observing the effects of pain medications on hospice patients.

Dube admitted that it was highly unusual for a pharmacist to be considered an expert in pain management. But he testified that he had developed his expertise by seeing patients every day while working at the University of Nebraska Medical Center. He further stated that physicians at the medical center had asked for and relied upon his personal observations of patients and recognized him as an authority on pain management. He had written about pain management and had been involved in the development of hospice care programs. He also taught others how to provide effective pain management. We conclude that the court erred in excluding Dube's causation testimony while admitting Eiler's opinion based on a similar foundation.

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[26] See Dorland's Illustrated Medical Dictionary (28th ed. 1994).

[27] See *id.*

But Hospice House argues that even if Dube's testimony was admissible, the error was not prejudicial because the testimony was cumulative. On this point, we agree.

[14,15] To constitute reversible error in a civil case, a trial court's admission or exclusion of evidence must unfairly prejudice a substantial right of the litigant complaining about the ruling.[28] When substantially similar evidence is admitted without objection, an improper exclusion of evidence is ordinarily not prejudicial.[29]

When Dube testified, Eilers and Gamble, two nurses with extensive experience and expertise in hospice care, had already testified. They testified that Mumm's instruction to withhold pain medications had breached the standard of care and caused Frances increased pain and suffering. Eilers held a doctorate in nursing, and Gamble held a master's degree. Gamble had personally observed Frances. As noted, Dube's expertise in pain management was also based on his clinical experience, which overlapped the expertise of Gamble and Eilers. On the issue of causation, his specific expertise in pharmacy did not add a new perspective to the body of evidence. Thus, we conclude that the court's exclusion of Dube's causation opinion did not prejudice the estate.[30]

CONCLUSION

We conclude that the district court did not err in failing to submit the estate's misrepresentation claims to the jury. The estate could not have sought any damages under a theory of misrepresentation additional to those it was entitled to seek under its theory of negligence. We further conclude that the court's exclusion of an expert's causation opinion did not prejudice the estate because it was cumulative to other experts' causation opinions.

AFFIRMED.

MILLER-LERMAN, J., participating on briefs.

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[28] See *Leavitt v. Magid*, 257 Neb. 440, 598 N.W.2d 722 (1999).

[29] See *id.*

[30] See *id.*

HARLEYSVILLE INSURANCE GROUP, APPELLEE, V. OMAHA GAS APPLIANCE CO., DOING BUSINESS AS RYBIN PLUMBING AND HEATING, APPELLEE, AND VICTORIA M. BECK, PERSONAL REPRESENTATIVE OF THE ESTATE OF NANCY SACHS AND SPECIAL ADMINISTRATOR OF THE ESTATE OF RICHARD SACHS, INTERVENOR-APPELLANT.

772 N.W.2d 88

Filed September 18, 2009. No. S-07-1235.

1. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the trial court.
2. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.
3. **Interventions.** An intervenor against whom a judgment has been rendered must be accorded the rights which, under like circumstances, belong to any other unsuccessful suitor.
4. ____. It is fundamental that an intervenor takes the action as he finds it and cannot secure relief that is foreign or extraneous to the action.
5. ____. An intervenor cannot widen the scope of the issues, broaden the scope or function of the proceedings, or raise questions which might be the subject of litigation but which are extraneous to the controlling question to be decided in the case.
6. **Declaratory Judgments: Justiciable Issues.** The requirements for a justiciable controversy and a direct and legal interest in the controversy by the parties are no less exacting in a case brought under the declaratory judgment statute than in any other type of suit.
7. **Courts: Jurisdiction.** A determination with regard to ripeness depends upon the circumstances in a given case and is a question of degree.
8. **Insurance: Contracts.** In construing an insurance contract, a court must give effect to the instrument as a whole and, if possible, to every part thereof.
9. ____: ____. In situations involving the interplay between primary and umbrella coverages, courts should examine the overall pattern of insurance and construe each policy as a whole.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Matthew D. Hammes and Ralph A. Froehlich, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for intervenor-appellant.

Dan H. Ketcham and Meredith J. Kuehler, of Engles, Ketcham, Olson & Keith, P.C., for appellee Harleysville Insurance Group.

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

MCCORMACK, J.

I. NATURE OF CASE

Nancy Sachs and Richard Sachs were allegedly killed by carbon monoxide poisoning after Omaha Gas Appliance Co., doing business as Rybin Plumbing and Heating (Rybin), failed to properly repair and maintain a gas boiler in their home. Victoria M. Beck is the personal representative of the estate of Nancy Sachs and special administrator of the estate of Richard Sachs, and in those capacities, she brought a negligence action against Rybin. Rybin's insurer, Harleysville Insurance Group (Harleysville), brought this declaratory judgment action against Rybin alleging that pollution exclusions preclude coverage for the alleged occurrence. Beck intervened in the declaratory judgment action and now appeals the summary judgment entered in favor of Harleysville.

Beck alleges that the district court erred in failing to appreciate the differences in the Harleysville policies between "liability" caused by a pollutant and "injury" caused by a pollutant. In response, Harleysville argues that Beck has no standing to appeal in the declaratory judgment action because Rybin chose not to appeal. We hold that Beck had standing to appeal, but affirm the order of summary judgment in favor of Harleysville.

II. FACTS

Rybin is in the business of plumbing, heating, and air conditioning. The Sachses' home was heated by radiators connected to a gas boiler system, and Rybin repaired the system after a fire occurred in the Sachses' home. Rybin conducted subsequent service checks on the boiler and eventually replaced it in 2001. Thereafter, the Sachses both died. Beck alleged that the Sachses' deaths were caused by the original boiler's leaking carbon monoxide into the home and that

Rybin had failed to conduct reasonable inspections of and repairs to the boiler.

At the time of the alleged negligent acts, Rybin had general liability and umbrella policies with Harleysville. The liability policy provided that Harleysville would indemnify Rybin for sums Rybin became obligated to pay as damages because of "'bodily injury'" "to which this insurance applies." The general liability policy contained a pollution exclusion endorsement with "Limited Coverage for Pollution From a Hostile Fire." The endorsement was in effect at all relevant time periods and stated: "This insurance does not apply to . . . '[b]odily injury' or 'property damage' which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time." "'Pollutants'" were defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

The umbrella policy stated that Harleysville would pay on behalf of Rybin the "'ultimate net loss' in excess of the 'applicable underlying limit' which the insured becomes legally obligated to pay as damages because of . . . '[b]odily injury' . . . covered by this policy." A limited pollution exclusion in the umbrella policy provided that "[t]his insurance does not apply to . . . [a]ny liability caused by pollutants excluded by 'underlying insurance.'" This provision stated further that the listed exceptions to the pollution exclusion outlined in the umbrella policy were overridden by any broader exclusion in the underlying policy. "'Underlying insurance'" was defined so as to include the liability policy, any replacement or renewal policies, and any other insurance available to the insured.

Harleysville's complaint for declaratory judgment alleged that due to the pollution exclusion in the general liability policy and the total pollution exclusion endorsement on that policy, Harleysville had "no duty to defend or indemnify or provide any coverage whatsoever to Rybin in connection with any claim . . . arising out of the alleged carbon monoxide exposure." The complaint did not specifically refer to the umbrella policy, but it was attached as an exhibit.

Beck filed a motion asking for permission to intervene in the declaratory judgment action and to be named as a party defendant. The court granted leave to intervene. Thereafter, the court granted Harleysville's motion for summary judgment, concluding that Harleysville did not have a duty to defend or indemnify Rybin in its pending litigation with Beck because carbon monoxide was a "pollutant" excluded from coverage. Because Beck had not been notified of the summary judgment proceedings, however, the court later vacated that order. Harleysville again moved for summary judgment, and Beck filed a cross-motion for summary judgment. In support of her motion for summary judgment, Beck argued that the pollution exclusion in the umbrella policy was distinct from the general liability policy and did not bar coverage for the Sachses' injuries. Beck also asserted that Harleysville was estopped from asserting any exclusion under the umbrella policy because it did not specifically address that policy in its complaint for declaratory judgment.

The court denied Beck's motion for summary judgment and again granted summary judgment in favor of Harleysville. The court explained that the language of the umbrella policy excluding coverage for "liability caused by pollutants" did not indicate that the pollutant must be the sole cause of the insured's liability or that the application of the exclusion depended on the underlying negligence of the insured. The court also found no authority for the assertion that an insurer must plead specific policy exclusions in a declaratory judgment action.

Beck moved to alter or amend the summary judgment order. Harleysville resisted, arguing, among other things, that because Rybin did not challenge the summary judgment order, Beck, as merely an intervenor, was unable to make any challenge. The court rejected this argument and found that Beck, as an intervenor, was to be accorded the rights which, under like circumstances, belong to any other unsuccessful suitor.[1] But the court found that the motion otherwise lacked merit. Beck appeals.

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[1] See *Kirchner v. Gast*, 169 Neb. 404, 100 N.W.2d 65 (1959).

III. ASSIGNMENTS OF ERROR

Beck assigns that (1) the district court erred in determining as a matter of law that the umbrella policy does not provide coverage for Rybin's negligent acts or omissions resulting in the Sachses' deaths and (2) Harleysville has waived its right to assert an exclusion under the umbrella policy by failing to plead any exclusion under the umbrella policy.

IV. STANDARD OF REVIEW

[1] The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the trial court.[2]

[2] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.[3]

V. ANALYSIS

1. Standing

[3] We first address Harleysville's jurisdictional arguments relating to Beck's standing before our court. Harleysville asserts that Beck does not have standing to appeal because the nonintervening party, Rybin, chose not to appeal. Alternatively, Harleysville asserts that Beck cannot present any arguments about the interpretation of the policies that were not also made by Rybin. Harleysville apparently hopes to bind Beck by res judicata to a judgment limiting her future ability to recover against Harleysville and, at the same time, preclude her access to the appellate courts to challenge that judgment. This we will not do. As the trial court noted, an intervenor against whom a judgment has been rendered must be accorded the rights

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[2] *Jones v. Shelter Mut. Ins. Cos.*, 274 Neb. 186, 738 N.W.2d 840 (2007).

[3] *County of Sarpy v. City of Gretna*, 267 Neb. 943, 678 N.W.2d 740 (2004).

which, under like circumstances, belong to any other unsuccessful suitor.[4]

[4] Harleysville's reliance on *State ex rel. Nelson v. Butler*[5] is misplaced. In *Butler*, we said: "An interven[o]r who is not an indispensable party cannot change the position of the original parties, or change the nature and form of the action or the issues presented therein."[6] This proposition, however, does not touch on the right to appeal an unfavorable judgment. The proposition refers to the scope of the action before the trial court and the fact that "it is fundamental that an intervenor takes the action as he finds it and cannot secure relief that is foreign or extraneous to the action."[7]

[5] In other words, "[a]n interven[o]r cannot widen the scope of the issues . . . [,] broaden the scope or function of [the] proceedings . . . [,] or raise questions which might be the subject of litigation but which are extraneous to the controlling question to be decided in the case."[8] Thus, in *Butler*, we held that the intervenors' challenge to the constitutionality of a legislative resolution improperly broadened the scope of a mandamus action in which the original parties relied upon the resolution's validity.[9] And in *Arnold v. Arnold*,[10] we held that the district court was correct in refusing to consider, in a dissolution action, a series of law actions between the intervening parents of the husband and the divorcing spouses based on various promissory notes and debts alleged to be due to the parents.

In this case, Beck did not seek to expand the scope of the original declaratory judgment action. Beck did not seek, for example, to litigate the underlying issues of negligence that

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[4] *Kirchner v. Gast, supra* note 1.

[5] *State ex rel. Nelson v. Butler*, 145 Neb. 638, 17 N.W.2d 683 (1945).

[6] *Id.* at 650, 17 N.W.2d at 691.

[7] *Arnold v. Arnold*, 214 Neb. 39, 41, 332 N.W.2d 672, 674 (1983).

[8] *State ex rel. Nelson v. Butler, supra* note 5, 145 Neb. at 650, 17 N.W.2d at 691 (citations omitted).

[9] *Id.*

[10] *Arnold v. Arnold, supra* note 7.

were pending in another action. She merely presented alternative arguments for the resolution of the central question of the declaratory judgment action—whether Harleysville's policy with Rybin excluded coverage in relation to Beck's claims.

[6] We are aware that because the underlying negligence action was not yet resolved at the time of declaratory judgment, Beck's subrogation interest, much like Harleysville's interest in resolving the issue of indemnification, depends upon the ultimate success of that action. And the requirements for a justiciable controversy and a direct and legal interest in the controversy by the parties are no less exacting in a case brought under the declaratory judgment statute than in any other type of suit.[11] An action for declaratory judgment cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain.[12]

[7] But a determination with regard to ripeness depends upon the circumstances in a given case and is a question of degree.[13] With regard to the jurisdictional aspect of ripeness, we employ a two-part test in which we consider (1) the fitness of the issues for judicial decision and (2) the hardship of the parties of withholding court consideration.[14] We have already held, in *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*,[15] that the meaning of a pollution exclusion in an insurance policy is ripe for review even before the underlying claim between the victim and the insured has been resolved. We held this to be true as to both the insurer's duty to defend in the pending suit and its duty to indemnify the insured in the event judgment is rendered

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[11] See, *City of Omaha v. City of Elkhorn*, 276 Neb. 70, 752 N.W.2d 137 (2008); *Koch v. Aupperle*, 274 Neb. 52, 737 N.W.2d 869 (2007); *Douglas Cty. Sch. Dist. 0001 v. Johanns*, 269 Neb. 664, 694 N.W.2d 668 (2005); *Ruzicka v. Ruzicka*, 262 Neb. 824, 635 N.W.2d 528 (2001); *Dobson v. Ocean Accident & Guarantee Corporation*, 124 Neb. 652, 247 N.W. 789 (1933); 26 C.J.S. *Declaratory Judgments* § 25 (2001).

[12] *City of Omaha v. City of Elkhorn, supra* note 11.

[13] See *id.*

[14] *Id.*

[15] *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112 (2001).

in favor of the plaintiff. We explained that the meaning of the language of an insurance policy was a question of law that did not turn on any facts yet to be determined in the separate suit and that the duty to defend was "bound up" in whether the policy covered indemnification for the potential damages.[16] Thus, there was a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.[17]

It is generally held that injured persons, although they lack privity of contract with the insurer, are interested and proper parties to a declaratory judgment action brought by the insurer against the insured to determine coverage as it pertains to a pending lawsuit.[18] In *American Fam. Mut. Ins. Co. v. Hadley*,[19] our consideration of an injured party's appeal from a declaratory judgment action brought by the tort-feasor's insurer is an implicit recognition of this rule and presents procedural facts very similar to the case at bar. In *Hadley*, the insurer had brought a declaratory judgment action against the insured, alleging that it had no duty to defend a pending lawsuit by the parents of the alleged victim of civil assault and battery. The insurer also alleged that it had no duty to indemnify the insured for any claim arising from that lawsuit. The parents of the injured child were allowed to intervene despite the insurer's protestations that the parents were not necessary parties and should be dismissed. Summary judgment was eventually entered in favor of the insurer, and the insured chose not to appeal. In an appeal brought by the parents from the declaratory judgment action, we addressed the meaning of the

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[16] *Id.* at 753, 635 N.W.2d at 118. See, also, *Farm Bureau Ins. Co. v. Witte*, 256 Neb. 919, 594 N.W.2d 574 (1999). Compare, *Medical Protective Co. v. Schrein*, 255 Neb. 24, 582 N.W.2d 286 (1998); *Ryder Truck Rental v. Rollins*, 246 Neb. 250, 518 N.W.2d 124 (1994); *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981).

[17] See *Nebraska Coalition for Ed. Equity v. Heineman*, 273 Neb. 531, 731 N.W.2d 164 (2007).

[18] See, generally, Annot., 142 A.L.R. 8 et seq. (1943).

[19] *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002).

merits of the parents' arguments as to the meaning of the insurance policy.[20]

We conclude that Beck has standing to bring this appeal and to present the arguments that she makes. Beck was a proper party defendant to Harleysville's declaratory judgment action alleging that it had no duty in relation to the alleged incident that killed the Sachses. While Beck presented somewhat different assertions as to why the policy should cover the incident, those did not interject any factual or legal questions extraneous to the action. The central question remained whether, as a matter of law, the pollution exclusions barred coverage. We turn now to whether the district court was correct in its interpretation of the exclusions.

2. Pollution Exclusion in Umbrella Policy

We note that Beck takes no issue with the district court's determination that a pollution exclusion precluded coverage under Harleysville's general liability policy with Rybin. Neither does Beck dispute that the carbon monoxide gases were "pollutants" as defined by the policies. Beck argues instead that the umbrella policy extended coverage to pollution occurrences excluded by the general liability policy. According to Beck, the umbrella policy excluded only coverage stemming from strict liability pollution claims, but it extended coverage for pollution-related injuries caused by negligence.

(a) Failure to Plead

Beck's first argument, however, is that Harleysville is procedurally barred from raising any exclusion under the umbrella policy. According to Beck, Harleysville "had raised the issue of no coverage under [the] umbrella [policy], but [it] didn't identify any exclusions in the umbrella [policy]." Beck points out that, generally, exclusions in insurance policies are treated as affirmative defenses and therefore must be specifically pled.[21]

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[20] See *id.*

[21] See, e.g., *Spulak v. Tower Ins. Co.*, 257 Neb. 928, 601 N.W.2d 720 (1999).

We find no merit to Beck's assertion that Harleysville is barred, by a failure to plead, from raising the pollution exclusion in the umbrella policy. Harleysville attached both policies to its complaint, and the complaint sufficiently put Rybin and Beck on notice that Harleysville was claiming it was not liable for the Sachses' deaths under either policy.[22] It is apparent that Harleysville specifically pled only the general liability policy because it believed the umbrella policy was merely a monetary supplement to the general policy that incorporated the underlying policy's pollution exclusion. As will be discussed below, we find that view to be correct.

(b) Merits

[8,9] In construing an insurance contract, a court must give effect to the instrument as a whole and, if possible, to every part thereof.[23] In situations involving the interplay between primary and umbrella coverages, courts should examine the overall pattern of insurance and construe each policy as a whole.[24] Reading the phrase, "[a]ny liability caused by pollutants excluded by 'underlying insurance,'" we find no basis for Beck's conclusion that this could reasonably be construed as providing coverage, admittedly excluded by the underlying insurance, for negligence-based pollution occurrences. Beck would distinguish this phrase from "'bodily injury caused by pollutants'"[25] or, for example, from "liability caused by negligence and involving pollutants" and would interpret it as synonymous with "bodily injury stemming from a strict liability claim." But we need not engage in Beck's extensive semantic discussion of whether the isolated phrase referring to "liability caused by pollutants" refers solely to legal obligations

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[22] See *Gies v. City of Gering*, 13 Neb. App. 424, 695 N.W.2d 180 (2005).

[23] *Travelers Indemnity Co. v. International Nutrition*, 273 Neb. 943, 734 N.W.2d 719 (2007); *Callahan v. Washington Nat. Ins. Co.*, 259 Neb. 145, 608 N.W.2d 592 (2000).

[24] *Treder ex rel. Weigel v. LST, Ltd. Partnership*, 271 Wis. 2d 771, 679 N.W.2d 555 (Wis. App. 2004). See, also, *Ill. Emcasco Ins. Co. v. Cont. Cas. Co.*, 139 Ill. App. 3d 130, 487 N.E.2d 110, 93 Ill. Dec. 666 (1985).

[25] Brief for appellant at 13.

stemming from the pollutants themselves without any human causal element. Viewing the phrase in context, it clearly conveys that the umbrella policy was not meant to provide coverage for any additional pollution occurrences excluded under the general liability policy. The umbrella policy, like the general liability policy, excluded coverage for liability occasioned by the release of pollutants—regardless of what level of human culpability was involved.

VI. CONCLUSION

We affirm the judgment of the district court in favor of Harleysville.

AFFIRMED.

GERRARD, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
KENNETH W. CLARK, APPELLANT.
772 N.W.2d 559

Filed September 18, 2009. No. S-08-735.

1. **Jurisdiction: Appeal and Error.** Subject matter jurisdiction is a question of law for the court, which requires an appellate court to reach a conclusion independent of the lower court's decision.
2. **Sentences: Time.** A sentence validly imposed takes effect from the time it is pronounced.
3. **Sentences.** When a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed.
4. **Sentences: Judges: Records.** The circumstances under which a judge may correct an inadvertent mispronouncement of a sentence are limited to those instances in which it is clear that the defendant has not yet left the courtroom; it is obvious that the judge, in correcting his or her language, did not change in any manner the sentence originally intended; and no written notation of the inadvertently mispronounced sentence was made in the records of the court.
5. **Sentences.** Pursuant to Neb. Rev. Stat. § 47-503 (Reissue 2004), a sentencing court is required to separately determine, state, and grant credit for time served.
6. ____. Credit for time served is not incorporated into a sentence such that the amount of credit given cannot be modified, amended, or revised after the sentence is put into execution.
7. **Sentences: Records.** The credit for time served to which a defendant is entitled is an absolute and objective number that is established by the record.

8. ____: ____. The exact credit for time served to which a defendant is entitled is objective and not discretionary. The court has no discretion to grant the defendant more or less credit than is established by the record.
9. ____: ____. When a court grants a defendant more or less credit for time served than the defendant actually served, that portion of the pronouncement of sentence is erroneous and may be corrected to reflect the accurate amount of credit as verified objectively by the record.

Petition for further review from the Court of Appeals, IRWIN, SIEVERS, and CARLSON, Judges, on appeal thereto from the District Court for Lancaster County, JEFFRE CHEUVRONT, Judge. Judgment of Court of Appeals affirmed.

Dennis R. Keefe, Lancaster County Public Defender, Webb E. Bancroft, and Yohance L. Christie, Senior Certified Law Student, for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

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

MCCORMACK, J.

NATURE OF CASE

The issue in this case is whether the pronouncement of a sentence of imprisonment giving an offender more credit for time served than he actually served can be corrected by the sentencing court to give the offender the appropriate amount of credit. On May 19, 2008, the district court attempted to sentence Kenneth W. Clark to 360 days in jail but incorrectly credited Clark with 361 days' time served. On June 12, the court entered a written sentencing order granting Clark credit for 61 days' time served, the amount of time actually served and reflected by the record. Clark appealed, and the Nebraska Court of Appeals affirmed. We granted Clark's petition for further review. For different reasons, we affirm.

BACKGROUND

Clark was initially charged with third degree sexual assault of a child. Clark pleaded not guilty. The State then filed an amended information charging Clark with third degree sexual

assault, a Class I misdemeanor. Clark changed his plea to no contest, and the court found him guilty.

On May 19, 2008, the court held a sentencing hearing. At the sentencing hearing, Clark's counsel made comments regarding Clark's impending sentence, including asking the court to consider the fact that Clark had served 61 days in jail. The court then sentenced Clark to 360 days in jail, but mistakenly gave him credit for 361 days of time served. Specifically, the court stated to Clark, "So it will be the order of the Court [that] you be sentenced to a period of 360 days in the Lancaster County Jail, that you pay the costs of prosecution. You will be given credit for 361 days already served." Neither party objected to or raised any issue regarding the court's pronouncement. Court was immediately adjourned, and Clark left the courtroom. The court made a computer entry in the courtroom, which stated, "Order of sentence in file. (360 days jail) (GILTY CT)," but no formal sentencing order was prepared and signed by the judge, and no commitment order was issued. Later, after Clark left the courtroom, it came to the court's attention that Clark was given more credit for time served than he actually had served.

On May 20, 2008, the court issued a written order requesting that Clark appear on May 21, 2008. The order stated,

> Because of certain irregularities in the terms of the sentence, it is ordered that [Clark] appear in this court in [sic] May 21, 2008 at 9:30 a.m.
>
> Because no written order of sentence was prepared and signed by the court, the journal entry dated May 19, 2008 stating that an order of sentence is in the file is incorrect.

The matter was continued until June 12 to give counsel an opportunity to submit legal authority to the court on whether the court could resentence Clark.

At the June 12, 2008, hearing, the court again pronounced a sentence against Clark. The court stated, "So it will be the order of the Court that . . . Clark, unfortunately for him or maybe it will turn out okay, will be sentenced to the 360 days in the Lancaster County Jail. He'll be given credit for the 61 days already served." After the hearing, the court entered a written order, dated June 12, 2008, sentencing Clark to a term

of 360 days' imprisonment and granting him 61 days' credit for time served.

In its written order, the court posed the issue in this case as whether the credit for time served is part of the "sentence" imposed by the court. The court stated:

> Often, the formal order of sentence refers merely to "credit for time served" without specifying the exact number of days. It is obvious in this case that "361 days credit" was a mistake. The presentence investigation showed 61 days credit due and counsel for Clark referred to 61 days in his comments during the proceeding. Further, no written order of sentence or commitment was ever issued by the court. . . .
>
> Therefore, this court concludes that because [there is] no written notation or order concerning the credit for time served, there is no "sentence." Further, this court finds that the fixing of credit for time served is not a part of the "sentence imposed" and could be corrected even if a written order of sentence had been entered showing the 361 days credit.

Clark appealed. The district court delayed execution of the sentence pending this appeal.

On appeal to the Court of Appeals, Clark assigned that the district court erred in modifying his sentence to reflect the actual number of days served in jail and that the district court's modified sentence was excessive and an abuse of discretion. The Court of Appeals held that the district court had authority to modify and revise Clark's sentence by removing the erroneous portion, making the proper finding of previous time served, and giving Clark credit for such time served by making the appropriate correction.[1]

ASSIGNMENT OF ERROR

Clark argues that the Court of Appeals erred in holding that the district court had jurisdiction to modify a lawfully imposed and final sentence pronounced by the court.

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[1] *State v. Clark*, 17 Neb. App. 361, 762 N.W.2d 64 (2009).

STANDARD OF REVIEW

[1] Subject matter jurisdiction is a question of law for the court, which requires an appellate court to reach a conclusion independent of the lower court's decision.[2]

ANALYSIS

Clark argues that the sentence pronounced by the district court on May 19, 2008, was a valid sentence because it was within the statutory limits and that thus, the district court erred when it "corrected" the sentence on June 12. The Court of Appeals concluded that the district court had the authority to correct its sentence. For slightly different reasons, we agree with that conclusion. We find that the sentencing pronouncement on May 19 was partially erroneous and that the district court had authority to correct the erroneous portion.

[2-4] We have said that a sentence validly imposed takes effect from the time it is pronounced.[3] And when a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed.[4] But it is possible, in limited circumstances, to correct an inadvertent mispronouncement of a valid sentence.[5] These circumstances are limited to those instances in which it is clear that the defendant has not yet left the courtroom; it is obvious that the judge, in correcting his or her language, did not change in any manner the sentence originally intended; and no written notation of the inadvertently mispronounced sentence was made in the records of the court.[6] This rule is meant to prevent this court from attempting to "'read the mind of the sentencing judge'" in cases where an entirely valid sentence

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[2] *Gilbert & Martha Hitchcock Found. v. Kountze*, 275 Neb. 978, 751 N.W.2d 129 (2008).

[3] *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000).

[4] *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006); *State v. Schnabel, supra* note 3.

[5] See, *State v. Schnabel, supra* note 3; *State v. Foster*, 239 Neb. 598, 476 N.W.2d 923 (1991).

[6] *Id.*

has been pronounced and later amended due to the judge's proclaimed inadvertence.[7]

[5,6] We have explained that pursuant to Neb. Rev. Stat. § 47-503 (Reissue 2004), a sentencing court is required to separately determine, state, and grant credit for time served.[8] The statute is intended to ensure that defendants receive all the credit against their sentence of imprisonment at the time of sentencing to which they are entitled—no less, and no more.[9] We explained in *State v. Torres*[10] that pursuant to § 47-503, credit for time served shall be set forth as part of the sentence at the time the sentence is imposed.[11] But we have not previously addressed whether an error in announcing the credit for time served is subject to correction after the sentence is imposed. We conclude that the statement that credit for time served should be set forth as "part of the sentence" simply refers to credit being given in the sentencing order or at the sentencing hearing, and does not incorporate credit for time served into the sentence such that, under *State v. Schnabel*,[12] the amount of credit given cannot be modified, amended, or revised after the sentence is put into execution.

[7-9] And the credit for time served to which a defendant is entitled is an absolute and objective number that is established by the record. Therefore, the exact credit for time served to which a defendant is entitled is objective and not discretionary. The court has no discretion to grant the defendant more or less credit than is established by the record.[13] Thus, when a court grants a defendant more or less credit for time served than the defendant actually served, that portion of the pronouncement of

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[7] *State v. Foster, supra* note 5, 239 Neb. at 601, 476 N.W.2d at 925.

[8] See, *State v. Torres*, 256 Neb. 380, 590 N.W.2d 184 (1999); *State v. Esquivel*, 244 Neb. 308, 505 N.W.2d 736 (1993).

[9] See, *State v. Gass*, 269 Neb. 834, 697 N.W.2d 245 (2005); *State v. Banes*, 268 Neb. 805, 688 N.W.2d 594 (2004).

[10] *State v. Torres, supra* note 8.

[11] See, also, *State v. Esquivel, supra* note 8.

[12] *State v. Schnabel, supra* note 3.

[13] See § 47-503.

sentence is erroneous and may be corrected to reflect the accurate amount of credit as verified objectively by the record.

Under the facts presented here, we do not have to "read the mind of the sentencing judge,"[14] because the judge was without discretion to award Clark more credit for time served than he actually served. The only available credit the court was authorized to grant Clark was 61 days, which was reflected by the record.[15] To the extent that the court gave Clark more credit for time served than he actually served, that portion of the May 19, 2008, sentencing pronouncement was unauthorized under law and erroneous.[16] Accordingly, we conclude that the district court had authority to correct the erroneous portion of its sentencing pronouncement by giving Clark the accurate amount of credit for time served as reflected by the record.

We note that our holding in this case is limited to those instances in which a sentencing court has made an error in pronouncing sentence that can be objectively corrected, and is not intended to afford the sentencing court the opportunity to reconsider its original pronounced sentence.[17]

CONCLUSION

In sum, we conclude that to the extent the May 19, 2008, sentencing pronouncement gave Clark more credit for time served than reflected by the record, it was erroneous. The district court thus had authority to correct the error in its June 12 written sentencing order to reflect the correct number of days of credit for time served, and the Court of Appeals did not err in affirming the order of the district court.

AFFIRMED.

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[14] See *State v. Foster, supra* note 5.

[15] See *State v. Banes, supra* note 9.

[16] See *State v. Sorenson*, 247 Neb. 567, 529 N.W.2d 42 (1995).

[17] See *State v. Schnabel, supra* note 3.

STATE OF NEBRASKA EX REL. PATRICK REED, APPELLANT, V. STATE OF NEBRASKA GAME AND PARKS COMMISSION ET AL., APPELLEES.

773 N.W.2d 349

Filed September 18, 2009. No. S-08-1261.

1. **Judgments: Appeal and Error.** On a question of law, an appellate court reaches a conclusion independent of the court below.
2. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case, because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.
3. **Standing: Jurisdiction.** The defect of standing is a defect of subject matter jurisdiction.
4. **Motions to Dismiss: Standing: Jurisdiction: Rules of the Supreme Court: Pleadings: Appeal and Error.** If a motion to dismiss for lack of jurisdiction is filed at the pleadings stage and the motion challenges the sufficiency of the complaint to invoke the court's jurisdiction, then the district court will review the pleadings to determine whether there are sufficient allegations to establish the plaintiff's standing. Aside from factual findings, which are reviewed for clear error, the granting of a motion to dismiss for lack of subject matter jurisdiction under Neb. Ct. R. Pldg. § 6-1112(b)(1) is subject to de novo review.
5. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court.
6. **Standing: Jurisdiction: Justiciable Issues.** As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.
7. **Standing: Municipal Corporations.** Generally, in order to have standing to bring suit to restrain an act of a municipal body, the persons seeking such action must show some special injury peculiar to themselves aside from a general injury to the public, and it is not sufficient that they have merely a general interest common to all members of the public.

Appeal from the District Court for Seward County: PAUL D. MERRITT, JR., Judge. Affirmed.

Richard L. Rice and Mathew T. Watson, of Crosby Guenzel, L.L.P., for appellant.

Jon Bruning, Attorney General, Jody Gittins, and Michelle Weber for appellees State of Nebraska Game and Parks Commission, Rex Amack, and Carey Grell.

Kile W. Johnson, of Johnson, Flodman, Guenzel & Widger, Stephen D. Mossman, of Mattson, Ricketts, Davies, Stewart & Calkins, and Bonnie J. Hostetler, of Nebraska Public Power District, for appellee Nebraska Public Power District.

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

WRIGHT, J.

NATURE OF CASE

Patrick Reed sought a writ of mandamus to compel the Nebraska Game and Parks Commission (NGPC) and its officers to prohibit the Nebraska Public Power District (NPPD) from constructing a power transmission line across Twin Lakes Wildlife Management Area (Twin Lakes). Reed also sought injunctive relief and declaratory judgments to prevent construction of the transmission line. The Seward County District Court found that Reed did not have standing and dismissed the petition without leave to amend. Reed appeals.

SCOPE OF REVIEW

[1] On a question of law, an appellate court reaches a conclusion independent of the court below. *Lamar Co. v. City of Fremont, ante* p. 485, 771 N.W.2d 894 (2009); *Pierce v. Douglas Cty. Civil Serv. Comm.*, 275 Neb. 722, 748 N.W.2d 660 (2008).

[2] Standing is a jurisdictional component of a party's case, because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court. *Lamar Co., supra*; *In re Estate of Dickie*, 261 Neb. 533, 623 N.W.2d 666 (2001).

[3] The defect of standing is a defect of subject matter jurisdiction. *Citizens Opposing Indus. Livestock v. Jefferson Cty.*, 274 Neb. 386, 740 N.W.2d 362 (2007).

[4] If a motion to dismiss for lack of jurisdiction is filed at the pleadings stage and the motion challenges the sufficiency of the complaint to invoke the court's jurisdiction, then the district court will review the pleadings to determine whether there

are sufficient allegations to establish the plaintiff's standing. *Id.* Aside from factual findings, which are reviewed for clear error, the granting of a motion to dismiss for lack of subject matter jurisdiction under Neb. Ct. R. Pldg. § 6-1112(b)(1) is subject to de novo review. *Citizens Opposing Indus. Livestock, supra.*

FACTS

Reed owns land and resides in Seward County, Nebraska. He regularly uses Twin Lakes, a wildlife management area that is also located in Seward County. Twin Lakes has been designated as a wildlife management area by NGPC and is subject to its control and protection pursuant to Neb. Rev. Stat. §§ 37-328 to 37-336 (Reissue 2008).

The Twin Lakes area contains a prairie wildflower known as the Western Prairie Fringed Orchid, which has been identified as a "threatened and/or endangered species" by the U.S. Department of the Interior and the State of Nebraska. The orchid is known to exist in seven states, including Nebraska, and one Canadian province. It is found in remnant native prairies and meadows, such as those that exist at Twin Lakes, and may go dormant for many years. NGPC and others have observed the orchid at Twin Lakes.

As the state agency charged with conservation and protection of state resources, NGPC has the authority to prevent the destruction of threatened and endangered species. NGPC also has the authority to grant easements across real estate under its control, including Twin Lakes, pursuant to § 37-330. NPPD has several easements across Twin Lakes that were granted in 1937 and 1968 to maintain a 115-kV transmission line across Twin Lakes.

NPPD has plans to begin an electric transmission line project known as the Electric Transmission Reliability Project for East-Central Nebraska (ETR Project). The ETR Project involves the construction of approximately 80 miles of 345-kV transmission line between Columbus, Nebraska, and Lincoln, Nebraska. The preferred route for this project crosses Twin Lakes. Construction of the ETR Project will require excavation 25 feet deep and large enough for a base with a 7-foot diameter to accommodate the 100- to 165-foot poles which will support

the transmission line. Reed alleges that this excavation will threaten the habitat of the orchid and will negate the primary purpose of Twin Lakes as a wildlife management area. He also claims that the ETR Project exceeds the scope of NPPD's existing easements.

Reed filed a petition in Seward County District Court alleging three causes of action. First, he sought a writ of mandamus to compel NGPC and its director to perform their statutory duties to protect Twin Lakes from harmful and unlawful intrusions by NPPD. Second, Reed sought to enjoin NGPC from issuing a new easement to NPPD for the ETR Project and from continuing the ETR Project with or without a sufficient easement. Finally, Reed requested a declaratory judgment that NPPD's existing easements were insufficient for the 345-kV transmission and that any easement for the construction of the ETR Project would destroy the habitat of the orchid and negate the primary purpose of Twin Lakes' designation as a wildlife management area.

The district court concluded that Reed did not have standing because he had not suffered any special injury peculiar to himself aside from and independent of the general injury to the public. It opined that while Reed's interests may very well involve matters of great public concern, such interests did not rise to the level described by this court in *Cunningham v. Exon*, 202 Neb. 563, 276 N.W.2d 213 (1979). Accordingly, the court dismissed the action.

ASSIGNMENT OF ERROR

Reed alleges the district court erred in determining that he lacked standing to bring this action.

ANALYSIS

The issue is whether the district court erred in dismissing Reed's petition. The court concluded that Reed lacked standing because he had not suffered any special injury peculiar to himself aside from and independent of the general injury to the public. Noting that an exception to the general rule exists when the case involves a matter of "'great public concern,'" the court found that the issue of potential harm to the natural resources

and aesthetic beauty at Twin Lakes did not constitute a matter of great public interest and concern such that Reed should be granted standing.

[5-7] Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court. *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006). Indeed, as an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf. *Lamar Co. v. City of Fremont, ante* p. 485, 771 N.W.2d 894 (2009). Generally, in order to have standing to bring suit to restrain an act of a municipal body, the persons seeking such action must show some special injury peculiar to themselves aside from a general injury to the public, and it is not sufficient that they have merely a general interest common to all members of the public. *Id.*

In the 19th and early 20th centuries, this court discussed an exception to the requirement that a litigant have a personal stake in the outcome of the controversy. We stated that if the question was one of a public right and the object of mandamus was to procure the enforcement of a public duty, the people were regarded as the real party in interest. In that situation, the individual bringing the action, the relator, did not need to show that he had any legal or special interest in the result. *City of Crawford v. Darrow*, 87 Neb. 494, 127 N.W. 891 (1910); *Van Horn v. State*, 51 Neb. 232, 70 N.W. 941 (1897); *State, ex rel., Ferguson v. Shropshire*, 4 Neb. 411 (1876). It was sufficient to show that the relator was a citizen and therefore interested in the execution of the laws. *Id.*

This exception existed only in rare cases. A public right was found to exist in *State, ex rel., Ferguson, supra*, when a resident of the sixth ward of the city of Omaha, Nebraska, filed an application for a mandamus to require a justice of the peace who was elected to the sixth ward to locate his office in the sixth ward rather than in the fourth ward. We allowed the mandamus, determining that requiring an elected official to

discharge the duties of his office in the ward in which he was elected was a legitimate general interest.

Likewise, in *The State v. Stearns*, 11 Neb. 104, 7 N.W. 743 (1881), a resident of Nance County, Nebraska, alleged that the newly appointed special commissioners responsible for counting votes to determine the location of the Nance County seat threw out a large number of votes cast in favor of Genoa and proclaimed Fullerton to be the county seat. The relator sought a mandamus to compel the commissioners to count all votes cast. Underscoring the importance of counting votes and noting that the relator was a citizen and interested in execution of the laws, we concluded that the relator had standing and awarded mandamus.

We clarified the exception to the general standing rule in *Cunningham v. Exon*, 202 Neb. 563, 276 N.W.2d 213 (1979), which presented the issue of whether the plaintiff had standing to challenge the accuracy of a constitutional amendment adopted by the electors of Nebraska. The plaintiff alleged that public officials of the State of Nebraska had erroneously omitted a portion of the Nebraska Constitution when it amended a section regarding state contracts for special education services from secular institutions. The defendants argued that the plaintiff did not have standing. They relied on other jurisdictions which held that in order to maintain an action for a declaratory judgment as to a legislative enactment, a plaintiff must show some special injury peculiar to himself aside from and independent of the general public. The action could be brought if the legislative enactment involved the expenditure of public funds or involved an illegal increase in the burden of taxation.

We recognized an exception to the standing requirement when the matter involved a great public concern that could otherwise go unchallenged. We concluded that an amendment to the Nebraska Constitution raised issues of great public interest and concern. If such an amendment could not be challenged by a citizen and taxpayer unless he had a special pecuniary interest different from the public generally, it was entirely possible that no one would have standing to challenge the amendment.

We declined to find an exception to the rule of standing in *Green v. Cox Cable of Omaha, Inc.*, 212 Neb. 915, 327 N.W.2d 603 (1982). In that case, two members of the Omaha City Council sought a declaratory judgment to avoid the award of a cable television franchise. The council members alleged that the franchise exposed the city to liabilities, but did not allege any facts in support of the claimed liabilities. We concluded that cable television did not reach the level of great public concern described in *Cunningham, supra*, and affirmed the trial court's dismissal for lack of standing.

In *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999), an Omaha registered voter and taxpayer sued, complaining that the elected mayor's appointment of the police, fire, and communications chiefs violated the Omaha home rule charter. The district court overruled the defendant's demurrer on the issue of standing. It found that police, fire, and emergency communications were essential services and that any citizen should have the right to bring suit if such services were not being provided as required by law. However, the plaintiff did not allege or identify any interest in the outcome of the litigation that was not shared by all the residents of Omaha. Because the plaintiff's generalized injury was not a sufficient interest to entitle her to bring the action, we concluded that she did not have standing and dismissed the complaint. We stated that in disputes over essential services, the proper mechanism for procuring change was through the ballot box, and not through the courts.

In *Neb. Against Exp. Gmblg. v. Neb. Horsemen's Assn.*, 258 Neb. 690, 605 N.W.2d 803 (2000), we held that a taxpayer and a nonprofit corporation organized to oppose the proliferation of gambling lacked standing to challenge the state racing commission's issuance of a license for simulcast of horse races. The alleged injury was not peculiar to the interests of the appellants, and there was no allegation of illegal expenditure of public funds or an increase in the burden of taxation. We determined that the appellants' stated interests in preventing the proliferation of gambling and having public officials act within their statutory boundaries were general interests common to all members of the public and did not rise to the level of great

public concern required by *Cunningham v. Exon*, 202 Neb. 563, 276 N.W.2d 213 (1979).

In the instant case, Reed claims that harm to the natural resources and aesthetic beauty of the state will result from the failure of state actors to uphold their statutory duties. He argues that the harm is of paramount concern to the general public and is sufficient to qualify as a matter of great public concern for purposes of conferring subject matter jurisdiction. Reed asserts that because the State would technically be the only party with standing to bring the suit, the actions of the NGPC are immunized from judicial review. If standing is not conferred upon a member of the public, Reed claims the general public would not have the ability to ensure that Twin Lakes was being adequately safeguarded by those charged with its stewardship.

Exceptions to the rule of standing must be carefully applied in order to prevent the exceptions from swallowing the rule. Other than challenges to the unauthorized or illegal expenditure of public funds, our more recent cases have narrowed such exceptions to situations where matters of great public concern are involved and a legislative enactment may go unchallenged unless the plaintiff has the right to bring the action. See, *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006); *Neb. Against Exp. Gmblg., supra*; *Cunningham, supra*.

Essentially, Reed seeks to impose upon NGPC his opinions regarding the administration of the state's wildlife management areas. By law, NGPC is charged with this responsibility. See § 37-336. Reed's claim that NGPC has breached its duties does not give Reed the right to seek relief in the courts. Such concerns are better left to the policy decisions of the legislative and executive branches. Certainly, the public has a right to influence NGPC's policies regarding the administration of the state's wildlife management areas. However, the mechanism for doing so is through our representative form of government, and not through the courts. See *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999). Reed has not shown that he has standing to bring the action.

CONCLUSION

We conclude that Reed's concern does not rise to the level of great public concern that is necessary to qualify for an exception to standing requirements. The district court was correct in dismissing Reed's cause of action for lack of standing.

AFFIRMED.

SOUTH SIOUX CITY EDUCATION ASSOCIATION, AN UNINCORPORATED ASSOCIATION, APPELLEE, V. DAKOTA COUNTY SCHOOL DISTRICT NO. 22-0011, ALSO KNOWN AS SOUTH SIOUX CITY COMMUNITY SCHOOLS, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.

772 N.W.2d 564

Filed September 25, 2009. No. S-08-1307.

1. **Commission of Industrial Relations: Appeal and Error.** Any order or decision of the Commission of Industrial Relations may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: (1) if the commission acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the commission do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.
2. **Commission of Industrial Relations: Evidence: Appeal and Error.** In an appeal from an order by the Commission of Industrial Relations regarding prohibited practices, an appellate court will affirm a factual finding of the commission if, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a preponderance of the competent evidence.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Commission of Industrial Relations: Administrative Law.** The Commission of Industrial Relations is not a court and is in fact an administrative body performing a legislative function. It has only those powers delineated by statute, and should exercise that jurisdiction in as narrow a manner as may be necessary.

Appeal from the Commission of Industrial Relations. Affirmed.

Kelley Baker and Steve Williams, of Harding, Shultz & Downs, P.C., L.L.O., for appellant.

Scott J. Norby, of McGuire & Norby, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Dakota County School District No. 22-0011, also known as South Sioux City Community Schools (District), appeals from a decision of the Commission of Industrial Relations (CIR). The CIR found that the District's board of education (Board) had committed a prohibited labor practice in its hiring of Bethany Manning as a long-term substitute teacher. The CIR ordered the District to pay Manning backpay in the amount of $6,321.37.

SCOPE OF REVIEW

[1] Any order or decision of the CIR may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: (1) if the CIR acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the CIR do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record considered as a whole. *Omaha Police Union Local 101 v. City of Omaha*, 276 Neb. 983, 759 N.W.2d 82 (2009).

FACTS

The District employed a teacher for the deaf and hard of hearing from August 2003 until the end of the 2006-07 school year, when she resigned. The District advertised the position and received three applications. Two of the applicants did not have the required certification. Manning had been employed by the District for 4 years as a substitute sign language interpreter and substitute teacher. She had certifications in deaf education, elementary education, and English as a second language. Manning also had a master's degree from the University of Northern Colorado and had previously taught in Colorado, Wyoming, and New Mexico.

Three school administrators were involved in evaluating the applicants: the student services director, the assistant superintendent, and the principal. The student services director conducted the interview with Manning and was not convinced that Manning "would be good for the job, but she was the only certified person that was available." Because there were no other certificated candidates, the student services director and the assistant superintendent decided to offer Manning a position as a long-term substitute.

The student services director sent Manning a letter on June 29, 2007, stating that she would be paid $95 per day for the first 20 days of substitute teaching. On the 21st day, Manning's pay was adjusted on the District's salary schedule to reflect her degree and experience.

During the fall semester of 2007, the District again advertised and solicited applications for the deaf educator position. Manning applied but was not hired. Instead, a previous applicant who, after the initial interview, received her degree and certification was hired for the position as a full-time teacher, with a contract commencing at the beginning of the second semester.

The South Sioux City Education Association (Association) filed a grievance on December 10, 2007, alleging that the District should have issued Manning a probationary teacher's contract as required by law. On December 11, Manning was notified that her services were no longer needed as a long-term substitute, effective December 13. The District denied the grievance, and the Association appealed to the Board, which also denied the grievance. Manning was encouraged to remain on the active substitute list and was retained as a substitute teacher. However, following the initiation of these proceedings, her name was removed from the active substitute list.

The Association commenced an action in the CIR against the District, claiming that it committed a prohibited labor practice. The Association alleged that Manning was a member of the bargaining unit represented by the Association and that she was entitled to be paid a salary and fringe benefits under the collective bargaining agreement (Agreement) between the Board and the Association. It was not disputed that Manning

replaced a permanent member of the District's certificated teaching staff who had severed her employment. Manning was not compensated as a member of the bargaining unit represented by the Association. She was compensated as a substitute teacher.

The petition alleged that the District's failure and refusal to compensate Manning as provided by the terms of the Agreement constituted a unilateral deviation in the terms of the Agreement, which deviation violated the integrity of the collective bargaining process and, as such, was a prohibited practice under Neb. Rev. Stat. § 48-824(2)(a) and (f) (Reissue 2004). The Association asked the CIR to (1) find that the District and the Board committed prohibited labor practices, (2) enter a cease-and-desist order, (3) award Manning backpay, and (4) award the Association costs and attorney fees.

The District's answer alleged that the CIR lacked jurisdiction, that the petition was time barred, and that the petition failed to state a claim upon which relief could be granted.

The parties stipulated to the following facts: (1) The Association is the recognized collective bargaining agent for all nonadministrative certificated employees of the District; (2) the Association is a labor organization as defined by Neb. Rev. Stat. § 48-801(6) (Cum. Supp. 2008); (3) the District is a political subdivision of the State of Nebraska and is an employer as the term is defined in § 48-801(4); (4) the parties entered into the Agreement for the 2007-08 school year; (5) Manning commenced her employment with the District on August 8, 2007, which was the first service day for certificated teaching staff for the 2007-08 school year; and (6) the District made no contribution or withholding for Manning's benefit to the Nebraska School Employees Retirement System.

On November 14, 2008, the CIR directed the District to cease and desist from implementing unilateral deviations from the provisions of the Agreement, including its compensation provisions. The CIR also ordered the District to reimburse Manning backpay in the amount of $6,321.37, which was equal to the difference between the amount she received for her bargaining unit duties and the amount to which she would have been entitled under the Agreement. It declined to award

attorney fees, finding that the District's actions were not willful or flagrant. The District appeals.

ASSIGNMENTS OF ERROR

The District assigns, summarized and restated, the following errors: The CIR erred in finding that (1) it had subject matter jurisdiction; (2) the factual allegations of the petition stated a claim of a prohibited practice upon which relief could be granted; (3) the claim was not time barred; and (4) Manning was a certificated employee and, therefore, a member of the bargaining unit.

ANALYSIS

[2] In an appeal from a CIR order regarding prohibited practices, an appellate court will affirm a factual finding of the CIR if, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a preponderance of the competent evidence. See *Omaha Police Union Local 101 v. City of Omaha*, 274 Neb. 70, 736 N.W.2d 375 (2007). The issues before the CIR were (1) whether the CIR had jurisdiction, (2) whether the District committed a prohibited labor practice in violation of § 48-824 by failing to compensate an employee in accordance with the 2007-08 negotiated Agreement, (3) whether the petition was time barred, and (4) whether Manning was a certificated employee and member of the bargaining unit represented by the Association.

Subject Matter Jurisdiction

[3] The District first argues that the CIR lacked jurisdiction over the subject matter of the petition and that the CIR lacked the authority to provide the relief requested by the Association. 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. *Kilgore v. Nebraska Dept. of Health & Human Servs.*, 277 Neb. 456, 763 N.W.2d 77 (2009). The District asserts that the issues raised by the Association should have been addressed in an action for breach of contract. The District argues that two cases control the issue of jurisdiction: *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979), and

Central Nebraska Education Association v. Central Technical Community College Area, 6 C.I.R. 237 (1982).

In *Transport Workers of America, supra*, the union filed a petition against the employer, claiming that the employer had refused to pay for a short-term disability benefit for employees as agreed to in a collective bargaining agreement. The parties stipulated that the only issue was whether employees who were receiving workers' compensation benefits were also entitled to receive short-term disability benefits as provided in the collective bargaining agreement.

The CIR found that the employer had breached its agreement with the union. On appeal, this court addressed whether the CIR had jurisdiction to declare the rights, duties, and obligations of the parties under an existing agreement. We determined that the CIR, as an administrative body performing a legislative function, had "no power or authority other than that specifically conferred by statute or by a construction necessary to accomplish the plain purpose" of the statutes. *Id*. at 30, 286 N.W.2d at 105.

We found no authority in the state Constitution or statutes which allowed the CIR to hear cases involving an alleged breach of contract and to grant equitable relief such as an accounting. We stated that the statutes governing the CIR provided a forum for public employers and employees to discuss wages, hours, and conditions or terms of employment without interruption of necessary public service. "It is the public interest in having uninterrupted public service that is principally sought to be protected by the creation of the [Industrial Relations] Act and not the creation of a specialty forum for the trying of breach of contract cases by public employees." *Transport Workers of America*, 205 Neb. at 32, 286 N.W.2d at 106. We reversed the judgment and remanded the cause to the CIR with directions to dismiss the petition.

In *Central Nebraska Education Association, supra*, the union sought a determination from the CIR whether nurses who were members of the bargaining unit were being paid in accord with the collective bargaining agreement.

The CIR reasoned that pursuant to this court's decision in *Transport Workers of America, supra*, once a collective

bargaining agreement had been reached and a subsequent breach of that agreement was alleged, the parties were required to litigate their disputes concerning alleged breaches of collective bargaining agreements in a court of general jurisdiction. Therefore, an action for breach of contract must be brought in a court of general jurisdiction.

Subsequently, the Legislature passed § 48-824, which states in relevant part:

> (1) It is a prohibited practice for any employer, employee, employee organization, or collective-bargaining agent to refuse to negotiate in good faith with respect to mandatory topics of bargaining.
>
> (2) It is a prohibited practice for any employer or the employer's negotiator to:
>
> (a) Interfere with, restrain, or coerce employees in the exercise of rights granted by the Industrial Relations Act;
>
> . . . .
>
> (f) Deny the rights accompanying certification or recognition granted by the Industrial Relations Act[.]

Both *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979), and *Central Nebraska Education Association v. Central Technical Community College Area*, 6 C.I.R. 237 (1982), predated the adoption in 1995 of § 48-824. In *Ewing Educ. Ass'n v. Holt Co. School Dist. No. 29*, 12 C.I.R. 242 (1996), the CIR addressed the question whether a unilateral change in a condition of employment contained in a collective bargaining agreement was a prohibited labor practice. In that case, the employer changed the terms and conditions of employment by altering the health insurance provided to union members. The union filed a petition with the CIR alleging that the employer's action was a prohibited practice. The employer argued that the question was whether the contract had been breached and whether the CIR had jurisdiction over such an issue.

In response, the CIR stated:

> That a unilateral change in a term or condition of employment contained in a collective bargaining agreement may be a breach of contract and actionable as such goes without saying. We will not determine whether a

> breach of contract has occurred in this case because we have no jurisdiction to do so. The question is whether a unilateral change in a condition of employment contained in a collective bargaining agreement is also a prohibited practice. The [union] argues that NEB. REV. STAT. § 48-824 and § 48-825 . . . grant to the [CIR] the specific statutory authority to find and declare what is known elsewhere in labor law as an unfair labor practice. We agree.

Ewing Educ. Ass'n, 12 C.I.R. at 244. The CIR determined that it had jurisdiction over the petition and that the employer had committed a prohibited practice by agreeing to provide a certain level of insurance coverage and then unilaterally changing that provision.

In the present case, the CIR concluded that § 48-824 gave the CIR jurisdiction over prohibited practices. The issue was presented whether the District's actions interfered with, restrained, or coerced employees in the exercise of rights or denied the rights accompanying recognition granted by the Industrial Relations Act, Neb. Rev. Stat. § 48-801 et seq. (Reissue 2004 & Cum. Supp. 2008). The CIR determined that the Association's petition alleged facts that were within its jurisdiction. It concluded that the Association had alleged a prohibited practice which impacted the Association. The CIR was not requested to determine whether a breach of contract occurred, but whether the District's acts constituted a prohibited practice. The CIR concluded it had subject matter jurisdiction. We agree.

The Association did not allege that the District breached its contract with Manning but that the District committed a prohibited practice under § 48-824(2)(a) and (f). It claimed that the failure and refusal of the District to compensate Manning was a unilateral deviation of the economic terms of the Agreement. The pretrial report described the first issue as whether the District committed a prohibited labor practice in violation of § 48-824 by failing to compensate Manning in accordance with the 2007-08 negotiated Agreement. Breach of contract was not alleged in the petition or stated as an issue in the pretrial report.

[4] The CIR is not a court and is in fact an administrative body performing a legislative function. *Omaha Police Union*

Local 101 v. City of Omaha, 274 Neb. 70, 736 N.W.2d 375 (2007). It has only those powers delineated by statute, and should exercise that jurisdiction in as narrow a manner as may be necessary. *Id*. Section 48-823 states that all grants of power, authority, and jurisdiction made under the Industrial Relations Act "shall be liberally construed to effectuate the public policy enunciated in section 48-802."

Industrial disputes involving governmental service "shall be settled by invoking the jurisdiction" of the CIR. § 48-810. "The statutory jurisdiction of the CIR is to settle pending controversies." *NAPE v. Game & Parks Comm.*, 220 Neb. 883, 885, 374 N.W.2d 46, 48 (1985). Sections 48-824 and 48-825 define prohibited practices and set forth the process for filing a complaint alleging a prohibited practice.

The District hired Manning and identified her as a long-term substitute teacher when she was in fact a certificated teacher hired to replace a teacher who had resigned and was not planning to return. Manning was not hired as a substitute for a teacher on leave. At the end of the semester, the District terminated Manning's contract and hired a replacement, who was placed on the salary schedule as a full-time teacher.

The CIR was presented with an industrial dispute involving allegations that the District interfered with the rights granted by the Industrial Relations Act and denied rights accompanying certification. These issues were within the jurisdiction of the CIR, which had the statutory authority to consider whether the District's actions were prohibited practices. The CIR properly exercised jurisdiction over the issues presented to it.

Claim for Relief

The District argues that the petition failed to state a claim upon which relief could be granted. It asserts that the payment of a substitute teacher was not a "focal point" of negotiations or a priority for the Association. See brief for appellant at 13. It claims that the petition did not state a claim for relief unless the prohibited practice was a focal point of negotiations. The District offers no statutory or case law to support this position. And we have found no requirement that in order for an action

to rise to the level of a prohibited practice, the issue must be related to a "focal point" of negotiations.

State law makes it a prohibited practice for an employer to interfere with employees' rights under the Industrial Relations Act. See § 48-824(2). The Association demonstrated that the District unilaterally altered the wages of Manning, a bargaining unit member, during the term of the Agreement without first obtaining the consent of the Association.

Manning was a certificated teacher hired to replace a teacher who had left the District's employ with no plans to return. Manning was paid as a substitute teacher, even though she was a probationary employee. The District's employment of Manning as a "long-term substitute" was a prohibited practice, as alleged by the Association. The Association stated a claim for relief. This assignment of error has no merit.

Timeliness of Petition

Section 48-825(1) provides that a petition must be filed within 180 days after the alleged violation. The District claims that the petition was time barred because it was not filed within 180 days after the alleged violation. The District relies upon *Regina Davis, et. al. v. FOP Lodge 8*, 15 C.I.R. 1, 15 (2004), in which the CIR noted that the limitation period for a "duty of fair representation" claim begins to run when the cause of action accrues. The District argues that the limitations period began to run when Manning was offered the position as a long-term substitute.

The District claims that Manning was on notice she would not be covered by the contract when she received a letter from the student services director on June 29, 2007. The letter stated that as a long-term substitute, Manning was not contractually bound to the District. The District asserts that if a prohibited practice occurred, it took place on June 29 when Manning received the letter.

The CIR concluded that the cause of action first arose when the District implemented the deviation from the salary schedule and not when Manning was offered the position. The CIR determined that the prohibited practice occurred on September 21, 2007, when Manning's pay was changed. The petition asserted

that the alleged prohibited practice was the unilateral deviation from the salary schedule, which first occurred on September 21, 2007. The petition was filed on January 16, 2008. The CIR found that the petition was timely filed.

The District's reliance on *Regina Davis, et. al., supra*, is misplaced. That case involved a duty of fair representation claim, and in such cases, the limitations period begins to run when the employee knew or should have known of the violation. See, e.g., *Howard v. Lockheed-Georgia Co.*, 742 F.2d 612 (11th Cir. 1984); *Sixel v. Transportation Communications*, 708 F. Supp. 240 (D. Minn. 1989).

In cases involving the unilateral modification of economic terms of employment, federal courts have uniformly held that the limitations period for claims alleging an unfair labor practice does not begin to run until the date the union received actual and unequivocal notice of the employer's unilateral modification. See, *N.L.R.B. v. Walker Const. Co.*, 928 F.2d 695 (5th Cir. 1991); *N.L.R.B. v. Glover Bottled Gas Corp.*, 905 F.2d 681 (2d Cir. 1990); *Esmark, Inc. v. N.L.R.B.*, 887 F.2d 739 (7th Cir. 1989); *Teamsters Local Union No. 42 v. N.L.R.B.*, 825 F.2d 608 (1st Cir. 1987).

Since the cause involves a claim alleging a prohibited labor practice, the question is when the Association had notice of the District's unilateral modification of the terms and conditions of Manning's employment. The burden of proof was on the District to demonstrate when the Association had notice of the alleged prohibited practice. See *Broekemeier Ford v. Clatanoff*, 240 Neb. 265, 481 N.W.2d 416 (1992). The District failed to prove that the Association was aware of the alleged prohibited practice prior to the filing of a grievance on December 10, 2007. The 180-day statute of limitations began on December 10, and the filing of the petition on January 16, 2008, was timely.

The limitations period began on the date the Association knew or should have known of the alleged prohibited practice. The CIR used September 21, 2007, as the beginning of the limitations period, finding that the change in terms of Manning's contract did not occur until she was paid on that date. Even if September 21 is used as the starting date for the limitations

period, the petition was timely because September 21 is within the 180-day time period preceding the filing of the petition. The petition was timely filed, and this assignment of error has no merit.

Certificated Employee and Member of Bargaining Unit

The District argues that Manning was not a member of the bargaining unit, because she was hired as a long-term substitute teacher and not as a regular certificated employee.

The District relies on the statutory definition of a certificated employee to argue that substitute teachers are not certificated. This reliance is without merit. Neb. Rev. Stat. § 79-824(1) (Reissue 2008) provides that certificated employees are all teachers and administrators as defined in Neb. Rev. Stat. § 79-101 (Reissue 2008), other than substitute teachers. Section 79-101(9) defines a teacher as "any certified employee who is regularly employed for the instruction of pupils in the public schools." Neb. Rev. Stat. § 79-902(38) (Reissue 2008), which provides definitions for the school employees' retirement systems, states that a "[s]ubstitute employee" is "a person hired by a public school as a temporary employee on an intermittent basis to assume the duties of regular employees due to the temporary absence of the regular employees." Manning was not hired due to the temporary absence of a regular employee.

The CIR found that in hiring Manning, the District deviated from its previous practices. Administrators who testified could not recall an instance in the previous 24 years that the District had hired a teacher at the beginning of the school year as a long-term substitute when the teacher was not actually fulfilling the duties of another staff member who was on a leave of absence. Of the 34 new teachers hired for the 2007-08 school year, Manning was the only teacher not issued a teacher's contract. All other new teachers were compensated based on the Agreement. Manning did not receive fringe benefits, life insurance, personal leave benefits, or sick leave that was provided to the other teachers. The District attempted to treat her as a substitute teacher even though she was not taking the place of a teacher who planned to return.

The CIR correctly determined that Manning was a member of the bargaining unit. As a member of the bargaining unit, she was entitled to be paid under the salary schedule, and thus, paying her on a different basis was a unilateral deviation from the economic terms in the Agreement.

A teacher who is hired to fill an open position is not a substitute employee. The District therefore arbitrarily designated Manning as a long-term substitute. To allow the District to designate her as such would, as the CIR so determined, allow the District to "unilaterally control the composition of the bargaining unit."

We also find no merit to the argument that Manning was employed "less than one-half time" because she served only 83.5 days out of a total of 188 teacher service days in 2007-08. See brief for appellant at 16. Manning was not hired to assume the duties of an employee who was temporarily absent. Her predecessor resigned from the position. The District unilaterally decided to end Manning's employment in December after she taught nearly every day of the first semester. The authority of the Association and its rights would be undermined if the District were allowed to unilaterally designate probationary teachers as long-term substitutes. The District's designation of Manning as a long-term substitute had the effect of unilaterally removing her from the bargaining unit.

The CIR correctly concluded that Manning was not a long-term substitute, but performed as a probationary certificated employee and was therefore a member of the bargaining unit. The act of unilaterally paying Manning on a basis other than as provided in the Agreement and without bargaining with the Association about such a change was a violation of § 48-824.

Any order or decision of the CIR may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: (1) if the CIR acts without or in excess of its powers, (2) if the order was procured by fraud or is contrary to law, (3) if the facts found by the CIR do not support the order, and (4) if the order is not supported by a preponderance of the competent evidence on the record

considered as a whole. *Omaha Police Union Local 101 v. City of Omaha*, 276 Neb. 983, 759 N.W.2d 82 (2009).

The CIR acted within its powers when it exercised jurisdiction to determine whether the District had committed a prohibited practice. The CIR found that the District had implemented unilateral deviations from the Agreement, including compensation provisions. It ordered the District to reimburse Manning backpay equal to the difference between the amount received for her bargaining unit duties and the amount to which she would have been entitled under the Agreement. The CIR's order was not procured by fraud and is not contrary to law. The order of the CIR is supported by a preponderance of the evidence on the record.

CONCLUSION

The District unilaterally changed the terms of the Agreement, which is a prohibited practice. Manning, a member of the Association, was a probationary teacher who was not compensated properly under the Agreement. The CIR had jurisdiction to hear the controversy, and the petition was not time barred. The judgment of the CIR is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JIMMEL W. FULLER, APPELLANT.
772 N.W.2d 868

Filed October 2, 2009. No. S-08-1253.

1. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
3. ____: ____. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

4. **Criminal Law: Statutes: Legislature: Intent.** Although the rule of lenity requires a court to resolve ambiguities in a penal code in the defendant's favor, the touchstone of the rule of lenity is statutory ambiguity, and where the legislative language is clear, a court may not manufacture ambiguity in order to defeat that intent.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Matthew G. Graff for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

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

WRIGHT, J.

NATURE OF CASE

Jimmel W. Fuller pled no contest to third degree assault; driving under the influence, first offense; and driving during suspension, second offense, in Lancaster County District Court. The court accepted Fuller's pleas, found him guilty, and sentenced him to prison terms of 1 year, 30 days, and 90 days, respectively, to be served concurrently. The court also revoked his operator's license for 2 years beginning on the date he is released from prison or placed on parole, whichever is first.

SCOPE OF REVIEW

[1] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Davis*, 277 Neb. 161, 762 N.W.2d 287 (2009).

[2] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *State v. Dragoo*, 277 Neb. 858, 765 N.W.2d 666 (2009).

FACTS

On April 8, 2008, Fuller caused an automobile accident in Lincoln, Nebraska, by turning in front of another vehicle. The driver of the other vehicle suffered bodily injury as a result of the accident. Fuller fled the scene of the accident on foot but was subsequently apprehended. It was then discovered that his blood alcohol level was in excess of the legal limit for driving a motor vehicle and that he had been driving with a suspended license.

Fuller was initially charged with leaving the scene of an injury accident, a Class IIIA felony; driving under the influence, first offense, a Class W misdemeanor; and driving during suspension, second offense, a Class II misdemeanor. Pursuant to a plea agreement, the first charge was amended to third degree assault, a Class I misdemeanor. He pled no contest and was sentenced to terms of imprisonment of 1 year, 30 days, and 90 days, respectively. The court ordered that these sentences be served concurrently to each other, but consecutively to the sentence Fuller was then serving on unrelated charges. The court also revoked Fuller's operator's license for 2 years in connection with the driving under the influence and driving during suspension convictions and ordered the revocation to commence upon Fuller's release from prison or his placement on parole, whichever came first.

Fuller timely appeals. Pursuant to Neb. Ct. R. App. P. § 2-111(E)(5)(a), no oral argument was allowed.

ASSIGNMENTS OF ERROR

Fuller claims that the district court abused its discretion by imposing excessive sentences. He also claims that the court erred in ordering that his operator's license revocation not begin until his release from prison or until he is placed on parole.

ANALYSIS

Excessive Sentences

Fuller claims that the district court abused its discretion in sentencing him to prison instead of placing him on probation,

because he was already incarcerated on another offense. He argues that because he was already in prison, the sentences did not have a deterrent effect and did not strike the correct balance between the protection of the public and Fuller's rehabilitative needs.

The court-ordered presentence investigation report details Fuller's lengthy criminal history, including robbery, three convictions for false information, three convictions for possession of marijuana, possession of a stolen firearm, failure to appear, three counts of failing to carry an operator's license, driving on the sidewalk, disorderly conduct, obstructing the administration of law, open container, possession of a controlled substance, assault, third degree domestic assault, suspended license, two counts of violation of protection order, and driving during revocation, second offense. He has served multiple jail terms, and at the time of sentencing, he was incarcerated on charges unrelated to those at issue in this case.

Fuller was found guilty of a Class I misdemeanor, a Class W misdemeanor, and a Class II misdemeanor. A Class I misdemeanor is punishable by up to 1 year's imprisonment, a $1,000 fine, or both. Neb. Rev. Stat. § 28-106 (Reissue 2008). A Class W misdemeanor, first offense, is punishable by up to 60 days' imprisonment and a $500 fine. *Id.* A Class II misdemeanor is punishable by up to 6 months' imprisonment, a $1,000 fine, or both. *Id.*

An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Davis*, 277 Neb. 161, 762 N.W.2d 287 (2009). Fuller's sentences are within these limits. Considering the seriousness of the charges and Fuller's extensive criminal history, the district court did not abuse its discretion in imposing the sentences. This assignment of error is without merit.

License Revocation

Fuller also claims that the language of Neb. Rev. Stat. § 60-4,108 (Reissue 2004) prohibits the district court from ordering the mandatory 2-year operator's license revocation to begin upon his release from incarceration or placement

on parole, instead of the date that the court issued the order of sentence.

The relevant portion of § 60-4,108 states that for individuals convicted of second and subsequent offenses of operating a motor vehicle during any period that his or her operator's license is suspended, the court is to "order such person not to operate any motor vehicle for any purpose for a period of two years *from the date ordered by the court* and also order the operator's license of such person to be revoked for a like period." (Emphasis supplied.) Fuller claims that the phrase "from the date ordered by the court" is ambiguous because it is not clear whether the sentence is to run from the date that the court issued its sentencing order or from the date selected by the court.

In *State v. Nelson*, 276 Neb. 997, 759 N.W.2d 260 (2009), we considered the meaning of the phrase "from the date ordered by the court" with regard to Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1990) (now located at Neb. Rev. Stat. § 60-6,197.03(4) (Cum. Supp. 2008)). Section 39-669.07 provided for a 15-year license revocation period for individuals convicted of third-offense driving under the influence and contained language similar to § 60-4,108, ordering that a license revocation run "from the date ordered by the court." The defendant in *Nelson* argued that because the sentencing order did not specify when the 15-year revocation period began, it necessarily began on the date he pled guilty to the charges and the court "ordered" him to turn over his license while he was released on bail before sentencing. He argued that the sentence began with his condition of bail.

We held that the language "from the date ordered by the court" referred to the date that the court ordered the 15-year license revocation, and not from any other date of any other order affecting the defendant's license. *State v. Nelson, supra*. Because the court in *Nelson* did not specify a date for the 15-year period to begin, it necessarily began on the day the court imposed the sentence and not before. Unlike *Nelson*, the court in this case specified that Fuller's license revocation is to begin on either the date he is released from prison or the date he is placed on parole, whichever is earlier.

The Nebraska Court of Appeals considered this issue with regard to § 60-6,197.03 (Cum. Supp. 2006) in *State v. Lankford*, 17 Neb. App. 123, 756 N.W.2d 739 (2008). Section 60-6,197.03 contained language similar to § 60-4,108, ordering that a license revocation run "from the date ordered by the court." Noting that the word "ordered" modifies "date," the Court of Appeals held that the revocation begins on the date selected by the court in its sentencing order, and not on the date that the court issues its sentencing order. *State v. Lankford, supra.*

[3] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *State v. Hense*, 276 Neb. 313, 753 N.W.2d 832 (2008). As plainly stated in the language of § 60-4,108, a license revocation is to begin on the date that is ordered by the court. Obviously, some drivers may not be in a position to drive until they have served their sentence of incarceration. Therefore, the court is given the discretion to determine when the license revocation pursuant to § 60-4,108 is to begin, including after the completion of a period of confinement. This is, in fact, what the court chose to do in Fuller's case.

[4] Although the rule of lenity requires a court to resolve ambiguities in a penal code in the defendant's favor, the touchstone of the rule of lenity is statutory ambiguity, and where the legislative language is clear, a court may not manufacture ambiguity in order to defeat that intent. *State v. Ramirez*, 274 Neb. 873, 745 N.W.2d 214 (2008). Section 60-4,108 is not ambiguous. The language "from the date ordered by the court," see *id.*, clearly means "from the date selected by the court," giving the district court the discretion to determine the beginning date of the operator's license revocation. Accordingly, this assignment of error is without merit.

CONCLUSION

We conclude that the district court did not abuse its discretion in sentencing Fuller to 1 year's imprisonment and did not err or abuse its discretion in ordering the 2-year license

revocation set forth in § 60-4,108 to begin when Fuller is released from imprisonment or placed on parole. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
MAURO YOS-CHIGUIL, APPELLANT.
772 N.W.2d 574

Filed October 2, 2009. No. S-08-1329.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. ____: ____. If the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.
5. **Criminal Law: Sentences: Judgments.** In a criminal case, the judgment is the sentence.
6. **Criminal Law: Pleas: Time: Proof.** As a general rule, a defendant seeking to withdraw a plea of guilty or no contest after he or she has been sentenced bears the burden of showing by clear and convincing evidence that such withdrawal is necessary to correct a manifest injustice. But as to such pleas entered after July 20, 2002, Neb. Rev. Stat. § 29-1819.02(2) (Reissue 2008) establishes a statutory procedure whereby a convicted person may file a motion to have the criminal judgment vacated and the plea withdrawn when the advisement required by § 29-1819.02(1) was not given and the conviction "may have the consequences for the defendant of removal from the United States, or denial of naturalization pursuant to the laws of the United States."
7. **Criminal Law: Pleas.** Failure to give all or part of the advisement required by Neb. Rev. Stat. § 29-1819.02(1) (Reissue 2008) regarding the immigration consequences of a guilty or nolo contendere plea is not alone sufficient to entitle a convicted defendant to have the conviction vacated and the plea withdrawn pursuant to § 29-1819.02(2). The defendant must also allege and show that he or she actually faces an immigration consequence which was not included in the advisement given.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Mauro Yos-Chiguil, pro se.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

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

STEPHAN, J.

Mauro Yos-Chiguil sought to vacate his conviction for attempted second degree murder on the ground that the district court for Buffalo County failed to fully advise him of the immigration consequences of conviction prior to accepting his plea of no contest.[1] The district court denied the relief requested, and Yos-Chiguil appealed. We affirm the order of the district court.

BACKGROUND

Pursuant to a plea agreement, on March 12, 2008, Yos-Chiguil entered no contest pleas to one count of attempted second degree murder and one count of second degree assault. Before he did so, the court advised him of various consequences of his pleas, including the following: "If you are not a citizen of the United States, and if you are convicted of a crime, that conviction could adversely affect your ability to remain or work in this country." Yos-Chiguil stated through an interpreter that he understood this advisement. In exchange for his pleas, the State dismissed two counts of use of a deadly weapon to commit a felony, each Class III felonies, and agreed to recommend concurrent sentences. The factual basis for Yos-Chiguil's pleas was that on November 30, 2007, he stabbed his girlfriend and her minor sister during a domestic dispute.

At the sentencing hearing on May 1, 2008, defense counsel admitted that Yos-Chiguil was in the country illegally. Counsel did not take issue with the advisement given to Yos-Chiguil prior to the acceptance of his pleas. The district court imposed concurrent sentences of 18 to 28 years' imprisonment on the count of attempted second degree murder, with credit for time

[1] See Neb. Rev. Stat. § 29-1819.02 (Reissue 2008).

served, and from 2 to 5 years' imprisonment on the count of second degree assault. Yos-Chiguil filed a direct appeal, case No. A-08-697, which was dismissed by the Nebraska Court of Appeals on July 15. On August 27, the district court entered judgment on the mandate.

On December 1, 2008, Yos-Chiguil filed a motion seeking to withdraw his plea of no contest to the count of attempted second degree murder on the ground that he was not properly advised of the immigration consequences of his no contest plea as required by § 29-1819.02(1). The district court denied the motion without conducting an evidentiary hearing, and Yos-Chiguil then perfected this appeal. We moved the appeal to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[2] The appeal was submitted without oral argument.[3]

ASSIGNMENT OF ERROR

Yos-Chiguil assigns that the district court erred in denying his motion to withdraw his plea because the court failed to comply with the "immigration consequences" warning provision of § 29-1819.02 prior to entry of his plea.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[4]

[2] 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.[5]

ANALYSIS

In *State v. Zarate*,[6] we held that because the possibility of deportation was a collateral consequence of a guilty plea, the

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[2] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

[3] Neb. Ct. R. App. P. § 2-111(E)(5)(a) (rev. 2008).

[4] *State v. Hausmann*, 277 Neb. 819, 765 N.W.2d 219 (2009).

[5] *State v. Rodriguez-Torres*, 275 Neb. 363, 746 N.W.2d 686 (2008).

[6] *State v. Zarate*, 264 Neb. 690, 651 N.W.2d 215 (2002).

fact that defense counsel did not inform a defendant of the possibility of deportation did not render a guilty plea involuntary or unintelligent for constitutional purposes. We noted, however, that our decision was likely one of last impression due to the fact that in 2002, well after the acceptance of the plea at issue in *Zarate*, the Nebraska Legislature had enacted a law requiring trial courts, prior to accepting a guilty or nolo contendere plea, to advise criminal defendants of certain immigration consequences of such plea.

Yos-Chiguil seeks to set aside his plea-based conviction under the statute enacted in 2002, which currently provides:

> Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant:
>
> IF YOU ARE NOT A UNITED STATES CITIZEN, YOU ARE HEREBY ADVISED THAT CONVICTION OF THE OFFENSE FOR WHICH YOU HAVE BEEN CHARGED MAY HAVE THE CONSEQUENCES OF REMOVAL FROM THE UNITED STATES, OR DENIAL OF NATURALIZATION PURSUANT TO THE LAWS OF THE UNITED STATES.[7]

Yos-Chiguil alleges that the advisement given to him by the district court did not "strictly or substantially" comply with this statutory directive.

Subject Matter Jurisdiction

[3,4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[8] If the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.[9] The State argues that neither the district court nor this court has subject matter

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[7] § 29-1819.02(1).

[8] *State v. Poindexter*, 277 Neb. 936, 766 N.W.2d 391 (2009); *State v. Rodriguez-Torres, supra* note 5.

[9] *State v. Sklenar*, 269 Neb. 98, 690 N.W.2d 631 (2005).

jurisdiction, because we held in *State v. Rodriguez-Torres*[10] that § 29-1819.02 does not provide a procedure for setting aside a plea after a conviction based upon such plea has become final.

The State's argument both overstates our holding in *Rodriguez-Torres* and overlooks a critical difference between it and this case. In *Rodriguez-Torres*, the plea-based conviction which the defendant sought to vacate was entered in 1997, long before the enactment of § 29-1819.02.[11] The sole basis alleged by the defendant for withdrawal of the plea was § 29-1819.02(3), which provides:

> With respect to pleas accepted prior to July 20, 2002, it is not the intent of the Legislature that a court's failure to provide the advisement required by subsection (1) of this section should require the vacation of judgment and withdrawal of the plea or constitute grounds for finding a prior conviction invalid. Nothing in this section, however, shall be deemed to inhibit a court, in the sound exercise of its discretion, from vacating a judgment and permitting a defendant to withdraw a plea.

We held in *Rodriguez-Torres* that this language did not create a statutory procedure pursuant to which a plea entered before July 20, 2002, could be withdrawn after the person convicted of the crime had already served his sentence. Because the issue was not presented to us, we did not address whether a common-law remedy existed for withdrawal of the plea in that circumstance.

[5,6] The plea in the instant case was entered in 2008 and was therefore subject to § 29-1819.02(2), which provides in relevant part:

> If, on or after July 20, 2002, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which the defendant pleaded guilty or nolo contendere may have the consequences for the defendant of removal from the United States, or denial of naturalization pursuant to the laws of

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[10] *State v. Rodriguez-Torres, supra* note 5.

[11] See 2002 Neb. Laws, L.B. 82, § 13.

> the United States, the court, on the defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty.

In a criminal case, the judgment is the sentence.[12] As a general rule, a defendant seeking to withdraw a plea of guilty or no contest after he or she has been sentenced bears the burden of showing by clear and convincing evidence that such withdrawal is necessary to correct a manifest injustice.[13] But as to such pleas entered after July 20, 2002, § 29-1819.02(2) establishes a statutory procedure whereby a convicted person may file a motion to have the criminal judgment vacated and the plea withdrawn when the advisement required by § 29-1819.02(1) was not given and the conviction "may have the consequences for the defendant of removal from the United States, or denial of naturalization pursuant to the laws of the United States."

The State argues that this procedure is not available to Yos-Chiguil, because his judgment became final when his direct appeal was dismissed in July 2008, prior to the filing of his motion to vacate the judgment. In effect, the State contends that the procedure conferred by § 29-1819.02(2) may be utilized only on direct appeal. But there is no language in the statute which would support such a limited construction, and indeed, the language permitting the procedure to be initiated by motion would suggest otherwise. Moreover, a defendant who does not receive the statutorily required advisement of the immigration consequences of a plea-based conviction may not be aware of those consequences until after the conviction becomes final and the consequences materialize. As more fully set forth below, it is the failure to give the required advisement *and* the occurrence of an immigration consequence of which the defendant was not advised which trigger the statutory remedy in § 29-1819.02(2).

In this case, Yos-Chiguil was serving his sentence at the time he filed his motion to withdraw his plea pursuant to

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[12] *State v. Nelson*, 276 Neb. 997, 759 N.W.2d 260 (2009).

[13] See *State v. Holtan*, 216 Neb. 594, 344 N.W.2d 661 (1984).

§ 29-1819.02(2). We therefore need not decide whether the remedy created by that subsection would extend to a defendant who had completed his or her sentence. On the record before us, we conclude that the district court had jurisdiction to consider Yos-Chiguil's motion to vacate his conviction, and this court has appellate jurisdiction to determine whether the district court erred in overruling the motion.

MERITS

Section 29-1819.02(1) requires that before accepting a guilty or nolo contendere plea, a trial court must advise the defendant of two potential immigration consequences: "REMOVAL FROM THE UNITED STATES" and "DENIAL OF NATURALIZATION PURSUANT TO THE LAWS OF THE UNITED STATES." In his motion, Yos-Chiguil alleged that the district court advised him that conviction could adversely affect his ability to remain or work in the United States, but failed to warn him "of the distinctly different and separate consequence that he would lose benefit of any opportunity to achieve citizenship status by means of America's constitutionally mandated naturalization process." Although Yos-Chiguil pled no contest to two separate counts after being given this advisement, he now seeks to vacate only his conviction for second degree murder. His argument is based solely upon the allegedly incomplete advisement.

But, as noted above, § 29-1819.02(2) requires that in addition to showing that the advisement required by § 29-1819.02(1) was not given or was incomplete, a defendant seeking to vacate a plea-based conviction must also show that such conviction "may have the consequences for the defendant of removal from the United States, or denial of naturalization pursuant to the laws of the United States." The Supreme Judicial Court of Massachusetts has construed similar statutory language to mean that "a defendant must demonstrate more than a hypothetical risk of such a consequence, but that he actually faces the prospect of it occurring."[14] Applying this principle, the court held that a convicted defendant who faced deportation

[14] *Com. v. Berthold*, 441 Mass. 183, 185, 804 N.E.2d 355, 357 (2004).

and was warned that deportation was a possible consequence of his guilty plea was not entitled to withdraw the plea on the ground that he was not also given a statutorily required warning that conviction could result in "'exclusion from admission to the United States.'"[15] The court reasoned that although the advisement given by the trial court did not cover all the immigration consequences enumerated in the statute, it would not construe the statute to impose the "extraordinary remedy" of vacating the judgment of conviction "in circumstances where the inadequacy complained of is immaterial to the harm for which the remedy is sought."[16] The court concluded that "[a] defendant who has been warned under the statute of the very consequence with which he must subsequently contend is not entitled to withdraw his plea, even if he was not warned of other enumerated consequences that have not materialized."[17] In a subsequent application of this principle, a Massachusetts appellate court held that a defendant was not entitled to have his plea-based conviction vacated on the ground that he was not given a statutory warning that his guilty plea could result in denial of naturalization, where he made no claim that he faced the prospect of denial of a request for naturalization.[18]

[7] We agree with the reasoning of the Massachusetts courts and hold that failure to give all or part of the advisement required by § 29-1819.02(1) regarding the immigration consequences of a guilty or nolo contendere plea is not alone sufficient to entitle a convicted defendant to have the conviction vacated and the plea withdrawn pursuant to § 29-1819.02(2). The defendant must also allege and show that he or she actually faces an immigration consequence which was not included in the advisement given. In his motion to withdraw his plea, Yos-Chiguil alleged that the advisement given at the time of his plea was incomplete in that it did not include denial of naturalization as a possible consequence of his plea, but he did not

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[15] *Id.* at 184, 804 N.E.2d at 357, quoting Mass. Gen. Laws Ann. ch. 278, § 29D (West 1998).

[16] *Id.* at 186, 804 N.E.2d at 358.

[17] *Id.*

[18] *Com. v. Cartagena*, 71 Mass. App. 907, 883 N.E.2d 986 (2008).

allege that he faces the prospect of denial of an application for naturalization based solely upon the conviction which he seeks to vacate. Because Yos-Chiguil did not allege an essential fact necessary to trigger the remedy provided by § 29-1819.02(2), the district court did not err in denying the relief sought without an evidentiary hearing.

Because we dispose of the appeal on this basis, we do not reach the State's arguments that "substantial compliance" with the requirements of § 29-1819.02(1) is sufficient and that the advisement which was given to Yos-Chiguil substantially complied with those requirements.[19]

CONCLUSION

For the reasons discussed, the judgment of the district court is affirmed.

AFFIRMED.

[19] Brief for appellee at 10.

STATE OF NEBRASKA, APPELLEE, V.
JORGE GALINDO, APPELLANT.
774 N.W.2d 190

Filed October 9, 2009. Nos. S-04-443, S-04-1326.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, and an appellate court resolves such issues independently of the lower court's conclusions.
2. **Trial: Juries: Appeal and Error.** The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court and is subject to reversal only when clearly wrong.
3. **Venue: Appeal and Error.** A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion.
4. **Constitutional Law: Criminal Law: Statutes.** Any statute which punishes as a crime an act previously committed which was innocent when done, which makes more burdensome the punishment for a crime after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed is prohibited as ex post facto.
5. **Constitutional Law: Legislature.** The Ex Post Facto Clause does not extend to limit legislative control of remedies and modes of procedure which do not affect matters of substance.

6. **Criminal Law: Statutes: Time.** Statutes governing substantive matters in effect at the time of a crime govern, and not later enacted statutes.
7. ____: ____: ____. Procedural statutes in effect on the date of a hearing or proceeding govern, and not those in effect when the violation took place.
8. ____: ____: ____. A change in law will be deemed to affect matters of substance where it increases the punishment or changes the ingredients of the offense or the ultimate facts necessary to establish guilt.
9. **Statutes: Words and Phrases.** A rule is substantive if it alters the range of conduct or the class of persons that the law punishes.
10. **Statutes.** Rules that regulate only the manner of determining a defendant's culpability are procedural.
11. **Death Penalty: Legislature: Statutes.** The change in 2002 Neb. Laws, L.B. 1, regarding which fact finder should determine death eligibility is a procedural change and not a change in substance.
12. **Sentences: Death Penalty: Legislature: Juries: Judges.** *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), is a limited holding that a jury, and not a judge, must decide those facts which a state legislature has determined to be essential to a sentence of death.
13. **Trial: Sentences: Death Penalty.** *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), invalidated a particular procedure for determining death eligibility at trial, but it did not invalidate the death penalty.
14. **Sentences.** The invalidity of a single provision purely procedural in nature does not automatically invalidate the underlying punishment to which that procedure applies.
15. **Constitutional Law: Statutes: Proof.** Only the clearest proof suffices to establish the unconstitutionality of a statute as a bill of attainder.
16. **Criminal Law: Statutes: Words and Phrases.** A bill of attainder is a legislative act which applies to named individuals or to easily ascertained members of a group in such a way as to inflict punishment on them without a judicial trial.
17. **Criminal Law: Statutes.** 2002 Neb. Laws, L.B. 1, is not a bill of attainder.
18. ____: ____. In order for a legislative enactment to be deemed a bill of attainder, it must (1) specify the affected persons, (2) inflict punishment, and (3) lack a judicial trial.
19. **Juries: Verdicts.** There is no general requirement that a jury reach agreement on the preliminary factual issues which underlie the verdict.
20. **Constitutional Law: Criminal Law: Trial: Witnesses.** The Sixth Amendment to the U.S. Constitution guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him or her, and the main and essential purpose of confrontation is to secure the opportunity of cross-examination.
21. ____: ____: ____: ____. The right to confrontation is not applicable to the sentencing phase of a criminal trial.
22. **Sentences: Due Process: Constitutional Law.** Although a defendant is entitled to due process upon sentencing, the U.S. Constitution does not require that he or she be given the full panoply of rights accorded when the issue is guilt or innocence.
23. **Statutes: Time.** While procedural statutes do apply to pending litigation, it is a general proposition of law that new procedural statutes have no retroactive effect

upon any steps that may have been taken in an action before such statutes were effective. All things performed and completed under the old law must stand.

24. **Jurors: Appeal and Error.** The erroneous overruling of a challenge for cause will not warrant reversal unless it is shown on appeal that an objectionable juror was forced upon the challenging party and sat upon the jury after the party exhausted his or her peremptory challenges.
25. **Juror Qualifications.** The law does not require that a juror be totally ignorant of the facts and issues involved in the case; it is sufficient if the juror can lay aside his or her impression or opinions and render a verdict based upon the evidence.
26. ____. If the voir dire examination of a juror considered as a whole does not show bias or partiality, a challenge upon that ground is properly overruled, although during his or her examination statements are made which, if unexplained, might have been a ground for challenge.
27. **Venue: Appeal and Error.** A trial court abuses its discretion in denying a motion to change venue when a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair and impartial jury.
28. **Venue: Juror Qualifications.** Voir dire examination provides the best opportunity to determine whether a court should change venue.
29. **Juror Qualifications: Parties: Appeal and Error.** Generally, the extent to which parties may examine jurors as to their qualifications rests largely in the discretion of the trial court, the exercise of which will not constitute reversible error unless clearly abused, and where it appears that harmful prejudice has been caused thereby.
30. **Juror Qualifications: Death Penalty.** The proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his or her duties as a juror in accordance with the juror's instructions and oath.
31. ____. ____. Essential demands of fairness mandate that a defendant on trial for his or her life be permitted on voir dire to ascertain whether a prospective juror holds a belief that reflects directly on that individual's inability to follow the law.
32. **Constitutional Law: Juror Qualifications: Death Penalty.** The U.S. Constitution does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury.
33. **Death Penalty.** The death penalty as retribution must be tailored to the defendant's personal responsibility and moral guilt.
34. **Criminal Law: Sentences: Death Penalty.** The reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.
35. **Homicide.** The greater a defendant's participation in the felony murder, the more likely the defendant acted with reckless indifference to human life.
36. ____. Premeditated murder and felony murder are but different ways to commit a single offense of first degree murder.

37. **Constitutional Law: Criminal Law: Appeal and Error.** The decision whether a sentence is so disproportionate as to violate the Eighth Amendment in any particular case, like other questions bearing on whether a criminal defendant's constitutional rights have been violated, has long been viewed as one that a trial judge or an appellate court is fully competent to make.
38. **Constitutional Law: Sentences: Juries.** If state law makes a factual finding a necessary prerequisite to imposing a greater punishment than authorized without such a finding, then a defendant has a Sixth Amendment right to have this finding made by a jury beyond a reasonable doubt.
39. **Constitutional Law: Juries.** The Sixth Amendment does not countenance legislative encroachment on the jury's traditional domain.
40. **Sentences: Juries: Legislature.** Considerations under *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), and *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987), are not facts on which the Legislature conditions an increase in a defendant's maximum punishment and are not within the jury's traditional domain.
41. **Homicide: Photographs.** In a homicide prosecution, photographs of a victim may be received into evidence for the purpose of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.
42. **Criminal Law: Evidence.** The State is allowed to present a coherent picture of the facts of the crimes charged, and it may generally choose its evidence in so doing.
43. **Trial: Photographs.** The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.
44. **Sentences: Rules of Evidence.** The sentencing phase is separate and apart from the trial phase, and the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence.
45. **Homicide: Presentence Reports: Sentences: Constitutional Law.** The Confrontation Clause does not attach to the use of presentence reports in capital sentencing proceedings.
46. **Statutes: Legislature: Intent.** In the absence of clear legislative intent, the construction of a statute will not be adopted which has the effect of nullifying another statute.
47. **Constitutional Law: Sentences.** Victim impact statements considered at sentencing to show the personal characteristics of the victim or the emotional impact of the crime on the family do not violate the U.S. Constitution.
48. ____: ____. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), has no effect on the longstanding proposition that the right to confrontation is inapplicable to sentencing proceedings.

Appeals from the District Court for Madison County: ROBERT B. ENSZ, Judge. Affirmed.

Douglas J. Stratton and Andrew D. Weeks, of Stratton & Kube, P.C., for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and SIEVERS, Judge.

MCCORMACK, J.

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I. NATURE OF CASE

On September 26, 2002, Jorge Galindo, Erick Vela, and Jose Sandoval entered a bank in Norfolk, Nebraska. Within 40

seconds, the three men had shot and killed four bank employees and one customer. When another customer walked in, but was able to escape, the three men fled. By the time they were apprehended, Galindo, Vela, and Sandoval had broken into two residences and stolen two vehicles, obtaining the keys to one of the vehicles at gunpoint. This case presents Galindo's appeal from his convictions on five counts of first degree murder, six counts of use of a deadly weapon to commit a felony, one count of robbery, and one count of burglary. Galindo was sentenced to death. Galindo does not challenge the sufficiency of the evidence to support the jury's determination of guilt, but he presents numerous arguments as to why he should not be subjected to the death penalty in connection with these crimes.

II. BACKGROUND

1. Filing of Information

The information against Galindo was filed on October 22, 2002. The original information did not set forth the alleged aggravating circumstances for death eligibility. However, in response to the subsequent passage of L.B. 1,[1] the State filed an amended information on November 22, containing a notice of aggravating circumstances, as required by the new law. The notice alleged five aggravating circumstances: (1) Galindo had a substantial prior history of serious assaultive or terrorizing criminal activity; (2) the murder was committed in an effort to conceal the identity of the perpetrator; (3) the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity; (4) at the time of the murder, another murder had been committed; and (5) at the time of the murder, Galindo knowingly created a great risk of death to at least several persons.

2. Venue and Venire

The trial court rejected Galindo's motions for change of venue from Madison County, where Norfolk is located. At the time of Galindo's trial, Norfolk had a population of

[1] 2002 Neb. Laws, L.B. 1.

approximately 25,000 people. In the months before Galindo's trial, there had been a resurgence of publicity due to the 1-year anniversary of the crime and due to the recent legal proceedings of Vela and Sandoval. The media coverage was extensive and included detailed accounts of the evidence adduced in the other two legal proceedings, as well as the final verdicts of guilty and the imposition of the death penalty against those defendants. Coverage also included the planned memorial to the victims, profiles of the victims' families, and the effect of the shootings on the community. Some people interviewed by the media expressed their opinion that the defendants all deserved the death penalty. A relatively small number of articles and news reports involved complaints about the financial burden to the community, the rights given to the bank shooters, and how long it was taking to bring them to justice.

The proposed jury list was composed of 1,615 randomly selected members of the community, who qualified for jury service after answering an eligibility questionnaire.[2] From the jury list, 180 people were randomly selected for a jury pool. The 180 jury pool members were also sent a detailed supplemental questionnaire. Of the 156 respondents, 93 jury pool members, or almost 60 percent, stated that they could lay aside their impressions or opinions and render a verdict based only on the evidence and testimony, and not on sympathy or prejudice. A little less than 29 percent did not believe they could be impartial. The rest were unsure. From the jury pool, 71 people were randomly selected for the venire. The court permitted the parties to conduct lengthy, individual, sequestered voir dire of each prospective juror in the venire. From the venire, 42 prospective jurors were chosen, upon which each party could exercise 12 peremptory challenges, with 2 challenges for each of the alternates.[3]

Most of the 71 potential jurors had some exposure to media accounts relating to the bank shooting. In addition, 29 had a direct or indirect relationship with one of the victims, 4 knew Galindo's family or his ex-girlfriend, and several were

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[2] See Neb. Rev. Stat. §§ 25-1628 and 25-1629 (Cum. Supp. 2004).

[3] See Neb. Rev. Stat. § 29-2005 (Reissue 2008).

acquainted with the attorneys or law enforcement personnel that were potential witnesses in the case.

Prior to questioning, the trial judge read for the jury an article describing jury responsibility and the importance of making the sacrifice to serve, despite the inconvenience it might cause. After voir dire was completed, 29 jurors were excused for cause, 21 of those because they admitted that they had already decided that Galindo was guilty and could not be fair and impartial. Of those who were passed to the panel of 42, several had stated in their questionnaire that they could not be fair and impartial, but they were not struck because they reconsidered this position during the voir dire. Eleven opined during voir dire that Galindo was guilty. Sixteen had some relationship with the victims or their families. All of the jurors who ultimately sat at Galindo's trial affirmed under oath that they could decide the case based solely on the evidence presented at trial and upon the judge's instructions as to the law.

3. Trial: Guilt Phase

Galindo's counsel did not dispute the basic details of Galindo's involvement in the crime. A surveillance tape recorded the main counter and lobby area during the robbery. Although the surveillance tape cuts between several cameras and has no sound, it captured most of what occurred. Galindo's theory of defense rested on convincing the jury that the State could not prove the statutory aggravators which would make Galindo eligible for the death penalty. He argued that the robbers had never planned on harming anyone and that instead, it was a tragic "robbery gone bad."

The evidence showed that Galindo and Sandoval had been planning the robbery for at least a month. Sandoval was considered the "leader." Galindo recruited Vela to be the third robber, and Gabriel Rodriguez, Sandoval's half brother, had agreed to act as a scout and driver.

Galindo and Sandoval chose the particular date of the robbery because they knew that the weekly deposit of cash from an armored vehicle would have been made that morning. They chose the particular bank branch because of its relatively small size. The layout of the bank entailed a double-door vestibule

that led to a small mezzanine and then to the customer counter. The drive-through service area was located just beyond the customer counter, separated by a small partition. Small sitting areas were situated directly to either side of the vestibule, adjoined by a single office on either side.

While Galindo, Vela, and Sandoval waited in an alley, Rodriguez went into the bank to make a transaction. Communicating through a walkie-talkie, Rodriguez told Sandoval how many people were in the bank and what their locations were at that time. A surveillance tape shows that Galindo entered the bank at approximately 8:44 a.m., with Sandoval and then Vela closely behind him.

Galindo went directly to the office on the left, which was the office of Lola Elwood, the branch manager. Elwood was at her desk conversing with Susan Staehr and Cheryl Cahoy, bank employees. Sandoval went straight to the main counter where Samuel Sun was attending to customer Evonne Tuttle. Employee Jo Mausbach was working at the drive-through window behind Sun. Vela went directly to the right, to the office of personal banker Lisa Bryant.

In his descriptions to law enforcement, Galindo stated that soon after entering the bank, "Sandoval got crazy" and started yelling. Galindo then heard gunshots being fired, and his gun "went off," shooting Elwood three times in the chest. Galindo claimed the trigger on his gun "was very sensitive."

The surveillance tape shows Sandoval brandishing a gun and standing at the counter in front of Sun, with Tuttle beside him. Galindo's back can be seen in the doorway of Elwood's office. As Sandoval leaned against the counter, he motioned Mausbach to him. As soon as Mausbach approached, 23 seconds after the three men had entered the bank, Sandoval shot Mausbach, Sun, and Tuttle at close range and in rapid succession. Around that same time, Vela killed Bryant, shooting her once in her leg and again, at close range, through the back of her neck and hand.

Sandoval then jumped over the counter in an apparent attempt to retrieve money, but, as he did so, customer Micki Koepke walked in. Koepke later recalled that when she was walking from her car toward the building, she had heard a distinct "pop" off to the left and another "pop" off to the right

of the entry, but she thought it might be construction. It had been 37 seconds since Galindo and his accomplices entered the bank.

Koepke testified that as she entered through the second set of glass doors, it was strangely silent and she saw Sandoval leaning against the front counter, smiling at her with a gun in his hand. It was not until she saw something move to her left, however, that she registered that the bank was being robbed. Koepke quickly turned and walked back out.

The movement Koepke had detected was Galindo standing in Elwood's office. Galindo fired at Koepke as she exited the vestibule. Glass shattered, injuring her shoulder, but Koepke was able to get to her car and call the 911 emergency dispatch service. One of the bullets fired by Galindo traveled across the street and struck a fast-food restaurant near the drive-through window.

In his confession to law enforcement officers, Galindo claimed he shot at Koepke accidentally. Galindo stated that he saw Vela pointing his gun toward Koepke and that he yelled for Vela not to shoot. Then, according to Galindo, his gun went off. The evidence at trial demonstrated that Galindo shot at Koepke at least twice, and the surveillance video shows Galindo aiming at Koepke in a "modified Weaver stance."

After Koepke escaped, Sandoval jumped back over the counter and the three fled. The tape shows Galindo briefly hesitating back toward the office where Cahoy and Staehr sat crouched with their faces hidden, still unharmed. Cahoy later testified that she heard someone say "hurry up" before the robbers left.

Galindo, Vela, and Sandoval fled on foot, having been abandoned by Rodriguez. They broke into a house nearby, and Galindo acquired keys to a vehicle by pointing a gun at the two women who lived there. This vehicle was eventually abandoned, and the trio stole another vehicle after breaking into a house and finding the keys. Shortly after driving off with this second vehicle and throwing their weapons out the window, they were apprehended.

Galindo eventually led law enforcement officers to where the guns used in the robbery had been disposed of. At the officers'

request, Galindo also identified a photograph of Rodriguez. The jury found Galindo guilty of all crimes charged.

4. Aggravation Hearing

At the aggravation hearing, extensive evidence was adduced to show Galindo's prior participation in the murder of Travis Lundell. Lundell was Sandoval's roommate when he was reported missing sometime before the bank robbery. While incarcerated, Galindo eventually led law enforcement officers to where Lundell's body was hidden. The evidence demonstrated that after Galindo recruited Vela, Vela had killed Lundell, with Galindo's assistance, in order to prove himself worthy of the robbery scheme.

The jury also considered the State's evidence of the agonizing nature of the victims' deaths. Bryant's right femur was shattered by a bullet before she fell and was shot through her throat and larynx, causing suffocation by blood filling her air passages. Elwood had fractured ribs, was shot in both lungs and her heart, and died of bleeding into her chest cavity. Mausbach suffered injuries to her jaw and neck, which caused extensive bleeding into her air passages, and she died from obstructed breathing, leaving blood splatters on the wall from her coughing. Sun likewise suffered bleeding into his air passages from a fractured jaw and other internal facial injuries. He also suffered bleeding into his chest cavity as a result of the second bullet that pierced his ascending aorta, heart, and lung. Tuttle died of massive disruption and bleeding in her brain, but the State's expert testified that she lived long enough to experience pain, as evidenced from froth in her air passages.

The jury found all five alleged aggravators. The cause was then put before a three-judge sentencing panel to determine any mitigating circumstances, weigh those against the aggravating circumstances found by the jury, and conduct a proportionality review to determine whether the death penalty would be imposed.

5. Sentencing

Over Galindo's objection, the panel received into evidence Galindo's presentence investigation report and the record from both the guilt and aggravation phases of the trial. The panel

also heard one representative of each of the victims' families read a statement describing their loss. The family representatives did not comment on the crimes, Galindo, or their opinions as to the appropriate punishment for Galindo. The family representatives heard by the panel were Bryant's mother, the guardian of Bryant's 11-year-old son; Sun's ex-wife, mother of their children; Tuttle's eldest daughter; and Elwood's husband. The prosecutor also read for the panel a short statement written by Mausbach's daughter. Galindo objected to the family representatives based on the fact that the statements read were not part of the presentence investigation report and also on the ground that not all of the representatives qualified as a "nearest surviving relative" under Neb. Rev. Stat. § 29-119 (Cum. Supp. 2004). His objections were overruled.

The sentencing panel refused Galindo's request that it consider, in its proportionality review, other first degree murder cases in which the death penalty was not imposed. The panel also refused to consider evidence referred to as the "Baldus Report."

Galindo made numerous objections to the imposition of the death penalty, which were rejected by the trial court. He objected to electrocution as an unconstitutional method of imposing the death penalty. He also argued that due to the U.S. Supreme Court's decision in *Ring v. Arizona*,[4] there was no death penalty at the time the crimes were committed and that the death penalty could not be retroactively applied.

The panel found no statutory mitigating circumstances. It considered the nonstatutory mitigating circumstance of Galindo's cooperation with the criminal investigation, but the panel determined that this mitigating circumstance was "offset" by a lack of remorse, an attempted escape, and other misbehavior while incarcerated. The panel found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Galindo to death for each of the five murders. Additional facts relating to Galindo's trial will be discussed in our analysis section below.

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[4] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

III. ASSIGNMENTS OF ERROR

Galindo asserts, consolidated and restated, that the trial court erred in (1) finding that the retroactive application of L.B. 1 did not violate ex post facto principles, due process, or the prohibition against bills of attainder; (2) failing to find that the absence of notice of aggravation in the original information violated due process; (3) failing to find that L.B. 1 was an unconstitutional inducement to waive a jury finding of aggravating circumstances; (4) failing to grant a motion to quash the information that alleged alternative theories of first degree murder; (5) overruling Galindo's step instruction on felony murder; (6) overruling Galindo's motions for change of venue; (7) making inappropriate comments to the venire prior to jury selection that emphasized their duty to serve as jurors; (8) informing the jury during voir dire that it would have no role in sentencing; (9) failing to allow Galindo to "'life qualify'"[5] the venire; (10) failing to strike certain jurors for cause; and (11) receiving into evidence a photograph of Lundell's body.

Galindo asserts that the sentencing panel erred in (12) considering the presentence investigation as part of weighing the aggravating and mitigating circumstances; (13) failing to receive as evidence, for purposes of the panel's proportionality review, sentencing orders from first degree murder cases where the death penalty was not imposed; (14) allowing consideration of the victim impact statements; and (15) sentencing him to electrocution, which is cruel and unusual punishment.

IV. STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, and an appellate court resolves such issues independently of the lower court's conclusions.[6]

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[5] Brief for appellant at 94.

[6] *State v. Epting*, 276 Neb. 37, 751 N.W.2d 166 (2008); *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008); *State v. Bossow*, 274 Neb. 836, 744 N.W.2d 43 (2008); *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007).

[2] The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court and is subject to reversal only when clearly wrong.[7]

[3] A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion.[8]

V. ANALYSIS

We first address Galindo's challenges to L.B. 1. Galindo asserts that the State should never have charged and tried him under this statutory scheme. He argues that the previous statutory scheme, with the death penalty provisions redacted, was the law applicable to his crimes.

1. Retroactive Application of L.B. 1

Now, as at the time of the bank robbery, a defendant found guilty of first degree murder can be sentenced to death only if one of the enumerated aggravating circumstances is found.[9] Without any aggravating circumstances, the sentence is life imprisonment.[10] The ultimate decision of whether to impose the death penalty when the defendant is found "death eligible" depends on whether the aggravating circumstances outweigh mitigating circumstances, as well as a proportionality review.[11] At the time of the bank robbery, the statutory scheme committed to the judge, and not a jury, both the capital sentencing factfinding of any aggravating and mitigating circumstances and the ultimate sentencing decision.[12] Approximately 3 months before the bank robbery took place, however, the U.S. Supreme Court had concluded in *Ring*[13] that the Sixth Amendment entitled capital defendants to a jury determination

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[7] *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007).

[8] *Id.*

[9] Neb. Rev. Stat. § 29-2519 (Reissue 2008).

[10] *Id.*

[11] See Neb. Rev. Stat. § 29-2522 (Reissue 2008).

[12] § 29-2522.

[13] *Ring v. Arizona, supra* note 4.

of any fact on which the Legislature conditions an increase in their maximum punishment.

After the robbery, but before Galindo's trial, the Legislature enacted L.B. 1, which did not change the nature of the statutory aggravating circumstances that make a defendant death eligible. But, it provided that the existence of any of these circumstances must be determined by a jury, instead of a judge, unless this right is waived by the defendant. Galindo was tried in accordance with L.B. 1. Galindo now argues that the imposition of the death penalty under L.B. 1 violated due process and the principles prohibiting ex post facto laws. He also argues L.B. 1 was an unlawful bill of attainder. He argues that these are issues of first impression, because in his case, the crimes were committed after *Ring*, but before L.B. 1.

(a) Ex Post Facto

[4-7] Any statute which punishes as a crime an act previously committed which was innocent when done, which makes more burdensome the punishment for a crime after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed is prohibited as ex post facto.[14] The Ex Post Facto Clause does not, however, extend to limit legislative control of remedies and modes of procedure which do not affect matters of substance.[15] Thus, statutes governing substantive matters in effect at the time of a crime govern, and not later enacted statutes.[16] In contrast, the procedural statutes in effect on the date of a hearing or proceeding govern, and not those in effect when the violation took place.[17]

[8-10] A change in law will be deemed to affect matters of substance where it increases the punishment or changes the ingredients of the offense or the ultimate facts necessary

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[14] *Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990).

[15] *Beazell v. Ohio*, 269 U.S. 167, 46 S. Ct. 68, 70 L. Ed. 216 (1925).

[16] See *id.*

[17] See *id.*

to establish guilt.[18] In other words, a rule is substantive if it alters the range of conduct or the class of persons that the law punishes.[19] In contrast, rules that regulate only the *manner of determining* a defendant's culpability are procedural.[20]

In *Ring*, the U.S. Supreme Court addressed a defendant's death sentence under an Arizona statutory scheme whereby the jury adjudicated guilt of first degree murder, but for imposition of the death penalty, the judge determined the presence or absence of the enumerated aggravating factors required under the statute. The Court held that if a state makes an increase in a defendant's authorized punishment contingent on a finding of fact, then such fact must be found by a jury beyond a reasonable doubt.[21] The aggravating circumstances under Arizona's statutory scheme were, the Court explained, "'the functional equivalent of an element of a greater offense'"[22] for purposes of the defendant's Sixth Amendment right to a trial by jury. Thus, because the aggravating circumstances had been found by a judge, the Court reversed the Arizona Supreme Court's decision affirming the conviction.

Because our statutory scheme, like Arizona's, committed to the judge or three-judge panel the determination of aggravating circumstances necessary to impose the death penalty, the Nebraska Legislature passed L.B. 1 to provide the right to a jury's finding of aggravating circumstances in a separate "aggravation hearing."[23] The determination of mitigating circumstances and the ultimate decision to impose the death penalty remain with the sentencing judge or three-judge panel.[24]

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[18] *Hopt v. Utah*, 110 U.S. 574, 4 S. Ct. 202, 28 L. Ed. 262 (1884).

[19] *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004).

[20] *Id.*

[21] *Ring v. Arizona, supra* note 4.

[22] *Id.*, 536 U.S. at 609.

[23] Neb. Rev. Stat. § 29-2520 (Reissue 2008).

[24] Neb. Rev. Stat. § 29-2521 (Reissue 2008).

[11] Galindo argues that because aggravating circumstances are the functional equivalents of an element of a greater offense, then a change in who determines whether those elements exist is a substantive and not a procedural change. This argument has already been rejected. In *State v. Gales*,[25] we held that the change in L.B. 1 regarding which fact finder should determine death eligibility was a procedural change and not a change in substance. In *Gales*, the defendant, Arthur Lee Gales, had committed first degree murder prior to both *Ring* and L.B. 1, but his appeal from his death penalty conviction was still pending when *Ring* was decided and L.B. 1 was passed. Because Gales' sentence was not yet final, we found *Ring* applicable, and reversed his conviction and remanded the cause for resentencing. In so doing, we rejected Gales' arguments that he could not be resentenced to death, because L.B. 1 did not exist at the time of his crime.

In concluding that the death penalty provisions of L.B. 1 were procedural in nature, we noted that L.B. 1 did not make any change to the provisions defining the aggravating or mitigating circumstances relevant to the death penalty determination. Furthermore, L.B. 1 did not change the degree of punishment, the character of the offense, or the rules of evidence. We summarized that L.B. 1, as applicable to the death penalty, in fact did nothing more than reassign from judges to juries the responsibility for determining the existence of any aggravating circumstances. It merely changed the manner of determining the defendant's culpability.[26]

[12] In *Schriro v. Summerlin*,[27] the U.S. Supreme Court likewise explicitly rejected the argument that changes mandated by *Ring* were substantive rather than procedural. The Court explained that statutory aggravators were only "*effectively*"[28] elements of the offense for *Sixth Amendment purposes*. The aggravating circumstances were therefore "subject to the

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[25] *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003).

[26] *Id.*

[27] *Schriro v. Summerlin, supra* note 19.

[28] *Id.*, 542 U.S. at 354 (emphasis in original).

procedural requirements the Constitution attaches to trial of elements."[29] However, the Court explained: "[H]olding that, *because Arizona* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as *this Court's* making a certain fact essential to the death penalty."[30] *Ring* did not "alter the range of conduct the statute punishes, rendering some formerly unlawful conduct lawful or vice versa."[31] It is a limited holding that a jury, and not a judge, must decide those facts which a state legislature had already determined to be essential to a sentence of death.

In *State v. Mata* (*Mata I*),[32] we reaffirmed our holding that L.B. 1's changes were procedural in nature. Raymond Mata, Jr., like Gales, had committed his crimes and had been tried before *Ring* was decided, but his appeal was still pending when *Ring* and L.B. 1 had passed. Unlike Gales, however, Mata had not argued to the trial court that he was entitled to a jury determination of aggravating circumstances. On appeal, we held that it was plain error to fail to have the jury determine death eligibility.

But, in *State v. Mata* (*Mata II*),[33] we rejected Mata's argument that *Ring* had retroactively invalidated Nebraska's capital sentencing statutes that were in effect when he committed the murder and that he was thus subject only to life imprisonment. In so doing, we discussed the U.S. Supreme Court's decision in *Dobbert v. Florida*.[34] In *Dobbert*, the defendant argued that because the Court had since declared unconstitutional the statutory methods to determine the death penalty that were in effect at the time of the defendant's crime and his trial, the state had not lawfully sentenced him to death under the original statute. Accordingly, the defendant argued that even though

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

[30] *Id.* (emphasis in original).

[31] *Id.*

[32] *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *abrogated on other grounds, State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[33] *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

[34] *Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977).

the changes in the new statute were procedural, they were ex post facto because they provided what did not exist before—a constitutional procedure for imposing the death penalty. The U.S. Supreme Court opined: "[T]his sophistic argument mocks the substance of the *Ex Post Facto* Clause."[35] The Court's prior holding and the statutory amendment passed pursuant thereto "simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime."[36]

Galindo argues that his case is distinguishable from these cases. Galindo claims this is so because when he committed his crimes, the U.S. Supreme Court had already announced its decision in *Ring*. This decision, Galindo argues, immediately "invalidated"[37] the death penalty portions of Nebraska's law governing first degree murder. And since the Nebraska Legislature had not yet passed L.B. 1 when Galindo attempted to rob the bank, his crimes occurred during a brief moment when there was no death penalty in Nebraska. According to Galindo, the change we must consider in our ex post facto analysis is not from the previous death penalty scheme to the modified death penalty scheme in L.B. 1, but from a scheme where the maximum punishment was life imprisonment to a scheme that included the death penalty.

[13] While the previously discussed case law may not share the precise timing anomaly that Galindo finds so significant, we conclude it applicable nonetheless. *Ring* invalidated a particular procedure for determining death eligibility at trial, but it did not invalidate the death penalty.

A similar argument was addressed in dicta by the Idaho Supreme Court in *State v. Lovelace*.[38] The defendant in *Lovelace* argued that *Ring* invalidated the state's death penalty scheme, and the remaining valid portions, which provided for life imprisonment, became controlling until a new statute was

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[35] *Id.*, 432 U.S. at 297.

[36] *Id.*, 432 U.S. at 293-94.

[37] Brief for appellant at 28.

[38] *State v. Lovelace*, 140 Idaho 53, 90 P.3d 278 (2003).

enacted. He argued that both ex post facto and due process prohibited resentencing under the new statute enacted prior to his convictions' becoming final. In rejecting this argument, the court explained that regardless of whether the defendant committed the crime before or after *Ring*'s pronouncement, *Ring* simply did not invalidate the death penalty as the maximum punishment for first degree murder. *Ring* invalidated nothing more than the identity of the fact finder to determine whether aggravating circumstances exist.

Galindo's underlying premise that *Ring* invalidated the death penalty in Nebraska is even more untenable in light of a careful observation of our death penalty statutes as they existed at the time *Ring* was decided. A lengthy series of statutes governed the death penalty. Neb. Rev. Stat. § 28-303 (Reissue 1995) stated that murder in the first degree shall be punished as a Class I or Class IA felony in accordance with Neb. Rev. Stat. §§ 29-2520 to 29-2524 (Reissue 1995 & Cum. Supp. 2006). Neb. Rev. Stat. § 28-105 (Cum. Supp. 2006) stated that the maximum punishment for a Class I felony was death, while the maximum punishment for a Class IA felony was life imprisonment. Section 29-2519 (Reissue 1995) stated that it was necessary to establish mandatory standards for the imposition of the death sentence and that it should be imposed only for first degree murder in instances when the aggravating circumstances outweigh the mitigating circumstances as set forth in §§ 29-2520 to 29-2524. Section 29-2523, in turn, defined the statutory aggravating and mitigating circumstances applicable in determining whether the death penalty should be imposed. And Neb. Rev. Stat. §§ 29-2521.01 to 29-2521.04 (Reissue 1995 & Cum. Supp. 2006) expressed the policy that the death penalty should not be imposed arbitrarily and set forth the procedure for automatic appeal to our court.

[14] Of all the statutes composing our death penalty scheme and referring to the death penalty as the maximum punishment for first degree murder, only one, § 29-2522, dealt with *who* should make the determination of the aggravating circumstances. Thus, only § 29-2522 violated the principles of jury factfinding set forth by *Ring*. It would have been unreasonable to conclude that *Ring* called into question the remaining

provisions of the Nebraska death penalty scheme. The invalidity of a single provision purely procedural in nature does not automatically invalidate the underlying punishment to which that procedure applies.

Our conclusion that *Ring* did not invalidate the death penalty is consistent with our reasoning in *Mata II*.[39] In that case, we invalidated electrocution as the method of imposing the death penalty. We were thus faced with whether Mata's sentence of death could stand under a scheme that, as of that moment, had no constitutional means of carrying out the sentence. We affirmed the death penalty as the maximum punishment under Nebraska law. We reasoned that the statutes specifying the mode of inflicting the death penalty were separate and severable from other provisions of the death penalty scheme. Therefore, despite the fact that there was no constitutional means to carry out a death sentence, the sentence itself was not invalid. Similarly, despite the fact that during the months between *Ring* and L.B. 1, there was no constitutional *procedure* to determine death eligibility in a trial for first degree murder, it does not follow that Nebraska law no longer provided for the death penalty as the maximum punishment at the time of Galindo's crimes. Section 29-2522, which listed the judge or three-judge panel as the fact finder for aggravating circumstances, was separate and severable from the remaining statutes pertaining to the death penalty scheme.

(b) Due Process

Invoking due process principles, Galindo argues that the citizenry was on notice at the time of his crime that *Ring* had removed the death penalty from Nebraska law and that the Legislature had chosen not to reenact capital punishment. Based on the above discussion, we find no merit to this argument.

Galindo's principal due process argument, however, stems from *Coleman v. McCormick*,[40] a case considering whether a defendant was given a fair opportunity to defend the relevant

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[39] *Mata II, supra* note 33.

[40] *Coleman v. McCormick*, 874 F.2d 1280 (9th Cir. 1989).

issues at trial. In *Coleman*, the court held that the state's retroactive application of procedural changes to the death penalty statute violated fundamental principles of procedural due process.

The defendant in *Coleman* was originally tried and convicted under a statute which provided for a mandatory death sentence whenever the defendant was found guilty of aggravated kidnapping. On appeal, the state supreme court held the law was unconstitutional, because it did not allow the trial court to consider any mitigating circumstances. It remanded the cause with directions to resentence in accordance with a new statute enacted in the interim, which listed aggravated kidnapping as an aggravating circumstance. The new law also provided for the consideration of mitigating circumstances upon review of the trial record. Without a new trial on guilt, the court on remand reviewed the trial record and again sentenced the defendant to death. The Ninth Circuit Court of Appeals held that resentencing deprived the defendant of procedural due process, because the defendant did not know at the time he put on his defense in trial that the evidence would later be used to determine mitigating circumstances. The court explained:

> The defendant is due at least that amount of process which enables him to put on a defense during trial knowing what effect such a strategy will have on the subsequent capital sentencing, the results of which may be equally if not more critical to the defendant than the conviction itself.[41]

Because the defendant "made countless tactical decisions at trial aimed solely at obtaining [his] acquittal, without even a hint that evidence . . . would be considered as either mitigating or aggravating factors,"[42] the due process violation was pervasive and not harmless error, and the court vacated the defendant's death sentence.

Even assuming the Ninth Circuit Court of Appeals was correct in categorizing the legislative change in that case as merely procedural in nature, we find *Coleman* to be wholly

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[41] *Id.* at 1288.

[42] *Id.* at 1289.

inapplicable to the case at bar. When Galindo was tried, he was given fair notice of both the aggravating and mitigating circumstances to be weighed in the panel's sentencing decision. The State amended the information to advise Galindo it was proceeding under L.B. 1 a year before his trial. We find no merit to Galindo's due process arguments against the application of L.B. 1.

(c) Bill of Attainder

Galindo alternatively argues that L.B. 1, and the death penalty, cannot be applied against him because L.B. 1 constitutes a bill of attainder. Galindo asserts L.B. 1 was enacted as a direct response to the Norfolk killings and was thus "'improperly motivated,'"[43] in violation of U.S. Const. art. I, § 10 ("[n]o State shall . . . pass any Bill of Attainder"), and Neb. Const. art. I, § 16 ("[n]o bill of attainder . . . shall be passed").

[15,16] Only the clearest proof suffices to establish the unconstitutionality of a statute as a bill of attainder.[44] A bill of attainder is a legislative act which applies to named individuals or to easily ascertained members of a group in such a way as to inflict punishment on them without a judicial trial.[45] The bill of attainder provision prohibits trials by a legislature, and it forbids the imposition of punishment by the legislature on specific persons.[46] Stated differently, it proscribes legislation which singles out disfavored persons and carries out summary punishment for past conduct.[47] The bill of attainder clause was intended as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function.[48] It reflected the framers' belief that

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[43] Brief for appellant at 36.

[44] *Communist Party v. Control Board*, 367 U.S. 1, 81 S. Ct. 1357, 6 L. Ed. 2d 625 (1961).

[45] *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999).

[46] *Id.*

[47] *Id.* See, also, *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).

[48] *United States v. Brown*, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965).

the legislative branch is not so well suited as are politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons.[49]

[17] L.B. 1 is not a bill of attainder. By its terms, L.B. 1 does not focus on any particular person or persons, but is properly focused on prohibited conduct applicable equally to everyone. We also note that, in reality, L.B. 1 did not "inflict punishment" at all—in the sense that it did not inflict anything differently against anyone than had been the case before.

[18] Galindo's principal argument that L.B. 1 is a bill of attainder is that the particular timing of its passage was spurred by the occurrence of the bank robbery. Even if true, we find this to be of no consequence. In order for a legislative enactment to be deemed a bill of attainder, it must (1) specify the affected persons, (2) inflict punishment, and (3) lack a judicial trial.[50] L.B. 1 does not qualify as a bill of attainder under any of these criteria.

2. L.B. 1 as Unconstitutional Scheme

Galindo also presents various facial challenges to L.B. 1. These arguments have largely already been addressed by our court in *State v. Hessler*,[51] and we conclude they have no merit.

(a) Inducement to Waive Jury Finding of Aggravators

Galindo asserts that under the principles announced in *United States v. Jackson*,[52] L.B. 1 presents an unconstitutional inducement to waive his right to a jury finding of aggravating circumstances. Specifically, Galindo asserts that the most accurate weighing of aggravating against mitigating circumstances

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[49] *Id.*

[50] *Id.* See, also, *Selective Service v. Minn. Public Int. Res. Gp.*, 468 U.S. 841, 104 S. Ct. 3348, 82 L. Ed. 2d 632 (1984); *State v. Palmer, supra* note 45.

[51] *State v. Hessler, supra* note 7.

[52] *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968).

can only be achieved when the same entity making the sentencing determination has heard all of the evidence relevant to the finding of aggravating circumstances. Because the other two judges of the sentencing panel do not preside over a jury aggravation hearing, exercise of that right results in two judges being less informed than they would have been had Galindo waived the jury findings of aggravating circumstances. Galindo also complains that only when a judicial panel makes the finding of aggravating circumstances does the statutory scheme require written, unanimous findings of the facts supporting the determination.

In *Jackson*, the U.S. Supreme Court found unconstitutional a federal statutory provision that permitted capital punishment only when the defendant was tried by a jury and the jury recommended the death sentence. If the defendant waived the right to a jury trial or pled guilty, then the maximum punishment was life imprisonment. The Court held that the statute improperly coerced or encouraged the defendant to waive the Sixth Amendment right to a jury or the Fifth Amendment right to plead not guilty and that it needlessly penalized the defendant who asserted such rights.

The argument that L.B. 1, like the scheme considered in *Jackson*, penalizes a defendant's exercise of the right to have a jury finding of aggravating circumstances was recently rejected in *Hessler*.[53] We concluded that the Nebraska death penalty scheme "does not improperly coerce or encourage a defendant to waive his or her right to a jury and does not penalize a defendant who asserts such right."[54] Unlike the provision in *Jackson*, whereby the defendant could completely avoid the death penalty by waiving a jury trial, "[u]nder the Nebraska statutes, there is no such direct benefit achieved at the expense of waiving the right to a jury . . . ."[55]

In particular, we explained that "[w]hile the sentencing panel might be more thoroughly versed about the case if it

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[53] *State v. Hessler, supra* note 7.

[54] *Id.* at 503, 741 N.W.2d at 425.

[55] *Id.*

had also found aggravating circumstances, this does not mean that the sentencing panel would necessarily make a sentencing decision that was more favorable to the defendant."[56] And we similarly found no constitutional significance to the fact that the jurors are not required to unanimously agree on every factual predicate that may have led to their (unanimous) finding of an aggravating circumstance.

[19] Galindo attempts to illustrate that when the jury determined the Norfolk murders were especially heinous, atrocious, cruel, or manifested exceptional depravity, he had no way of knowing, based on the instructions given to the jury, whether the jury based its decision on findings of the victims' mental anguish or on the conclusion that Galindo relished the murders. But Galindo fails to explain how such specific knowledge would be useful to him. The U.S. Supreme Court in *Schad v. Arizona*[57] explained there is no constitutional mandate that the underlying facts of the crime be unanimously agreed upon by the jury: "'[D]ifferent jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly, there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.'" We find no reason to reconsider our decision in *Hessler*, and we conclude that whatever advantage written factual findings by the jury might provide, it is a far cry from the advantage considered unconstitutional in *Jackson*.

(b) Ability to Effectively Weigh Aggravating Circumstances and Admissibility of Record From Aggravation Hearing

Galindo's next argument is that L.B. 1 is unconstitutional because it provides for no means by which the nonpresiding judges of the sentencing panel can properly weigh the aggravating circumstances found by a jury against the mitigating circumstances found by the panel. Galindo comes to this conclusion after strictly reading L.B. 1 so as to prohibit the panel's

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[56] *Id.*

[57] *Schad v. Arizona*, 501 U.S. 624, 631-32, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991).

consideration of the record from the aggravation hearing. Thus, Galindo argues it was error for the panel in his trial to receive the aggravation record. At the same time, Galindo asserts it is impossible for the panel to weigh the aggravating circumstances against mitigating circumstances unless the aggravation record is considered. In sum, Galindo seeks to create a Catch-22 that would place the statutory scheme in violation of due process. We have already held, in *Hessler*, that the record from the aggravation hearing is admissible. Thus, there is no "unworkable"[58] scheme.

Section 29-2521(3) states that if the jury has determined the aggravating circumstances, then the panel must next hold a hearing to determine any mitigating circumstances. And at that hearing, the panel may receive "any matter that the presiding judge deems relevant to (a) mitigation, including, but not limited to, the mitigating circumstances set forth in section 29-2523, and (b) sentence excessiveness or disproportionality as provided in subdivision (3) of section 29-2522."[59] Galindo's argument is that the aggravation hearing record is not "relevant" to mitigation, sentence excessiveness, or disproportionality and that its consideration is therefore prohibited by L.B. 1.[60]

Galindo's strained attempt to demonstrate an unconstitutional scheme runs contrary to our rules of statutory construction that afford a presumption of constitutionality to legislative enactments. Also, we give statutes a sensible construction in light of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.[61] In *Hessler*, we said: "[T]he death penalty statutes read as a whole make clear that the sentencing panel needs to consider evidence of the crime and of aggravating circumstances in order to properly perform its balancing and

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[58] Brief for appellant at 42.

[59] § 29-2521(3).

[60] Brief for appellant at 40.

[61] See, *State v. Hynek*, 263 Neb. 310, 640 N.W.2d 1 (2002); *State v. Hookstra*, 263 Neb. 116, 638 N.W.2d 829 (2002).

proportionality sentencing functions."[62] Moreover, we noted that under § 29-2522, the sentencing panel is required to "'consider[] both the crime and the defendant'"[63] in determining whether aggravating circumstances justify imposition of a death sentence, whether mitigating circumstances exceed or approach the weight of aggravating circumstances, and whether a death sentence is excessive or disproportionate to the penalty imposed in similar cases. We explained in *Hessler* that the records of the guilt and aggravation phases of the trial clearly have probative value regarding the crime and the defendant.

[20-22] Galindo makes a further attempt at his Catch-22 by asserting that the aggravation hearing record was inadmissible because it violated his right to confrontation. The Sixth Amendment to the U.S. Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him," and the main and essential purpose of confrontation is to secure the opportunity of cross-examination.[64] Galindo was in fact given the right to confront all the witnesses during the guilt and aggravation phases of his trial, and thus, as a threshold matter, it does not appear that the Confrontation Clause is implicated by receipt of the trial record. Also, as will be discussed in further detail below, we have held that the right to confrontation is not applicable to the sentencing phase of a criminal trial.[65] Although a defendant is entitled to due process upon sentencing, the U.S. Constitution does not require that he or she be given the full panoply of rights accorded when the issue is guilt or innocence.[66]

We conclude that Galindo has failed to demonstrate that the record from the aggravation hearing was inadmissible. And we

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[62] *State v. Hessler, supra* note 7, 274 Neb. at 513, 741 N.W.2d at 431-32.

[63] *Id.* at 513, 741 N.W.2d at 432.

[64] *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008).

[65] *State v. Cook*, 236 Neb. 636, 463 N.W.2d 573 (1990). See, also, *State v. Barker*, 227 Neb. 842, 420 N.W.2d 695 (1988).

[66] *State v. Miller*, 221 Neb. 862, 381 N.W.2d 156 (1986).

find no merit to Galindo's attacks on L.B. 1 that revolve around the sentencing panel's consideration of the record from the aggravation hearing.

3. Notice of Aggravation

As an alternative to his argument that he should not have been charged and tried under L.B. 1, Galindo argues that the information against him was defective because it failed to comply with L.B. 1. Galindo argues that L.B. 1 demands that the *original* information contain a notice of aggravation, and that, as his did not, he cannot be sentenced to death.

The original information against Galindo did not contain a notice of aggravation because, at the time it was filed, the statutory scheme did not require such notice. An amended information containing the required notice of aggravation under the newly enacted Neb. Rev. Stat. § 29-1603(2)(a) (Reissue 2008) was filed the same day that L.B. 1 was enacted.

[23] Leaving aside whether Galindo correctly interprets § 29-1603, we observe that Galindo is demanding strict compliance with a *procedural* rule before it even existed. We apply our reasoning in *Mata I*[67] and *Gales*,[68] wherein we remanded the cause for resentencing under L.B. 1, despite the fact that the information against the defendants did not contain a notice of aggravation. The notice of aggravation is a procedural rule, and while procedural statutes do apply to pending litigation, it is a general proposition that "new procedural statutes have no retroactive effect upon any steps that may have been taken in an action before such statutes were effective. . . . All things performed and completed under the old law must stand."[69] We find no error stemming from the fact that the original information did not contain a notice of aggravation.

4. Jury

Having established that Galindo was properly charged under L.B. 1, we turn next to Galindo's argument that he was not

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[67] *Mata I, supra* note 32.

[68] *State v. Gales, supra* note 25.

[69] *Id.* at 635, 658 N.W.2d at 631 (citation omitted).

tried by a fair and impartial jury. Galindo's pretrial motions for change of venue were denied. Galindo alleges that the scale of the crimes, the publicity, and the relatively small population of the county where the crimes occurred made it impossible for him to be tried fairly there. Galindo claims, due to these difficulties, the trial court improperly tried to influence the venire in order to obtain jurors who would state their willingness to be impartial. Galindo also claims the trial court refused to excuse for cause many jurors who had demonstrated they could not be fair and impartial.

(a) Alleged Inappropriate "Pep Talk" to Jury

Galindo argues that the judge made inappropriate comments to the venire prior to the individual voir dire. He alleges that these comments were designed to convince jurors who did not want to be on the jury panel to sit, and he alleges that jurors were clearly influenced by the comments. According to Galindo, the trial court's comments violated his right to due process and a fair trial.

Prior to examination of the 71 potential jurors, the trial judge made the following remarks:

> Before we get started, I'd like to make a few comments about jury duty generally. Many times we just show a video; I'm not going to show a video today of the trial process. This is a bit of a unique trial, but I just want to talk to you generally about jury duty.
>
> I believe that some people perceive jury duty as being an inconvenience and an imposition in their work and daily lives. Some see it as a sacrifice that they are unwilling to make and find ways to seek to avoid jury service.
>
> However, the greatest sacrifice was made by this country's founding fathers who by the 6th Amendment to the U.S. Constitution established the right of the accused to a trial by a jury of his or her peers and by the fighting men and women of our armed forces who have maintained that right since 1791.
>
> There was an article that appeared in the Omaha World Herald a few years ago. It was written by an individual by

> the name of Phillip Bissett who was a former member of the House Judiciary Committee of the Maryland General Assembly. I think that this is instructive and it gives a good insight into jury duty responsibility. It was written for Memorial Day, but I think it has meaning for any of us this day or any other day, and I'd like to read a portion of that article to you.
>
> . . . Bissett states, "The right to a trial by jury after all is one of the fundamental freedoms that Americans have fought and died for since the founding of our Republic. In a nation ruled by laws, not tyrants, jury duty ought to be considered a sacred obligation. Serving on a jury is one of the most important ways every American can serve his," and I'll add "or her country. Our justice system depends on citizens who answer the call of jury service. When you are selected to serve on a jury, you become an active participant in insuring fair and balanced justice in your community. Citizens with doubts about jury service should consider the words of Thomas Jefferson, 'The jury is the only anchor ever yet imagined by man by which a government can be held to the principles of its Constitution. The jury is the ultimate safeguard of our civil rights.' The American fighting men and women died safeguarding our civil rights. We dishonor their memory by not fulfilling the civil responsibilities that go hand in hand with those civil rights. If you're called to serve on a jury this year, remember it's far from the ultimate sacrifice. Step forward with pride and serve. It's a chance to participate in democracy that most of the world's 6.3 billion people would love to have."

Galindo's counsel did not object to these comments at the time they were made. On the third day of voir dire, however, Galindo's counsel objected to the comments as denying his right to select a fair jury. The court overruled the objection, explaining that "[d]ifferent judges have different introductory comments . . . . I see nothing that prohibits that . . . ." The judge further explained that the comments were simply an instruction on juror responsibility.

Assuming Galindo's objection was timely made,[70] we agree with the trial court. Galindo points out the proposition that "trial courts should refrain from commenting on evidence or making remarks prejudicial to a litigant or calculated to influence the minds of the jury."[71] But it is absurd to imply that the trial judge is prohibited from influencing the jury in any manner whatsoever.

In *State v. Bjorklund*,[72] we held that the trial judge did not violate the defendant's right to due process and a fair trial when the judge told the jury before deliberations, "'God be with us.'" We explained:

> The trial judge made no comment on the evidence, the law, or the defendant, and, as noted in the reviewing judge's findings, the jurors did not interpret his words as such. The phrase "God be with us" did not enhance the credibility of any witness, serve as an instruction on reasonable doubt, or in any way suggest to the jurors what an appropriate verdict would be in this case.[73]

Thus, it is clear that the influence prohibited is of a nature that encroaches upon the juror's role as the fact finder and arbiter of guilt. We conclude that the trial judge's comments to the venire for Galindo's trial were not inappropriate.

Furthermore, we find nothing prejudicial in judicial commentary about the importance of jury duty in our judicial system. To establish reversible error, a defendant must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant.[74] As the court explicitly stated, the comments were directed at the possible attitude that jury duty is an inconvenience. To dissuade a

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[70] See *State v. Rodriguez*, 244 Neb. 707, 509 N.W.2d 1 (1993).

[71] See, *State v. Duncan*, 265 Neb. 406, 412, 657 N.W.2d 620, 627 (2003). Accord *State v. Chapman*, 234 Neb. 369, 451 N.W.2d 263 (1990).

[72] *State v. Bjorklund*, 258 Neb. 432, 442, 604 N.W.2d 169, 189 (2000), *abrogated on other grounds, Mata II, supra* note 33.

[73] *Id*. at 503, 604 N.W.2d at 225.

[74] *State v. Duncan, supra* note 71; *State v. Privat*, 251 Neb. 233, 556 N.W.2d 29 (1996).

potential juror from such an attitude is of equal benefit to the defendant as it is to the State. Neither Galindo's right to due process nor his right to a fair trial was violated by the trial judge's comments on jury duty.

(b) Failure to Strike Jurors for Cause

[24] Galindo argues that numerous jurors from the venire should have been stricken from the jury for cause because they had already formed an opinion of Galindo's guilt. However, of the 19 jurors that Galindo argues should have been stricken for cause, only jurors Nos. 65 and 38 actually sat after the parties had exhausted their peremptory strikes. We have explained that even the erroneous overruling of a challenge for cause will not warrant reversal unless it is shown on appeal that an objectionable juror was forced upon the challenging party and sat upon the jury after the party exhausted his or her peremptory challenges.[75] Therefore, in determining whether the trial court committed reversible error in failing to strike the challenged jurors for cause, we consider only jurors Nos. 65 and 38.

Galindo's brief does not specifically discuss these two jurors, and he focuses instead on several jurors who were ultimately removed by peremptory challenge. Galindo simply cites to juror No. 65 as one of the "[m]any jurors [who] expressed an opinion that [Galindo] was guilty, but were asked to set that aside."[76] He then cites to juror No. 38 as one of the "[o]ther jurors [who] indicated that they could not be fair or impartial, but were asked to set that aside."[77] For the sake of completeness, we examine these jurors in more detail.

Juror No. 65 had some acquaintance with victims of the robbery. She used to work with Tuttle, Koepke, and Sun's ex-wife. She knew Cahoy because they were both from the same

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[75] *State v. Hessler, supra* note 7; *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001). See, also, *Rivera v. Illinois*, 556 U.S. 148, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009); *United States v. Martinez-Salazar*, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000); *Ross v. Oklahoma*, 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988); *Olmstead v. Noll*, 82 Neb. 147, 117 N.W. 102 (1908).

[76] Brief for appellant at 68.

[77] *Id.* at 71.

Nebraska town. Juror No. 65 remembered seeing Mausbach when she was a customer of the bank. Finally, juror No. 65's mother-in-law lived next door to the family that was held at gunpoint by Galindo in order to steal a getaway car.

Nevertheless, juror No. 65 had no knowledge of the case based on any discussions with surviving victims or their families. She stated that she had not gone to any of the funerals or memorial services for any of the victims. Juror No. 65 indicated that there was nothing about her relationship with any of these persons that would preclude her from taking an oath to sit as a fair and impartial juror and decide the case solely on the evidence presented during trial.

When asked about pretrial publicity, juror No. 65 stated she had read about the case in a newspaper and "[t]here's the appearance that [Galindo] was involved." Nevertheless, she repeatedly affirmed that she would judge Galindo based solely on the evidence presented at trial.

Juror No. 38 also had some acquaintance with a family member of one of the victims. Juror No. 38 worked with Bryant's husband for approximately 8 months after the shootings. Juror No. 38 explained that he saw Bryant's husband at work somewhat regularly, but there was no indication from the questioning of juror No. 38 that they were particularly close. Juror No. 38 stated that he never spoke with Bryant's husband about the robbery. As a customer of the bank, juror No. 38 was also acquainted with Cahoy, and he had gone to high school with the daughter of the woman Galindo had taken the car keys from. He did not attend any of the funeral or memorial services for the victims.

Juror No. 38 had stated in his questionnaire that he was not "sure" whether he could be impartial. In the beginning of voir dire, juror No. 38 reaffirmed this uncertainty. After the process was explained in more detail, however, he stated he believed he could put aside any feelings and opinions and presume Galindo innocent until proved otherwise. Juror No. 38 explained that the way his questionnaire had been worded, he was not sure, "but the way it's been explained today, I believe that I could base a verdict on evidence provided." Juror No. 38 admitted he had read many newspaper articles about the crime and had

formed the opinion that Galindo was guilty. Nevertheless, he stated, "I've been instructed to put aside those feelings and I believe I can do that."

While Neb. Rev. Stat. § 29-2006(2) (Reissue 1995) states that good cause to challenge a juror includes that he or she has formed or expressed an opinion as to the guilt or innocence of the accused, it also states that if the opinion was formed based on "reading newspaper statements, communications, comments or reports, or upon rumor or hearsay," then the potential juror may serve if he or she says "on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence" and if the court is satisfied that the potential juror is in fact "impartial and will render such verdict." Only if the juror's opinion was formed based upon "conversations with witnesses of the transactions or reading reports of their testimony or hearing them testify" is dismissal of the juror for cause mandatory.[78] There is no evidence that jurors Nos. 65 and 38 had formed their opinions based on conversations with witnesses of the transactions or reading or hearing their testimony, and the trial judge determined that the jurors were being truthful when they stated under oath that they could be impartial.

The mere fact that a prospective juror is personally acquainted with the victim or the victim's family does not automatically disqualify a person from sitting on a criminal jury.[79] Only when it appears that they cannot or will not put aside the relationship with the victim and render impartial verdicts based solely on the evidence need jurors be excused for cause.[80] The inquiry

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[78] § 29-2006(2). See, also, Neb. Rev. Stat. § 25-1636 (Reissue 2008).

[79] See, *Taylor v. State*, 808 So. 2d 1148 (Ala. Crim. App. 2000); *Com. v. Colson*, 507 Pa. 440, 490 A.2d 811 (1985), *abrogated on other grounds, Com. v. Burke*, 566 Pa. 402, 781 A.2d 1136 (2001). See, also, *State v. Krutilek*, 254 Neb. 11, 573 N.W.2d 771 (1998); *Carrillo v. People*, 974 P.2d 478 (Colo. 1999); *Stokes v. State*, 281 Ga. 825, 642 S.E.2d 82 (2007); *Powers v. State*, 945 So. 2d 386 (Miss. 2006); *State v. Jaynes*, 353 N.C. 534, 549 S.E.2d 179 (2001); *State v. Gell*, 351 N.C. 192, 524 S.E.2d 332 (2000); *State v. Sheppard*, 84 Ohio St. 3d 230, 703 N.E.2d 286 (1998); *Com. v. Robinson*, 581 Pa. 154, 864 A.2d 460 (2004).

[80] *King v. State*, 273 Ga. 258, 539 S.E.2d 783 (2000).

in ruling on a motion to strike a prospective juror for cause is whether the conditions behind a juror's familiarity with a party, victim, attorney, or witness are such that those connections would probably subconsciously affect his or her decision of the case adversely to the defendants; however, this does not encompass a mere social acquaintanceship in the absence of other indicia of a relationship so close as to indicate the probability of partiality.[81] There is no evidence in this case that jurors Nos. 65 and 38 had such a close relationship with any of the victims or their families.

[25] The law does not require that a juror be totally ignorant of the facts and issues involved in the case; it is sufficient if the juror can lay aside his or her impression or opinions and render a verdict based upon the evidence.[82] For the reasons discussed above, neither juror No. 65 nor juror No. 38 was subject to mandatory disqualification. Thus, their retention or rejection was a matter of discretion with the trial court that is subject to reversal only when clearly wrong.[83] Our review of the voir dire does not reveal error in the trial court's judgment that jurors Nos. 65 and 38 could be fair and impartial.

Juror No. 65's statement that "[t]here's the appearance that [Galindo] was involved" barely rises to an opinion of guilt. This statement does not call into question juror No. 65's later affirmation that she could render an impartial verdict upon the law and the evidence. Juror No. 38's doubts likewise do not lead us to the conclusion that the trial court was clearly wrong in believing juror No. 38's affirmation that he could set aside personal opinions and consider only the evidence at trial.

[26] If the voir dire examination of a juror considered as a whole does not show bias or partiality, a challenge upon that ground is properly overruled, although during his or her examination statements are made which, if unexplained, might have been a ground for challenge.[84]

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[81] *Ratliff v. Com.*, 194 S.W.3d 258 (Ky. 2006). See, also, e.g., *Vaughn v. Griffith*, 565 So. 2d 75 (Ala. 1990).

[82] See *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007).

[83] See *State v. Hessler, supra* note 7.

[84] See *May v. State*, 155 Neb. 786, 54 N.W.2d 62 (1952).

We defer to the trial court's judgment on a motion to strike for cause, because the trial court is in the best position to assess the demeanor of the venire and of the individuals who compose it.[85] As explained by the U.S. Supreme Court:

> [T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case.[86]

We are not insensitive to the issues of the personal connections of the community and the pretrial publicity in this case. These factors may have made the trial judge's task more challenging. But we conclude that the task was, in the end, successfully accomplished. There is nothing in the record of this case to indicate that the jurors who ultimately sat on Galindo's trial were anything but fair and impartial.

(c) Venue

[27] Of course, Galindo's challenge to the trial court's failure to strike jurors for cause is intertwined with his belief that a fair jury simply could not be found in Madison County. He alleges that under *Irvin v. Dowd*,[87] we must assume partiality of the Madison County jury as a matter of law, no matter how sincere the jurors were when they pledged to be impartial. Galindo asserts he was denied his rights to due process, a fair trial, and an impartial jury, because the trial court denied his request for a change of venue. Although we have set out factors for determining whether to grant a motion for change of venue, Galindo does not specifically rely on these factors. Instead, Galindo makes a twofold argument. First, he contends that pretrial publicity was pervasive and prejudicial. Second, he contends that the statements of potential jurors showed that voir dire was

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[85] See, *Uttecht v. Brown*, 551 U.S. 1, 127 S. Ct. 2218, 167 L. Ed. 2d 1014 (2007); *State v. Hessler, supra* note 7.

[86] *Reynolds v. United States*, 98 U.S. (8 Otto) 145, 156-57, 25 L. Ed. 244 (1878).

[87] *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961).

insufficient to protect his rights to a fair and impartial jury. A motion for change of venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse of discretion.[88] A trial court abuses its discretion in denying a motion to change venue when a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair and impartial jury.[89]

[28] We have held that voir dire examination provides the best opportunity to determine whether a court should change venue.[90] But Galindo asserts that the "'"pattern of deep and bitter prejudice"'"[91] against him in Madison County mandated a change of venue, no matter what the jurors stated in voir dire.

(i) Pretrial Publicity

We have stated that under *Irvin*,[92] "'adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed.'"[93] But "juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged [does not] alone presumptively deprive[] the defendant of due process."[94] "Partiality may be presumed only in situations where 'the general atmosphere in the community or courtroom is sufficiently inflammatory.'"[95]

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[88] *State v. Hessler, supra* note 7.

[89] *State v. Rodriguez, supra* note 82.

[90] *Id.*

[91] *Id.* at 941, 726 N.W.2d at 169.

[92] *Irvin v. Dowd, supra* note 87.

[93] *State v. Williams*, 239 Neb. 985, 991, 480 N.W.2d 390, 395 (1992), quoting *Patton v. Yount*, 467 U.S. 1025, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984). See, also, 6 Wayne R. LaFave et al., Criminal Procedure § 23.2(f) (3d ed. 2007).

[94] *Murphy v. Florida*, 421 U.S. 794, 799, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975).

[95] *State v. Williams, supra* note 93, 239 Neb. at 991, 480 N.W.2d at 395, quoting *Murphy v. Florida, supra* note 94.

A court will normally not presume unconstitutional partiality because of media coverage, unless the record shows a "'barrage of inflammatory publicity immediately prior to trial,' . . . amounting to a 'huge . . . wave of public passion'"[96] or resulting in "a trial atmosphere . . . utterly corrupted by press coverage."[97] The quantum of news coverage is not dispositive. Even the community's extensive knowledge about the crime or the defendant through pretrial publicity is insufficient in itself to render a trial constitutionally unfair when the media coverage consists of merely factual accounts that do not reflect animus or hostility toward the defendant.[98] Although we have frequently stated that the defendant must show pervasive, misleading pretrial publicity, the more important consideration is whether the media coverage was factual, as distinguished from "invidious or inflammatory."[99]

In *Irvin*, publicity against the defendant included prejudicial details of his criminal record over the course of the previous 20 years. The publicity detailed the fact that the defendant had failed a lie detector test and had confessed not only to the murder charged, but to five other murders and 24 burglaries committed around the same time. He was portrayed as a "'confessed slayer of six,'" "remorseless and without conscience," a parole violator, and fraudulent check artist.[100] Dramatic newspaper articles portrayed law enforcement pledges to see him punished and explained that defense counsel had no choice but to defend his client. Of a panel of 370 potential jurors, almost 90 percent entertained some opinion as to the defendant's guilt. Two-thirds of the venire were aware of the other murders

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[96] *Patton v. Yount, supra* note 93, 467 U.S. at 1033, quoting *Murphy v. Florida, supra* note 94, and *Irvin v. Dowd, supra* note 87.

[97] *Murphy v. Florida, supra* note 94, 421 U.S. at 798. See, also, *Dobbert v. Florida, supra* note 34.

[98] See, *Patton v. Yount, supra* note 93; *Dobbert v. Florida, supra* note 34; *State v. Rodriguez, supra* note 82.

[99] See *Murphy v. Florida, supra* note 94, 421 U.S. at 801 n.4. See, also, *State v. Rodriguez, supra* note 82; *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990).

[100] *Irvin v. Dowd, supra* note 87, 366 U.S. at 726.

attributed to the defendant.[101] Eight out of twelve of the jurors finally placed in the jury box thought the defendant was guilty—although they all stated under oath they could set aside that preconception.

The Court concluded that under these circumstances, "accounting for the frailties of human nature," "it would be difficult to say that each [juror] could exclude this preconception of guilt from his deliberations."[102] Therefore, the trial court's finding of impartiality did not meet constitutional standards and the conviction in the venue where the crime occurred was void.[103]

In support of an allegedly similar deep and bitter prejudice against him in Madison County, Galindo points to the extensiveness of the publicity. But in contrast to the facts in *Irvin*, much of the publicity Galindo complains of is the same publicity that we found insufficient to mandate a change of venue for Rodriguez' trial. In *State v. Rodriguez*,[104] we explained that while the media coverage was indeed "extensive," it consisted mostly of factual accounts. We noted that Rodriguez did not contend that the coverage displayed any hostility or animosity toward him. Since the time of Rodriguez' trial, the media has generated more publicity, but the nature of the publicity has not significantly changed. It remains largely factual, and none of the pretrial publicity revealed evidence inadmissible for the jury's consideration at trial. Press coverage which is factual in nature cannot serve as the basis for a change of venue.[105]

Like Rodriguez, Galindo does not argue that the publicity displayed animus or hostility toward him. This is distinct from *Irvin*, where pretrial publicity made it impossible to obtain a fair trial in the venue where the crime was committed. The relevant question is not whether the potential jurors knew

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[101] *Id.* See, also, *Rideau v. Louisiana*, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963).

[102] *Irvin v. Dowd, supra* note 87, 366 U.S. at 727-28.

[103] *Irvin v. Dowd, supra* note 87.

[104] *State v. Rodriguez, supra* note 82, 272 Neb. at 941, 726 N.W.2d at 169.

[105] *State v. Strohl*, 255 Neb. 918, 587 N.W.2d 675 (1999).

about the case but whether they "had such fixed opinions that they could not judge impartially the guilt of the defendant."[106] We do not believe that the media coverage was the type that would have inflamed public passion against him or corrupted the trial atmosphere such that the trial judge should have presumed prejudice for any potential juror. Nor do we believe that the jurors' statements during voir dire reflected such a widespread hostility toward Galindo that prejudice should have been presumed.

(ii) Jurors' Statements

Galindo also alleges that the juror questionnaires and the voir dire demonstrate a pervasive, biased community sentiment against him. In evaluating the reliability of jurors' statements that they can be impartial, another relevant consideration is whether most of the venire members have stated that they cannot be impartial. In *Murphy v. Florida*,[107] the U.S. Supreme Court, discussing *Irvin*, where nearly 90 percent of the venire members stated that they could not be fair and impartial, concluded:

> In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it.

But here, less than 29 percent of the jury pool members stated in the questionnaire that they did not believe they could be impartial. In contrast, almost 60 percent believed they could be impartial. Similarly, of the 71 of the venire members, 21 (about 29½ percent) were excused because they maintained their belief that they could not be fair and impartial. But these venire members did not represent "most" of the venire, and these numbers fell far short of the 90 percent of venire members in *Irvin* who could not set aside their prejudice. We conclude that the jurors' statements, taken as a whole, were

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[106] See *Patton v. Yount, supra* note 93, 467 U.S. at 1035.

[107] See *Murphy v. Florida, supra* note 94, 421 U.S. at 803.

insufficient to show that the court should have presumed the jurors would be affected by community partiality despite their statements to the contrary.

(iii) Size of Community

Lastly, Galindo argues that the small size of the community, in relation to the large scale of the crime, mandated a change of venue. Galindo complains that because of the size of the city and the fact that the murdered bank tellers worked with the public, many potential jurors had some direct or indirect acquaintance with at least one of the victims. But this is not enough to assume prejudice under *Irvin*.[108] To the extent voir dire revealed a relatively small degree of separation between the victims and the community, we find nothing in the record that calls into question the analysis already set forth above that the jury ultimately selected was fair and impartial. To hold otherwise would mandate a change of venue anywhere the community is relatively small in proportion to the crime or the number of victims. But neither the Fifth nor the Sixth Amendment demands or even contemplates a jury of strangers.[109] A serious case will tend to draw most of the public's attention in any size community, and absent particular evidence of the community's inability to put on a fair trial, such inability will not be presumed simply because of the community's size and the relationships among its people.

We find no merit to Galindo's argument that the failure to grant his motion for change of venue denied him his right to a trial before a fair and impartial jury.

(d) "Life Qualifying" the Venire

Galindo next asserts that due process and the prohibition against cruel and unusual punishment were violated when the trial court denied his request to "'life qualify'" the venire.[110] Specifically, Galindo sought to inquire whether any of the

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[108] *Irvin v. Dowd, supra* note 87.

[109] *Casey v. Moore*, 386 F.3d 896 (9th Cir. 2004); *Jerrel v. State*, 756 P.2d 301 (Alaska App. 1988); *Duke v. State*, 99 P.3d 928 (Wyo. 2004).

[110] Brief for appellant at 94.

potential jurors would automatically impose the death penalty in every first degree murder case. In denying the request, the trial court reasoned that Nebraska's sentencing scheme provides that the judge, not the jury, is to determine whether the death sentence will be imposed. Galindo argues that even though the jury does not impose the ultimate sentence, those jurors who believe in imposing the death sentence in all circumstances would vote to find an aggravator, despite the evidence.

[29] Generally, the extent to which parties may examine jurors as to their qualifications rests largely in the discretion of the trial court, the exercise of which will not constitute reversible error unless clearly abused, and where it appears that harmful prejudice has been caused thereby.[111] But Galindo relies on *Morgan v. Illinois*,[112] wherein the U.S. Supreme Court held that the defendant had the constitutional right to inquire if any of the prospective jurors would always impose the death penalty following a conviction of first degree murder. We find *Morgan* distinguishable from the present case.

[30] Central to the Court's decision in *Morgan* was the fact that Illinois had chosen to delegate to the jury the task of weighing the aggravating circumstances against mitigating circumstances and to determine whether the penalty of death should be imposed. The Court said that the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his or her duties as a juror in accordance with the juror's instructions and oath.[113] Under this standard, the Court explained: "[A] juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause."[114]

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[111] *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999); *Yount v. Seager*, 181 Neb. 665, 150 N.W.2d 245 (1967); *State v. Bruna*, 12 Neb. App. 798, 686 N.W.2d 590 (2004).

[112] *Morgan v. Illinois*, 504 U.S. 719, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992).

[113] See *id.*

[114] *Id.*, 504 U.S. at 728.

Stated another way, a juror who would impose the death penalty in all situations regardless of the weighing process is "announcing an intention not to follow the instructions" that he or she "consider" all the mitigating factors supported by the evidence.[115]

[31] The Court explained that it thus followed that "[w]ere *voir dire* not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would *always* impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless . . . ."[116] Despite the fact that voir dire is generally left to the discretion of the trial judge, the Court explained that the trial court's judgment was "'subject to the essential demands of fairness.'"[117] The Court concluded that these essential demands of fairness mandate that a defendant on trial for his or her life be permitted on voir dire to ascertain whether a prospective juror holds a belief that "reflects directly on that individual's inability to follow the law."[118]

In Nebraska, unlike in Illinois, jurors' beliefs regarding whether all first degree murderers should be sentenced to death do not reflect directly on their ability to follow the law. This is because juries in Nebraska do not make the ultimate sentencing determination. While it might be permissible to allow the type of questioning that Galindo wished to conduct, it is not mandated by the principles of fundamental fairness that limit the trial court's discretion in governing voir dire. We cannot conclude that the trial court abused its discretion in denying Galindo's request to "life qualify" the venire.

(e) Minimizing Jurors' Role in Death Penalty Determination

Galindo argues that in addition to refusing his request to life qualify the venire, the trial court handicapped the jury's ability to do its duty by minimizing its role in determining Galindo's

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[115] *Id.*, 504 U.S. at 738.

[116] *Id.*, 504 U.S. at 733-34 (emphasis in original).

[117] *Id.*, 504 U.S. at 730.

[118] *Id.*, 504 U.S. at 735.

sentences. Galindo asserts that the trial court's standard death qualification question violated his rights to due process and a fair trial and the right against cruel and unusual punishment. That question was as follows:

> Now, . . . Galindo is charged with first degree murder. Under Nebraska law if a person is found guilty of first degree murder, death is one of the possible penalties. If . . . Galindo is found guilty of first degree murder, a panel of three judges will determine his sentence, not the jury. Knowing that a panel of judges, not the jury, must determine the sentence, do you have any personal beliefs which would prevent you from making a finding of guilty of first degree murder even if the evidence supports such a finding?

We conclude that there is no constitutional violation stemming from this statement.

According to Galindo, the trial court's statement is analogous to commentary considered impermissible by the U.S. Supreme Court in *Caldwell v. Mississippi*.[119] Under Mississippi law at the time of the *Caldwell* decision, the jury in first degree murder cases made the ultimate sentencing determination. During closing arguments for the defendant's trial, the prosecution attempted to rebut defense counsel's argument that the defendant's life was in the jury's hands and that it had a solemn responsibility in determining whether to impose the death penalty. The prosecution responded that defense counsel was very "'unfair'" to imply that it would be the jury putting the defendant to death, explaining, "'[Y]our decision is not the final decision. . . . Your job is reviewable.'"[120] The trial court overruled defense counsel's objection to this line of argument, and the prosecution continued to explain to the jury that all death penalty determinations were automatically reviewed by the justices of the state supreme court.

The U.S. Supreme Court held that the prosecution's argument to the jury violated the defendant's Eighth Amendment rights.

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[119] *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985).

[120] *Id.*, 472 U.S. at 325.

The Court held that the Eighth Amendment prohibits the imposition of a death sentence by a sentencer "who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."[121] "[C]apital sentencers," the Court explained, should instead "view their task as the serious one of determining whether a specific human being should die at the hands of the State."[122]

Moreover, the Court explained that "[i]n the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court."[123] The Court concluded that "[b]ias against the defendant clearly stems from the institutional limits on what an appellate court can do—limits that jurors often might not understand."[124] The Court summarized:

> The "delegation" of sentencing responsibility that the prosecutor here encouraged would thus not simply postpone the defendant's right to a fair determination of the appropriateness of his death; rather it would deprive him of that right, for an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance. . . .
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> . . . But for a sentencer to impose a death sentence out of a desire to avoid responsibility for its decision presents the specter of the imposition of death based on a factor wholly irrelevant to legitimate sentencing concerns. The death sentence that would emerge from such a sentencing proceeding would simply not represent a decision that the State had demonstrated the appropriateness of the defendant's death.[125]

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[121] *Id.*, 472 U.S. at 329. See, also, *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003).

[122] *Caldwell v. Mississippi, supra* note 119, 472 U.S. at 329.

[123] *Id.*, 472 U.S. at 330.

[124] *Id.*

[125] *Id.*, 472 U.S. at 330, 332.

The U.S. Supreme Court, however, has since clarified *Caldwell* as follows:

> *Caldwell* [is] "relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." . . . Thus, "[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law."[126]

The prosecution's commentary to the jury in *Caldwell* is clearly distinct from the commentary by the trial judge in Galindo's voir dire. Most fundamentally, as the trial court noted, the jury in Galindo's trial was not the "sentencer." Based on the trial judge's statement, there could be no "false belief" that responsibility for determining the appropriateness of the death sentence rests elsewhere, because that decision *does* lie elsewhere.

Nor did the commentary influence the jury to "shift its sense of responsibility" in its function of determining death eligibility. The commentary complained of here occurred prior to trial as part of the jury selection process. The trial judge was simply trying to ascertain whether, despite the fact that the panel, and not the jury, would determine the ultimate sentence, any of the potential jurors would be unable to find Galindo guilty because he might be put to death based on such a verdict.[127] While the death qualification question did not inform the jury *at that time* that it would be charged with finding aggravating circumstances, this was deliberate. As required by § 29-1603(2)(c), the existence or content of the notice of aggravation was not disclosed to the jury prior to the return of the guilty verdicts. Section 29-1603(2)(c) states that "[t]he existence or contents of a notice of aggravation shall

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[126] *Romano v. Oklahoma*, 512 U.S. 1, 9, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994) (citations omitted).

[127] See, *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989); *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). See, also, *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

not be disclosed to the jury until after the verdict is rendered in the trial of guilt." Thus, the narrowness of the information revealed to the potential jurors during voir dire was an attempt to avoid unduly prejudicing the jury against Galindo during the guilt phase of the bifurcated trial.

By the time of the aggravation hearing, the nature of the jury's responsibility was fully explained. The jury was instructed: "Aggravating circumstances are reasons why [Galindo] may be sentenced to death" and "[i]f no aggravating circumstance is found to exist, the court shall enter a sentence of life imprisonment." While the jury was also informed that the three-judge panel determined Galindo's ultimate sentence, this unavoidable knowledge did not inaccurately diminish the jurors' sense of responsibility or interject irrelevant concerns. And certainly, unlike the concern over the jurors' knowledge of the confines of appellate review considered in *Caldwell*, there was no danger of the jury misunderstanding precisely what a three-judge panel does.

[32] Voir dire is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.[128] "The Constitution, after all, does not dictate a catechism for *voir dire*, but only that the defendant be afforded an impartial jury."[129] We find no constitutional violation stemming from the trial court's death eligibility questions.

5. *Enmund/Tison*

We turn now to a cluster of arguments made by Galindo pertaining to the U.S. Supreme Court's decisions in *Enmund v. Florida*[130] and *Tison v. Arizona*.[131] The *Enmund/Tison* rulings address accomplice liability for felony murder and the constitutional mandate that in capital cases, the punishment be tailored to both the nature of the crime and the defendant's

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[128] *Morgan v. Illinois, supra* note 112.

[129] *Id.*, 504 U.S. at 729.

[130] *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982).

[131] *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987).

personal responsibility and moral guilt.[132] Galindo asserts that under those cases, he had a right to know under which theory of first degree murder he was being tried and had a right to step instructions mandating specific findings pertaining to his level of culpability. In order to address these arguments, we first discuss, in some detail, those two cases and their progeny.

In *Enmund*, the defendant was sentenced to death after being convicted as an aider and abettor to felony murder. The only evidence of the defendant's participation in the crime was that he waited in a car a few hundred feet away to help the two robbers, who had killed the victims, escape. The Court held that the defendant's death sentence was a violation of his Eighth Amendment rights, because there was no evidence the defendant himself killed, attempted to kill, or intended or contemplated that a life would be taken.

Under the statutory scheme by which the defendant was convicted and sentenced to death, the State only needed to show that the aider and abettor to the felony murder intended the underlying crime. The jury was instructed that it need not conclude there was a premeditated design or intent to kill, and there was no requirement under the statutes charged that the State present any proof as to the defendant's mental state.

This, the Court explained, was distinguishable from the statutory schemes of most other states which generally rejected the death penalty for simple accomplice liability in felony murders—what the Court later called "felony murder *simpliciter*."[133] The Court observed that of those states that allowed capital punishment for felony murder accomplices, the death penalty was more narrowly conscribed to situations where sufficient aggravating circumstances are present. And most of those states made it a statutory mitigating circumstance that the defendant was an accomplice in a capital felony committed by another person and that his participation was relatively minor.

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[132] *Enmund v. Florida, supra* note 130. See, also, *Schad v. Arizona, supra* note 57; *Tison v. Arizona, supra* note 131.

[133] *Tison v. Arizona, supra* note 131, 481 U.S. at 148.

Specifically commenting on this mitigating circumstance, the Court explained: "By making minimal participation in a capital felony committed by another person a mitigating circumstance, these sentencing statutes reduce the likelihood that a person will be executed for vicarious felony murder."[134]

Based on a review of the statutory schemes and the circumstances under which the death penalty had actually been imposed, the Court concluded that society generally rejected the idea of capital punishment for felony murder simpliciter. And, unless the death penalty applied to a particular situation measurably contributes to the goal of either retribution or deterrence, then it is nothing more than the purposeless and needless imposition of pain and suffering.[135]

[33] The Court concluded that imposing the death penalty on those guilty of felony murder simpliciter did not measurably contribute to the goal of deterrence, because the likelihood of a killing in the course of a robbery was not so substantial that "one should share the blame for the killing if he somehow participated in the felony."[136] This left retribution as the only possible justification for executing the defendant, but, punishment as retribution "must be tailored to [the defendant's] personal responsibility and moral guilt" and to the defendant's "intentions, expectations, and actions."[137] It must be tailored to the defendant's culpability, "not on that of those who committed the robbery and shot the victims."[138] The Court concluded that "[p]utting [the defendant] to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts."[139]

The U.S. Supreme Court in *Tison* clarified that simply because the circumstances in *Enmund* did not meet the

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[134] *Enmund v. Florida, supra* note 130, 458 U.S. at 792.

[135] *Enmund v. Florida, supra* note 130.

[136] *Id.*, 458 U.S. at 799.

[137] *Id.*, 458 U.S. at 800, 801.

[138] *Id.*, 458 U.S. at 798.

[139] *Id.*, 458 U.S. at 801.

culpability requirements for imposing the death penalty, it did not follow that the death penalty could not be constitutionally imposed against any accomplice to felony murder who did not "kill, or intended that a killing take place."[140] The defendants in *Tison* were convicted of felony murder and sentenced to death in connection with their actions in providing weapons and assisting in an armed prison escape of two convicted murderers. They then helped flag down an innocent family to steal their vehicle, watched the family be murdered by the escapees, and continued in the joint criminal venture for several days afterward until their eventual arrest. This, the Court explained, was a far cry from "the minor actor" in *Enmund*.[141]

[34,35] The Court explained that even though they did not themselves kill or intend to kill, it was constitutionally permissible to execute the two defendants in *Tison* because they were both major participants in a dangerous crime. The Court then stated:

> [T]he reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.[142]

And "the greater the defendant's participation in the felony murder, the more likely that he acted with reckless indifference to human life."[143]

The Court explicitly declined in *Tison* "to precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty"[144] in other cases, but it did hold that "major participation in the felony committed,

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[140] *Tison v. Arizona, supra* note 131, 481 U.S. at 173 (Brennan, J., dissenting; Marshall, J., joins; Blackmun and Stevens, JJ., join in part).

[141] *Tison v. Arizona, supra* note 131, 481 U.S. at 149.

[142] *Id.*, 481 U.S. at 157-58.

[143] *Id.*, 481 U.S. at 153.

[144] *Id.*, 481 U.S. at 158.

combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement."[145]

(a) Step Instruction

Galindo's principal argument is that the trial court erred in denying his requested step instruction for the jury. Galindo requested a step instruction to determine whether a verdict of first degree murder was based on the theory of premeditation or felony murder. Galindo then requested that the jury be instructed that if it found him guilty of felony murder, it must determine (1) whether Galindo was "a major participant in the felony" committed and (2) whether he demonstrated "reckless indifference to human life."

Galindo argues that because the jury was given a general verdict form, we cannot know whether it convicted him solely as an aider and abettor to felony murder and rejected a premeditated intent to kill. If it did, then Galindo asserts that his crimes fall under the concerns of *Enmund/Tison*, because he did not himself kill four of the victims and he purportedly killed Elwood accidentally. And Galindo argues that the *Enmund/Tison* factors are "'functional equivalent[s]'" of elements of the offense of death-eligible felony murder that, under *Ring*, must be found by a jury beyond a reasonable doubt.[146]

(i) Separating Premeditated From Felony Murder

[36] We have explained that premeditated murder and felony murder are but different ways to commit a single offense of first degree murder.[147] And where a single offense may be committed in a number of different ways and there is evidence to support each of the ways, the jury need only be unanimous in its conclusion that the defendant violated the law by committing the act.[148] It need not be unanimous in its conclusion as to which of several consistent theories it believes resulted in

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[145] *Id.*

[146] Brief for appellant at 55.

[147] *State v. Parker*, 221 Neb. 570, 379 N.W.2d 259 (1986). See, also, *State v. Buckman*, 237 Neb. 936, 468 N.W.2d 589 (1991).

[148] *Id.*

the violation. Therefore, we have held that the trial court is not *required* to provide separate verdict forms for these two different theories of first degree murder.[149]

The U.S. Supreme Court has agreed, but has noted that simply because such a general verdict under two alternate theories of first degree murder does not "fall beyond the constitutional bounds of fundamental fairness and rationality," this is "not [to] suggest that jury instructions requiring increased verdict specificity are not desirable."[150] The Arizona Supreme Court in *State v. Smith*[151] explained further:

> [A]s a matter of sound administration of justice and efficiency in processing murder cases in the future, we urge trial courts, when a case is submitted to a jury on alternate theories of premeditated and felony murder, to give alternate forms of verdict so the jury may clearly indicate whether neither, one, or both theories apply.

The court in *Smith* illustrated that in death penalty cases, this "would be of great benefit to the trial court and to the reviewing courts in determining death penalty questions under the *Enmund/Tison* analysis."[152] In addition, the court noted that it had in the past been forced to reverse a general first degree murder verdict when it found the evidence failed to support the underlying felony—because it was simply unknown whether the verdict was based on felony murder or premeditation.

For the following reasons, we conclude that Galindo's *Enmund/Tison* arguments are without merit.

(ii) Enmund/Tison *Findings as Functional Elements of Offense*

Galindo's main purpose in separating premeditated from felony murder in the proposed jury instructions was to demand

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[149] See, *State v. Buckman, supra* note 147; *State v. Parker, supra* note 147. See, also, *Schad v. Arizona, supra* note 57; *State v. Smith*, 160 Ariz. 507, 774 P.2d 811 (1989); *San Martin v. State*, 717 So. 2d 462 (Fla. 1998); *State v. Fry*, 138 N.M. 700, 126 P.3d 516 (2005).

[150] *Schad v. Arizona, supra* note 57, 501 U.S. at 645.

[151] *State v. Smith, supra* note 149, 160 Ariz. at 513, 774 P.2d at 817.

[152] *Id.*

that the jury then make *Enmund/Tison* findings. It is error when the instructions provided do not require a jury to find each element of the crime under the proper standard of proof.[153] Before *Ring*, it was clear that there was no entitlement, absent legislation so providing, to *Enmund/Tison* findings by a jury beyond a reasonable doubt. Galindo argues, again, that *Ring* has changed the analysis.

In *Cabana v. Bullock*,[154] decided shortly before *Tison*, the U.S. Supreme Court explained that its ruling in *Enmund* "establishes no new elements of the crime of murder that must be found by the jury."[155] The defendant in *Cabana* had been sentenced to death after being found guilty of first degree murder under a general verdict. It was thus unclear whether the defendant was found guilty under a theory of premeditated or felony murder. The evidence was also unclear as to whether the defendant had actually killed. The Fifth Circuit Court of Appeals reversed the conviction because it concluded that *Enmund* prohibited the defendant's execution absent *Enmund* findings by the trier of fact beyond a reasonable doubt, but the Court reversed, holding that the circuit court had misunderstood *Enmund*.

[37] The Court clarified that *Enmund* "'does not affect the state's definition of any substantive offense, even a capital offense.'"[156] Instead, it is simply a "substantive limitation on sentencing, and like other such limits it need not be enforced by the jury."[157] The Court explained:

> [T]he decision whether a sentence is so disproportionate as to violate the Eighth Amendment in any particular case, like other questions bearing on whether a criminal

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[153] See, *Schad v. Arizona, supra* note 57; *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).

[154] *Cabana v. Bullock*, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704 (1986), *abrogated on other grounds, Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439 (1987).

[155] *Cabana v. Bullock, supra* note 154, 474 U.S. at 385. Accord *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), *overruled in part, Ring v. Arizona, supra* note 4.

[156] *Cabana v. Bullock, supra* note 154, 474 U.S. at 385.

[157] *Id.*, 474 U.S. at 386.

> defendant's constitutional rights have been violated, has long been viewed as one that a trial judge or an appellate court is fully competent to make.[158]

Accordingly, "[a]t what precise point in its criminal process a State chooses to make the *Enmund* determination is of little concern from the standpoint of the Constitution."[159]

In *State v. Bjorklund*,[160] we likewise rejected the defendant's argument that the death penalty could not be imposed without a jury's finding that the defendant intended to kill, attempted to kill, or actually did kill the victim; had a major personal involvement in any underlying felony during which the victim was killed; or showed a reckless indifference to human life. In affirming the imposition of the death penalty, we explained:

> [I]t is not the province of the jury to make the findings posited by [the defendant] in this assignment of error. The lack of a jury finding in this regard has no impact on sentencing because the *Enmund v. Florida, supra*, question is addressed as a mitigating circumstance during the sentencing phase of a capital case. It is, by statute, a mitigating circumstance that "[t]he offender was an accomplice in the crime committed by another person and his participation was relatively minor." § 29-2523(2)(e). The trial court found during sentencing that [the defendant] failed to establish this mitigator by a preponderance of the evidence . . . .[161]

We also observed that based on the evidence at trial, the concerns of the Court in *Enmund* were not present.[162]

Galindo argues that, under *Ring*, *Enmund/Tison* findings are akin to statutory aggravating circumstances and are likewise functional equivalents of elements of the offense. Galindo

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[158] *Id.*

[159] *Id.*

[160] *State v. Bjorklund, supra* note 72.

[161] *Id.* at 479, 604 N.W.2d at 211.

[162] See, *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998); *State v. Ryan*, 248 Neb. 405, 534 N.W.2d 766 (1995), *abrogated on other grounds, Mata II, supra* note 33.

argues that this is so because without those findings, an accomplice to felony murder cannot be subjected to the increased penalty of death. This is the first time that the relationship between *Enmund/Tison* and *Ring* has been squarely presented to this court. We determine, however, that the relevant holdings of *Bjorklund* and *Cabana* remain good law. *Enmund/Tison* "findings" are not elements of the offense of felony murder, even when the death penalty is imposed.

[38] Under *Ring*, the U.S. Supreme Court held there was a right to jury factfinding of aggravating circumstances, because if state law makes a factual finding a necessary prerequisite to imposing a greater punishment than authorized without such a finding, then a defendant has a Sixth Amendment right to have this finding made by a jury beyond a reasonable doubt.[163] In short, *Ring* extended Sixth Amendment jury protections to aggravating sentencing considerations.[164] The Court explained that "[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."[165]

[39] The Court has since explained that the "animating principle [of the rule in *Ring*] is the preservation of the jury's historic role as a bulwark between the State and the accused at the trial."[166] "[T]he Sixth Amendment does not countenance legislative encroachment on the jury's traditional domain."[167] That domain includes "the existence of '"any particular fact"' that the law makes essential to his punishment."[168]

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[163] *Ring v. Arizona, supra* note 4. See, *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005); *Schriro v. Summerlin, supra* note 19; *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

[164] See *Mata II, supra* note 33.

[165] *Ring v. Arizona, supra* note 4, 536 U.S. at 589.

[166] *Oregon v. Ice*, 555 U.S. 160, 129 S. Ct. 711, 717, 172 L. Ed. 2d 517 (2009).

[167] *Id.*

[168] *United States v. Booker, supra* note 163, 543 U.S. at 232.

But, as the Court explained in *Cabana*, Eighth Amendment considerations such as those in *Enmund* and *Tison* are traditionally the domain of a trial judge or appellate court, and not a jury. On remand in *Ring*, the Arizona Supreme Court specifically addressed the relationship between *Ring* and *Enmund/Tison.* Although the defendant had also complained to the U.S. Supreme Court that he was entitled to a jury determination of the *Enmund/Tison* factors, that issue was never addressed by its decision.[169]

The Arizona Supreme Court determined that *Ring* did not require a jury determination of "*Enmund-Tison* findings."[170] Such findings were part of an Eighth Amendment proportionality analysis and were nothing more than a judicially crafted instrument used to measure proportionality between a defendant's criminal culpability and the sentence imposed. They do not concern whether the State has met its burden to prove the offense, but instead whether, given a defendant's culpable mental state, the government can impose capital punishment consistent with the Eighth Amendment's proportionality threshold. This is "conceptually and constitutionally distinct"[171] from the *Sixth* Amendment analysis in *Ring*. As stated by another court in rejecting any relationship between *Ring* and *Enmund/Tison*, the *Enmund/Tison* determination "is a limiting factor, not an enhancing factor."[172]

[40] We agree. *Enmund* and *Tison* did nothing more than provide guidance to the courts in their traditional Eighth Amendment analysis of certain circumstances. In fact, as a careful reading of *Enmund* and *Tison* makes clear, any attempt to bottle *Enmund* and *Tison* into a formula of "factors" or "findings" is inappropriate and contradicts the U.S. Supreme Court's statement that it was not providing a precise delineation of "particular types of conduct and states of mind warranting

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[169] *Ring v. Arizona, supra* note 4.

[170] *State v. Ring*, 204 Ariz. 534, 563, 65 P.3d 915, 944 (2003).

[171] *Id.* at 565, 65 P.3d at 946.

[172] *Brown v. State*, 67 P.3d 917, 920 (Okla. Crim. App. 2003). But see *Palmer v. Clarke*, 293 F. Supp. 2d 1011 (D. Neb. 2003), *reversed and remanded in part* 408 F.3d 423 (8th Cir. 2005).

imposition of the death penalty" in other cases.[173] As explained in *Schriro*,[174] *Ring* did not touch on what elements are essential for a constitutional statutory scheme. And the Nebraska Legislature has not chosen to make any sort of *Enmund*/*Tison* finding a prerequisite to imposing a greater punishment than that which would be authorized, under law, without such a finding. In other words, *Enmund*/*Tison* considerations are not facts on which "the legislature conditions an increase in their maximum punishment."[175] They are, accordingly, not within the jury's traditional domain. As previously discussed, *Ring* was a limited, procedural holding concerning the Sixth Amendment. It does not cast any doubt on the traditional view that *Enmund* and *Tison* present no new elements of the offense of death-eligible felony murder.

(b) Bill of Particulars

Galindo also argues that the trial court erred in overruling his bill of particulars by which he sought to know exactly what theory of first degree murder the State intended to prove against him. Galindo asserts he had a due process right to know whether the State would attempt to prove that he was a major participant in the crime who displayed a reckless indifference to human life. Under *Ring* and related cases,[176] Galindo claims that the indictment must inform the defendant of any issue that would increase the punishment for the offense charged.

In line with our holdings concerning general verdict forms for first degree murder, we have said that it is not error to charge a defendant in the information with first degree murder without specifying whether the State's theory is felony murder or premeditated murder.[177] Rather, the charge is for a single crime and arises out of one set of facts.[178] And, we have already

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[173] *Tison v. Arizona, supra* note 131, 481 U.S. at 158.

[174] *Schriro v. Summerlin, supra* note 19.

[175] *Ring v. Arizona, supra* note 4, 536 U.S. at 589.

[176] See, e.g., *Apprendi v. New Jersey, supra* note 163; *Jones v. State*, 261 Ga. 665, 409 S.E.2d 642 (1991).

[177] See *State v. Buckman, supra* note 147.

[178] *Id.*

concluded that the holding in *Ring* is inapplicable to *Enmund/Tison* considerations. We accordingly find no error in the trial court's refusal to grant Galindo's bill of particulars.

(c) Whether Eighth Amendment Prohibits Any of Galindo's Death Penalty Sentences

To the extent that Galindo challenges the constitutionality of his ultimate penalty under *Enmund/Tison*, we conclude that none of the convictions violate Galindo's Eighth Amendment right against excessive punishment. While findings of culpability under *Enmund/Tison* need not necessarily be made by the jury,[179] for all five victims, the jury found aggravating circumstance (1)(f). Section 29-2523(1)(f) states that at the time of the murder, the defendant knowingly created a great risk of death to at least several persons.

The instruction on accomplice liability relevant to this aggravating circumstance read as follows:

> [Galindo] can be guilty of an aggravator even though he personally did not commit the act involved in the crime so long as he aided someone else to commit it. [Galindo] aided someone else if:
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> (1) [Galindo] intentionally encouraged or intentionally helped another person to commit the aggravator; and
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> (2) [Galindo] intended that an aggravator be committed; or [he] knew that the other person intended to commit or expected the other person to commit the aggravator; and
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> (3) the aggravator in fact was committed by that other person.

Thus, under this instruction, a finding of aggravating circumstance (1)(f) was a finding that Galindo intentionally or knowingly encouraged an act in which he knew or expected would create a great risk of death to several persons. Put another way, the jury found that Galindo acted with a reckless disregard for human life.

In addition, the sentencing panel specifically rejected the presence of mitigating circumstance (2)(e). Section

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[179] See discussion *infra* Part V.5(a)(ii).

29-2523(2)(e) states that the offender was an accomplice in the crime committed by another person and that his or her participation was relatively minor. The sentencing panel stated it found "no evidence to support the existence of this mitigating circumstance and concludes that it does not apply." As the U.S. Supreme Court in *Enmund* said: "By making minimal participation in a capital felony committed by another person a mitigating circumstance, these sentencing statutes reduce the likelihood that a person will be executed for vicarious felony murder."[180]

In fact, Galindo does not deny that he was a major participant in the underlying felony. Galindo was one of the principal planners of the robbery and one of the principal actors. As the U.S. Supreme Court indicated in *Tison*, the relationship between major participation and reckless disregard for human life is almost inseparable. This is especially true when the crime involves the armed robbery of a bank. Assuming without deciding that *Enmund*/*Tison* considerations are relevant when a defendant has actually killed one of the victims, the State has made more than an adequate showing here that those considerations are satisfied. Galindo was a major participant in the robbery, and he acted with a reckless disregard for human life; the Eighth Amendment does not prohibit him from being sentenced to the death penalty.

6. Evidentiary Challenges Considered During Aggravation and Sentencing Phases

We turn next to miscellaneous challenges Galindo makes to the trial court's evidentiary rulings during the aggravation and sentencing stages of trial. First, Galindo argues that he was prejudiced by the jury's exposure during the aggravation hearing to a photograph of Lundell's body. Second, Galindo argues that the three-judge panel should not have been allowed to consider the presentence investigation report, the aggravation hearing record, and certain victim impact statements. Finally, Galindo argues that he was prejudiced when the sentencing panel, for purposes of proportionality review, refused to

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[180] *Enmund v. Florida, supra* note 130, 458 U.S. at 792.

consider his offers of other first degree murder cases for which the death penalty was not imposed and the "Baldus Report."

(a) Photograph of Lundell's Body During Aggravation Hearing

Galindo chose jury determination of aggravating circumstances.[181] One of the aggravating circumstances alleged and found was that based upon Galindo's participation in Lundell's murder, he had a substantial prior history of serious assaultive or terrorizing criminal activity.[182] The evidence was relevant to the jury's finding that the State had proved aggravator (1)(a).

Over Galindo's objection, the court allowed the jury to view a photograph of Lundell's decomposed body. The pathologist testified that he was unable to determine the exact cause of Lundell's death. The photograph does show, however, that Lundell had been gagged and that his legs and feet were bound. The photograph also shows that Lundell's body had been burned before being taped up in a blanket and buried.

Galindo had offered to stipulate to the location of Lundell's body, but the State refused to enter into the stipulation. Galindo argues that because of his offer to stipulate and the fact that the exact cause of death was not able to be determined from the photograph, the photograph had little probative value. In contrast, Galindo claims the photograph was particularly prejudicial. Galindo asserts that the photograph was thus inadmissible under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008). Galindo did not stipulate to his involvement in Lundell's murder, and he does not contend that the State did not have to prove his involvement to show he had a substantial prior history of serious assaultive or terrorizing criminal activity.

Under the previous law, when a sentencing judge or panel of judges decided both aggravating and mitigating circumstances, this court held that the sentencing panel could consider unadjudicated misconduct in the penalty phase of a capital

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[181] See § 29-2520(2) (Reissue 2008).

[182] See § 29-2523(1)(a).

trial.[183] The issue in *State v. Reeves*[184] was whether the sentencing panel could consider unadjudicated misconduct to rebut the existence of a mitigating circumstance, i.e., that the defendant had no significant history of prior criminal activity. But we relied extensively on cases in which other state and federal courts had permitted evidence of unadjudicated offenses to prove an aggravating factor in the sentencing phase of a capital trial. Those courts reasoned that the evidence is not unfairly prejudicial, because guilt has already been determined in the sentencing phase. They further reasoned that evidence of a defendant's previous violent criminal conduct is particularly relevant to individualized capital sentencing. After reviewing these cases, we agreed with those courts:

> "[A]s is true in all other criminal causes, the sentencing authority in a death penalty case should be presented with a full range of relevant information so as to fashion a particular penalty in accord with 'the prevalent modern penal philosophy of individualized punishment.'" . . . In Nebraska, the sentencing court in noncapital cases is allowed wide latitude in the information it considers, including consideration of unadjudicated misconduct. . . . This wide latitude should not be circumscribed in capital cases, where the need for individualized punishment is crucial because of the seriousness of the offense and gravity of possible penalties which may be imposed after conviction.
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> . . . .
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> "In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances set forth in section 29-2523. Any such evidence which the court deems to have probative value may be received."

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[183] See *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990), *vacated and remanded on other grounds* 498 U.S. 964, 111 S. Ct. 425, 112 L. Ed. 2d 409 (1990).

[184] *Id.*

> . . . .
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> Moreover, because in Nebraska capital sentencing is conducted by a single judge or a panel of three judges and not by a jury, the risk that the sentencer might be unduly prejudiced by the admission of such evidence is minimized.[185]

As this statement illustrates, our holding and reasoning in *Reeves* also apply to aggravating circumstances, with the added requirement that the State must prove the unadjudicated offense beyond a reasonable doubt under Nebraska Evidence Rules.[186] Because unfair prejudice in the determination of Galindo's guilt for the charged murders was not an issue and the evidence is relevant for sentencing, the admission of the photograph was controlled by rule 403.

[41,42] In a homicide prosecution, photographs of a victim may be received into evidence for the purpose of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.[187] Even had the State accepted the stipulation, the photograph remained probative of the condition of the body, malice, and intent. But we point out that, generally, a defendant cannot negate an exhibit's probative value through a tactical decision to stipulate.[188] The State is allowed to present a coherent picture of the facts of the crimes charged, and it may generally choose its evidence in so doing.[189]

[43] The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value

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[185] *Id.* at 733-34, 453 N.W.2d at 374-75 (citations omitted).

[186] See § 29-2521(2).

[187] *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

[188] See, *State v. Rife*, 215 Neb. 132, 337 N.W.2d 724 (1983); *State v. McDaniel*, 17 Neb. App. 725, 771 N.W.2d 173 (2009); *Butler v. State*, 647 N.E.2d 631 (Ind. 1995); *Noe v. State*, 616 So. 2d 298 (Miss. 1993); *State v. Tharp*, 27 Wash. App. 198, 616 P.2d 693 (1980).

[189] See, *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997); *State v. McPherson*, 266 Neb. 734, 668 N.W.2d 504 (2003); *State v. McDaniel, supra* note 188.

against their prejudicial effect.[190] The trial court did not abuse its discretion in admitting the photograph of Lundell's body.

(b) Presentence Investigation Considered by Three-Judge Panel

Galindo also claims error stemming from the admission of the presentence investigation report before the three-judge panel. Galindo's argument against the admissibility of the presentence investigation is mostly entangled with arguments against the validity of L.B. 1 already considered above. However, Galindo also asserts that the presentence investigation report was inadmissible hearsay; violated his rights to confrontation; and was not admissible under L.B. 1, at least for certain purposes—on which Galindo is unclear.

Section 29-2521(3) states:

> When a jury renders a verdict finding the existence of one or more aggravating circumstances as provided in section 29-2520, *the panel of judges* shall, as soon as practicable after receipt of the written report resulting from the presentence investigation ordered as provided in section 29-2261, hold a hearing to receive evidence of mitigation and sentence excessiveness or disproportionality.

(Emphasis supplied.) Neb. Rev. Stat. § 29-2261(1) (Cum. Supp. 2006), in turn, stated that in the case of first degree murder where either the jury finds the existence of one or more aggravating circumstances or the offender waives the right to a jury determination of aggravators and the information contains a notice of aggravation, "*the court* shall not commence the sentencing determination proceeding as provided in section 29-2521 without first ordering a presentence investigation of the offender and according due consideration to a written report of such investigation." (Emphasis supplied.)

Galindo's arguments that L.B. 1 does not conceive of the admission of presentence investigations, and thus that his due process rights under the scheme were violated, stem from his assertion that the terms "court" and "panel" as used in these sections are not interchangeable. He also spends much time

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[190] *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002).

arguing what "due consideration"[191] might entail. According to Galindo, it is possible that under L.B. 1, the presentence investigation is meant to be utilized by the trial judge, i.e., "the court," only for the purpose of determining the appropriate sentence for crimes other than first degree murder or for purposes of sending the report on to the Department of Correctional Services. In contrast, when there is a "panel," i.e., when the death penalty is at stake, Galindo asserts that the statutory language indicates that, at most, the panel may consider the presentence investigation for the purpose of finding mitigating circumstances. Galindo argues that the panel may not utilize the report to weigh the aggravating against mitigating circumstances or in its ultimate sentencing determination—in large part because of Galindo's previous argument that the panel cannot consider evidence of aggravating circumstances at all.

It is unclear what prohibited usage of the report Galindo is alleging actually occurred. We surmise, however, that he finds prejudice from the court's knowledge of anything negative in the report, including his attempted escape from prison or other postincarceration behaviors that the sentencing panel specifically referred to in its consideration of whether there existed the nonstatutory mitigating circumstance that he cooperated with authorities. Under Galindo's interpretation of L.B. 1, the report can be used only for his benefit and can in no way prejudice him.

Galindo attributes too much to the statutes' alternate usage of "panel" and "court." We find nothing in the statutes to support Galindo's narrow interpretation of the permitted use of the report. Section 29-2521(3) plainly states that the panel of judges shall receive the presentence investigation report before holding a hearing to receive evidence of mitigation and sentence excessiveness or disproportionality. It logically follows that the report is to be considered for these purposes. As will be discussed below, in response to Galindo's allegation that the panel imposed a nonstatutory aggravator, the panel did not use

[191] Brief for appellant at 42.

the presentence investigation report for any prohibited purpose under this reading of the statute.

[44,45] With regard to the hearsay and confrontation arguments, we equally find no merit. The sentencing phase is separate and apart from the trial phase. We recognize that under Nebraska's sentencing scheme, the Nebraska Evidence Rules apply to evidence relating to aggravating circumstances.[192] But the Legislature did not provide that the Nebraska Evidence Rules shall apply to all evidence relevant to sentencing. We have held that the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence.[193] We conclude that this rule is still applicable to the sentencing phase of a capital trial except for evidence related to the finding of statutory aggravating circumstances. Presentence investigation reports have a particularly established role in the sentencing process. We have recognized that these reports are essential to a court's enlightened and just sentencing.[194] And a court does not violate a defendant's due process rights by considering information in a presentence report when the defendant had notice and an opportunity to obtain access to the information in the report and to deny or explain the information to the sentencing authority.[195] Further, we have held that the Confrontation Clause does not attach to the use of presentence reports in capital sentencing proceedings.[196] We find no error stemming from the panel's consideration of the presentence investigation report.

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[192] See §§ 29-2520(4)(a) and 29-2521(2).

[193] *State v. Hessler, supra* note 7; *State v. Bjorklund, supra* note 72; *State v. Strohl, supra* note 105; *State v. Ryan, supra* note 162; *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980).

[194] See *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986).

[195] See *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001) (distinguishing *Gardner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977)). See, e.g., *State v. True*, 236 Neb. 274, 460 N.W.2d 668 (1990); *State v. Williams*, 217 Neb. 539, 352 N.W.2d 538 (1984).

[196] See *State v. Rust, supra* note 194.

(c) Record From Aggravation Hearing

We have already considered this argument in part V.2(b) above.

(d) Victim Statements Before Sentencing Panel

Galindo makes three basic arguments regarding the trial court's admission, over his objection, of the victim impact statements. Galindo first argues that because § 29-2521(3) does not specifically list victim impact statements as something to be considered by the panel, then any such statements are barred by statute. Second, relying on what he claims to be the "watershed rule"[197] announced in *Crawford v. Washington*,[198] Galindo argues that the victim impact statements violate the Sixth Amendment's confrontation clause. Finally, Galindo asserts that if victim impact statements are admissible, he has a right to have any victim impact statements limited to those contained in the presentence investigation report and limited to "nearest surviving relative" as defined by § 29-119.

(i) Nebraska Crime Victim's Reparations Act

Victim impact statements are provided for in the Nebraska Crime Victim's Reparations Act (NCVRA).[199] The NCVRA was enacted to enable the rights set forth in article I, § 28, of the Nebraska Constitution.[200] Article I, § 28, of the Nebraska Constitution specifies that the rights of a "victim of a crime, as shall be defined by law, or his or her guardian or representative," include the right to "make an oral or written statement at sentencing, parole, pardon, commutation, and conditional release proceedings." Article I, § 28, further states that its "enumeration of certain rights for crime victims shall not be construed to impair or deny others provided by law or retained by crime victims" and that "[n]othing in this section shall

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[197] Brief for appellant at 84.

[198] *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[199] Neb. Rev. Stat. §§ 81-1801 to 81-1842 (Reissue 2008). See, also, Neb. Rev. Stat. §§ 81-1843 to 81-1851 (Reissue 2008).

[200] §§ 81-1801.01 and 81-1851.

constitute a basis for error in favor of a defendant in any criminal proceeding . . . ."

Section 81-1848 of the NCVRA states that victims, as defined in § 29-119, have certain enumerated rights, including the "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"[201] and the 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)."[202]

"Victim" is defined in § 29-119 in relevant part as "[i]n the case of a homicide, . . . the nearest surviving relative under the law as provided by § 30-2303 but does not include the alleged perpetrator of the homicide." Neb. Rev. Stat. § 30-2303 (Reissue 2008) describes the order of intestate succession.

(ii) L.B. 1

[46] Galindo is fundamentally mistaken in his apparent belief that principles of strict construction of criminal statutes mandate that those things not specifically listed are thereby prohibited. This is especially true where other statutes explicitly provide for the admissibility of those things upon which the first statute is silent. In interpreting statutes, all existing acts should be considered.[203] And, in the absence of clear legislative intent, the construction of a statute will not be adopted which has the effect of nullifying another statute.[204] We find no merit to Galindo's contention that L.B. 1 prohibits the panel's consideration of victim impact statements.

(iii) Confrontation

[47] The U.S. Supreme Court has held that victim impact statements considered at sentencing to show the personal characteristics of the victim or the emotional impact of the

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[201] § 81-1848(1)(d)(iv).

[202] § 81-1848(1)(d)(vii).

[203] *Whipps Land & Cattle Co. v. Level 3 Communications*, 265 Neb. 472, 658 N.W.2d 258 (2003).

[204] *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001).

crime on the family do not violate the U.S. Constitution.[205] Furthermore, as already mentioned, we have long held that the Sixth Amendment right to be "'confronted with the witnesses against'" one is not applicable to the sentencing phase of a criminal trial.[206] But Galindo claims this precedent is no longer good law after the U.S. Supreme Court's decision in *Crawford.* Galindo asserts that victim impact statements fall under the definition in *Crawford* of "'testimonial' statements"[207] and that therefore, he has a right to cross-examine the statements. Although a *Crawford* analysis is equally applicable to some of Galindo's other confrontation-based arguments against the admissibility of evidence before the panel, it is only in the context of the victim impact statements that his argument is fully articulated. And so, it is here that we discuss it.

[48] Paraphrasing the definition in *Crawford* of a testimonial statement, Galindo asserts that "[v]ictim impact statements are solemn declarations or affirmations made for the purpose of establishing or proving some fact, namely, the impact a victim's death has had on family members."[208] Of course, Galindo does not go so far as to actually contest the sincerity of the victims' sentiments expressed in the impact statements. He does not so much lament the inability to cross-examine the victims as the fact that the victims' statements were considered at all. In fact, the record is unclear as to whether Galindo's *Crawford* objection was to all the victims' statements or was instead limited to the State's proposed introduction of a videotape containing victim statements, an action which the trial court disallowed. We conclude that *Crawford* has no effect on the longstanding proposition that the right to confrontation is inapplicable to sentencing proceedings.

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[205] *Payne v. Tennessee*, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991). See, also, *State v. Bjorklund, supra* note 72; *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999).

[206] *State v. Cook, supra* note 65, 236 Neb. at 644, 463 N.W.2d at 579. Accord, *State v. Barker, supra* note 65; *State v. Williams, supra* note 195; *State v. Reeves, supra* note 127; *State v. Anderson and Hochstein, supra* note 193.

[207] *Crawford v. Washington, supra* note 198, 541 U.S. at 51.

[208] Brief for appellant at 85.

The Sixth Amendment's Confrontation Clause provides that "'[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'"[209] *Crawford* considered the meaning of the phrase "witnesses against him" and to what extent an out-of-court statement was a "witness against" the defendant. The Court held that any testimonial statement was subject to the defendant's right to confrontation. The pivotal holding was that "testimonial statements"[210] could not be admitted against a defendant at trial without an opportunity to cross-examine—regardless of rules of evidence that would allow the statements under "amorphous notions of 'reliability.'"[211]

The Court in *Crawford* did not address in what stage of the trial proceedings confrontation rights apply. It only considered to what type of evidence that right applies. As such, *Crawford* did not abrogate precedent that the right is inapplicable to sentencing proceedings. Indeed, as the Court in *Crawford* discussed, the concern of the Confrontation Clause is the right to confront one's "accusers."[212] A defendant cannot be found guilty based on accusations of witnesses whom the defendant has not been able to cross-examine.[213] In our bifurcated system of guilt and sentencing, however, there are no longer "accusers" at the sentencing stage. At the sentencing stage, the accusations have been resolved by the trier of fact against the defendant. The defendant is no longer the accused, but the convicted.

The U.S. Supreme Court has explained that "[w]hatever the prevailing sentencing philosophy, the sentencing authority has always been free to consider a wide range of relevant material."[214]

> [S]ince the American colonies became a nation, courts in this country and in England practiced a policy under

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[209] *Crawford v. Washington, supra* note 198, 541 U.S. at 38.

[210] *Id.*, 541 U.S. at 59.

[211] *Id.*, 541 U.S. at 61.

[212] *Id.*, 541 U.S. at 43.

[213] *Crawford v. Washington, supra* note 198.

[214] *Payne v. Tennessee, supra* note 205, 501 U.S. at 820-21.

> which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.[215]

Essential to the selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.[216] For this reason, we agree with most courts that have addressed the applicability of *Crawford* to the confrontation analysis in sentencing proceedings, and we hold that it in no way requires alteration of the proposition that Sixth Amendment rights are inapplicable during sentencing.[217]

(iv) Neither Nearest Surviving Relative Under § 30-2303 nor Contained in Presentence Investigation Report

Finally, we find no merit to Galindo's argument that the trial court committed reversible error in allowing relatives to testify that may not be considered the nearest surviving relatives under § 30-2303. The definition of "victim" upon which Galindo relies merely provides for a baseline right, under the NCVRA, to give a victim impact statement. The NCVRA does not seek to limit the sentencing court's traditional discretion to consider evidence from a variety of sources. For similar reasons, we find no merit to Galindo's strict interpretation of the NCVRA to conclude that no victim impact statement is admissible before the sentencer unless it was first contained in the presentence investigation. In summary, we find no error stemming from the

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[215] *Williams v. New York*, 337 U.S. 241, 246, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949).

[216] See *id.*

[217] See, e.g., *U.S. v. Monteiro*, 417 F.3d 208 (1st Cir. 2005); *U.S. v. Luciano*, 414 F.3d 174 (1st Cir. 2005); *U.S. v. Martinez*, 413 F.3d 239 (2d Cir. 2005); *U.S. v. Katzopoulos*, 437 F.3d 569 (6th Cir. 2006); *U.S. v. Littlesun*, 444 F.3d 1196 (9th Cir. 2006); *U.S. v. Chau*, 426 F.3d 1318 (11th Cir. 2005); *State v. McGill*, 213 Ariz. 147, 140 P.3d 930 (2006). See, also, *Szabo v. Walls*, 313 F.3d 392 (7th Cir. 2002); *U.S. v. Fleck*, 413 F.3d 883 (8th Cir. 2005); *U.S. v. Powell*, 973 F.2d 885 (10th Cir. 1992); *U.S. v. Cantellano*, 430 F.3d 1142 (11th Cir. 2005).

three-judge panel's consideration of the victim impact statements made before it.

(e) Failure to Consider First Degree Murder Cases in Which Defendant Was Not Sentenced to Death and "Baldus Report"

Galindo's counsel asked the sentencing panel to receive into evidence all of the first degree murder sentencing orders in Nebraska and also a certain report on homicide cases in Nebraska,[218] what he refers to as the "Baldus Report," although it is not commonly known under that title.[219] The report gives a narrative of the facts involved in all death-eligible cases prosecuted from 1973 to 1999. It was written for the Nebraska Commission on Law Enforcement and Criminal Justice during the time that L.B. 1 was under consideration. The report analyzes the impact of aggravating and mitigating circumstances on prosecutorial and judicial decisionmaking and identifies any geographic or racial facts in sentencing. The sentencing panel, citing *State v. Lotter*[220] and *State v. Palmer*,[221] concluded that it would review only those cases in which the death penalty had been imposed. The panel thus reviewed 15 cases, commencing in 1973, in which the death penalty was imposed. It found that the sentences of death in Galindo's case was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the reasons explained below, we find no error.

(i) Non-Death-Penalty First Degree Murder Convictions

Galindo argues that § 29-2521(3) does not limit the sentencing panel's review to only those cases where the death penalty

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[218] David C. Baldus et al., Final Report on the Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis (2002).

[219] See David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post*-Furman *Era: An Empirical and Legal Overview, With Recent Findings From Philadelphia*, 83 Cornell L. Rev. 1638 (1998).

[220] *State v. Lotter, supra* note 162.

[221] *State v. Palmer, supra* note 45.

is imposed, but instead plainly mandates that the panel consider all similar cases. Galindo concedes that the Eighth Amendment does not require a court to engage in a proportionality review. He claims instead that his due process right to the procedures afforded by the statute was violated.[222] Galindo also claims his right to a fair hearing on proportionality was denied, because merely considering cases where the death penalty was imposed does not reveal whether those who are sentenced to death are being discriminated against.

Section 29-2521(3) states that the sentencing panel shall hold a hearing to receive evidence of mitigation and sentence excessiveness or disproportionality. It states that "[e]vidence may be presented as to any matter that the presiding judge deems relevant to . . . (b) sentence excessiveness or disproportionality as provided in subdivision (3) of section 29-2522."[223] Section 29-2522(3), in turn, states that the sentencing determination shall be based, in addition to the aggravating and mitigating circumstances, on "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed *in similar cases*, considering both the crime and the defendant."

In *Bjorklund*, we held that proportionality review by the sentencing body entails consideration only of other cases in which the death penalty has been imposed. Specifically, we held that the term "'similar cases,'" as used in § 29-2522, refers to cases where the defendant was sentenced to death.[224] We have since affirmed this holding in *Lotter*.[225] The case law upon which Galindo relies was prior to our holding in *Bjorklund*, and Galindo gives us no compelling reason to reconsider that holding. The U.S. Supreme Court has explained that proportionality review is not a constitutionally required means of ensuring, under the 8th and 14th Amendments, that the death sentence

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[222] See *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984).

[223] § 29-2521(3).

[224] *State v. Bjorklund, supra* note 72, 258 Neb. at 482, 604 N.W.2d at 213.

[225] *State v. Lotter, supra* note 162. See, also, *State v. Dunster, supra* note 195.

not be "so wantonly and so freakishly imposed."[226] And we find no merit to Galindo's argument that he was denied a fair hearing on proportionality by considering only death penalty cases.

(ii) "Baldus Report"

The evidence referred to as the "Baldus Report" concludes that compared to other jurisdictions, the Nebraska capital system appears to be reasonably consistent and successful in limiting death sentences to the most culpable offenders.[227] The report concluded that there is no significant evidence of the disparate treatment of defendants based on the race of the defendant or the race of the victim.[228] The report has little if any relevance to Galindo's sentencing proceedings. As such, we conclude that the sentencing panel did not abuse its discretion in refusing to admit this report.

(f) Nonstatutory Mitigators

We next consider Galindo's assertion that the sentencing panel improperly found and imposed against him a nonstatutory aggravating circumstance. In its sentencing order, the panel first lists the five aggravating circumstances found by the jury. The panel then concludes that no statutory mitigating circumstances existed. After that, the panel considered whether any nonstatutory mitigating circumstances were present. In particular, it considered the nonstatutory mitigating circumstance proffered by Galindo that he had cooperated with law enforcement personnel following his arrest. The sentencing order states:

> The panel determines that this mitigating circumstance does exist. This mitigating circumstance is offset, in part, by the fact that [Galindo] does not demonstrate remorse for his actions. His cooperation has been tempered by

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[226] *Furman v. Georgia*, 408 U.S. 238, 310, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Stewart, J., concurring). See, also, *Pulley v. Harris, supra* note 222.

[227] See Baldus et al., *supra* note 218.

[228] *Id.*

> his actions and behavior during his post-arrest incarceration. The panel gives this mitigating factor little weight in determining the sentences to be imposed.

Galindo's postarrest actions and behavior referred to by the panel included an attempted escape from prison and a general lack of remorse for his crimes.

The next section of the panel's order sets forth its task in making the ultimate determination of whether to impose the death penalty. The panel explained that "[w]eighed against the [five] aggravating circumstances are no statutory mitigating circumstances and one non-statutory mitigating circumstance, to which the panel gives little weight." The panel stated that it had some concern with historic questions surrounding aggravating circumstance (1)(c), but even disregarding that aggravating circumstance, "the remaining factors are not approached or exceeded in weight by the one mitigating circumstance."

According to Galindo, the panel's reference to his postarrest behavior was effectively the imposition of additional "nonstatutory aggravators"[229] against him. Its consideration, argues Galindo, violated not only L.B. 1, but the Eighth Amendment principle under *Furman v. Georgia*[230] that a legislature specifically define aggravating circumstances that make a person eligible for the death penalty.

We conclude that the panel, in its sentencing calculus, did not consider any nonstatutory aggravating circumstance. Instead, the court's order, read in its entirety, simply determines the extent to which Galindo had cooperated with law enforcement. The panel was not obligated to consider the nonstatutory mitigating circumstance of postarrest cooperation in a vacuum of a single act without reference to Galindo's motivation.

7. Electrocution as Cruel and Unusual Punishment

Galindo's challenge to the electric chair as a method of implementing the death penalty was made prior to our opinion in *Mata II*.[231] In accordance with our opinion therein, we do

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[229] Brief for appellant at 91.

[230] *Furman v. Georgia, supra* note 226.

[231] *Mata II, supra* note 33.

find merit to this assignment of error. But, in accordance with that opinion, we nevertheless affirm the sentence of death.

8. De Novo Review

When a death sentence is appealed, this court conducts a de novo review of the record to determine whether the aggravating and mitigating circumstances support the imposition of the death penalty; we must also determine whether the sentence is excessive or disproportionate to the penalty imposed in similar cases.[232] We have reviewed our relevant decisions on direct appeal from other cases in which aggravating circumstances were found and the death penalty was imposed by the district court.[233] In particular, we take note of *State v. Moore*,[234] wherein we affirmed the sentence of death for the defendant's convictions of two counts of first degree murder of two cabdrivers during the perpetration of a robbery.

We agree with the sentencing panel that the five aggravating circumstances found in this case far outweigh the nonstatutory mitigating circumstance of Galindo's cooperation with authorities. Galindo knowingly participated in a dangerous crime in which five innocent victims were almost immediately shot and killed without any provocation. He planned for this crime by assisting in the murder of Lundell so that his recruit, Vela, could prove himself worthy of the robbery. In our de novo review, we conclude that the sentence of death is proportionate to the nature of the crimes and to the penalty imposed in similar cases.

VI. CONCLUSION

For the foregoing reasons, we find no merit to Galindo's assignments of error, except that assignment challenging electrocution as the method of death. We affirm the death sentence against Galindo for the murder of five people in an attempted bank robbery.

Affirmed.

Heavican, C.J., not participating.

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[232] § 29-2522; *State v. Dunster, supra* note 195.

[233] See, e.g., *State v. Gales, supra* note 25 (and cases gathered therein).

[234] *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982).

MELISSA L. MILLER, APPELLANT, V. REGIONAL WEST MEDICAL CENTER AND CONTINENTAL INSURANCE COMPANY, APPELLEES.

772 N.W.2d 872

Filed October 9, 2009. No. S-09-100.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
2. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from that of the trial court.
3. **Workers' Compensation: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation: Appeal and Error.** Appeals from a workers' compensation trial court to a review panel are controlled by statutory provisions found in the Nebraska Workers' Compensation Act.
5. **Workers' Compensation: Final Orders: Appeal and Error.** Pursuant to Neb. Rev. Stat. §§ 48-179 and 48-182 (Reissue 2008), a party may appeal to a review panel only from a final order of the Workers' Compensation Court.
6. **Workers' Compensation: Final Orders: Words and Phrases: Appeal and Error.** Neb. Rev. Stat. § 25-1902 (Reissue 2008) defines a "final order" for purposes of a workers' compensation appeal from a trial court to a review panel.
7. **Workers' Compensation: Final Orders.** A workers' compensation case is a special proceeding.
8. **Final Orders: Appeal and Error.** A substantial right is an essential legal right, not a mere technical right. A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken.

Appeal from the Workers' Compensation Court. Affirmed.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellant.

Jason A. Kidd and Abigail A. Wenninghoff, of Engles, Ketcham, Olson & Keith, P.C., for appellees.

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

STEPHAN, J.

In 1995, Melissa L. Miller was awarded workers' compensation benefits for injuries she sustained in an accident arising

out of and in the course of her employment with Regional West Medical Center (RWMC). On September 24, 2007, Miller filed a request for an independent medical examiner in the compensation court. The request sought resolution of issues pertaining to a shoulder surgery recommended by Miller's physician. A single judge of the compensation court denied Miller's request, based upon a determination that the 1995 award did not establish RWMC's liability for an injury to Miller's shoulder. Miller sought review of this order by a review panel of the compensation court. A majority of the review panel determined that the order of the single judge was not a final order and dismissed the application for review. Miller perfected this appeal, which we moved to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1] We affirm the order of the review panel dismissing the application for review.

BACKGROUND

On July 12, 1990, while employed by RWMC as a cook, Miller was injured when a 6-pound bundle of sacks fell from a shelf and struck her on the head, neck, and right shoulder. Following the accident, Miller complained of headaches and neck pain radiating to her right shoulder. In 1995, she filed a petition in the compensation court alleging injuries to her "upper back, head, and right shoulder." RWMC and its insurer filed an answer and admitted that the accident occurred in the course and scope of Miller's employment and that Miller "sustained a cervical sprain/strain," but denied all other material allegations.

In an award entered on December 11, 1995, the compensation court determined that Miller sustained compensable injuries "to her neck and head (headaches)" as a result of the 1990 accident and that she reached maximum medical improvement on June 29, 1994. The court ordered RWMC to pay benefits of "$112.00 per week for 7-5/7 weeks for temporary total disability and thereafter and in addition thereto the sum of $5.60 per week for 292-2/7 weeks for a 5 percent loss of earning

[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

power." The compensation court also ordered RWMC to pay certain medical and hospital expenses incurred by Miller. The compensation court concluded that the evidence was not sufficient to warrant a finding that Miller required treatment at an inpatient pain management center as of the date of the award. However, it ordered RWMC to "continue to provide and care for such future medical and hospital care and treatment as may be reasonably necessary as a result of said accident and injury." The award further stated that "[i]f said future treatment should require treatment at a pain management center and if the parties are then unable to agree as to said treatment, a further hearing may be requested by either party on this issue."

Following the 1995 award, Miller continued to receive treatment for her injuries, although such treatment was infrequent. In September 2007, Miller's treating physician, Dr. Terry Himes, recommended she undergo surgery on her right shoulder. In a letter to Miller's counsel, Himes stated:

> When she had intensification of the [shoulder] pain more recently and we had not been able to sort out to what extent her neck problems are contributing to the shoulder problem I explained to her that I thought it would be most appropriate to proceed with repair of her shoulder first and then if the levels were still unacceptable to consider the surgical correction of her neck problem.

Himes also opined, to a reasonable degree of medical certainty, that Miller's "right shoulder problems" were the "direct consequence" of the injuries sustained in her 1990 accident. Although the precise nature of the shoulder surgery recommended by Himes is not clear from the record, there is some indication that in 2007, Miller was diagnosed with a torn tendon in her right shoulder.

On September 24, 2007, Miller filed a request for an independent medical examiner, utilizing a form provided by the compensation court. On this form, she indicated that injuries to her head, neck, and shoulders had occurred on July 12, 1990, and referred to the provision of the 1995 award regarding future medical expenses. She alleged that Himes had recommended shoulder surgery and requested opinions from an independent medical examiner on the following issues:

1. Should the shoulder surgery or repair of shoulder be done at this time and then if levels of reducing the pain and discomfort are not acceptable to then consider the surgical correction of the neck problem.

2. Is this repair of shoulder surgery and potentially surgical correction of the neck problem associated with her Workers' Compensation injury for which she recovered an Award.

On December 28, 2007, the single judge denied Miller's request for an independent medical examiner, concluding that the 1995 award did not find a compensable shoulder injury and that therefore, RWMC had no liability for evaluation and treatment of Miller's right shoulder. In dismissing Miller's application for review, a majority of the review panel concluded that the single judge's denial of Miller's request was not a final, appealable order. One member of the panel filed a dissent, reasoning that the order of the single judge was final and appealable, because it prevented Miller from seeking workers' compensation benefits for specific medical care.

ASSIGNMENTS OF ERROR

Miller assigns, consolidated and restated, (1) that the review panel erred in finding the denial of her request for an independent medical examiner was not a final order and (2) that the single judge erred in denying her request for appointment of an independent medical examiner.

STANDARD OF REVIEW

[1-3] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.[2] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from that of the trial court.[3] The meaning of a statute is a question of law, and an appellate court

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[2] *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005).

[3] *Thompson v. Kiewit Constr. Co.*, 258 Neb. 323, 603 N.W.2d 368 (1999).

is obligated in workers' compensation cases to make its own determinations as to questions of law.[4]

ANALYSIS

[4-6] Appeals from a workers' compensation trial court to a review panel are controlled by statutory provisions found in the Nebraska Workers' Compensation Act, Neb. Rev. Stat. § 48-101 et seq. (Reissue 2008).[5] Pursuant to §§ 48-179 and 48-182, a party may appeal to a review panel only from a final order of the Workers' Compensation Court.[6] Neb. Rev. Stat. § 25-1902 (Reissue 2008) defines a "final order" for purposes of a workers' compensation appeal from a trial court to a review panel.[7] Under § 25-1902, a final order is (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.[8] Miller contends that the order of the single judge denying her request for appointment of an independent medical examiner was an order affecting a substantial right, because it was "clearly intended to serve as a final adjudication of the rights and liabilities of the parties," and that it was entered in a special proceeding.[9]

[7,8] It is well settled that a workers' compensation case is a special proceeding.[10] Thus, the finality of the single judge's order in this case hinges upon whether it affected a "substantial right," which we have defined as "'an essential legal right,

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[4] *Powell v. Estate Gardeners*, 275 Neb. 287, 745 N.W.2d 917 (2008); *Knapp v. Village of Beaver City*, 273 Neb. 156, 728 N.W.2d 96 (2007).

[5] *Thompson v. Kiewit Constr. Co., supra* note 3.

[6] *Id.* See, also, *Dawes v. Wittrock Sandblasting & Painting, supra* note 2.

[7] *Thompson v. Kiewit Constr. Co., supra* note 3.

[8] See, *id.*; *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999).

[9] Brief for appellant at 20.

[10] *Thompson v. Kiewit Constr. Co., supra* note 3.

not a mere technical right.'"[11] "'A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which the appeal is taken.'"[12] Miller argues that the order of the single judge affected a substantial right, because it deprived her of the ability to obtain an independent medical examination and thereby prejudiced her ability to seek workers' compensation benefits for her shoulder surgery. Specifically, Miller contends that, without the independent medical examination she requested, she is precluded from filing a petition for benefits pursuant to § 48-173, which provides in part: "No petition may be filed with the compensation court *solely on the issue of reasonableness and necessity of medical treatment unless a medical finding on such issue has been rendered by an independent medical examiner pursuant to section 48-134.01*." (Emphasis supplied.)

Section 48-134.01 authorizes the compensation court to develop and implement a medical examiner system whereby independent examiners who have not treated the injured employee "shall render medical findings on the medical condition of an employee and related issues."[13] Section 48-134.01(3) provides:

> If the parties to a dispute cannot agree on an independent medical examiner of their own choosing, the compensation court shall assign an independent medical examiner from the list of qualified examiners to render medical findings in any dispute relating to the medical condition of a claimant and related issues, including, but not limited to . . . the reasonableness and necessity of any medical treatment previously provided, or to be provided, to the injured employee, and any other medical questions which may pertain to causality and relatedness of the medical condition to the employment.

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[11] *Id.* at 329, 603 N.W.2d at 372, quoting *Holste v. Burlington Northern RR. Co., supra* note 8.

[12] *Id.*

[13] § 48-134.01(2).

Clearly, the "reasonableness and necessity" of medical treatment and "causality and relatedness of the medical condition to the employment" are separate and distinct questions upon which an independent examiner may be asked to opine, and they are separate issues which must be determined in a contested claim for workers' compensation benefits to pay for medical treatment. Here, the parties dispute whether Miller's current shoulder condition and planned surgical correction are causally related to the injuries determined in her 1995 award. The order of the single judge denying her request for an independent medical examination does not foreclose Miller's ability to file a petition pursuant to § 48-173 seeking workers' compensation benefits for her shoulder surgery. Such a petition would not present solely the "issue of reasonableness and necessity of medical treatment," but also the issue of whether the proposed treatment is causally related to the injuries determined by the 1995 award. Because the requested independent medical examination is not a prerequisite to the filing of a petition under § 48-173 seeking benefits for the proposed shoulder surgery on this record, the denial of the request did not affect a substantial right and is therefore not a final, appealable order.

Because we agree with the review panel that the order of the single judge was not a final, appealable order, we do not address Miller's assignment of error directed to that order.

CONCLUSION

For the reasons discussed, we affirm the order of the Workers' Compensation Court review panel dismissing Miller's application for review on the ground that the order of the single judge was not a final, appealable order and thus, the review panel was therefore without jurisdiction to review it.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM A. EPP, APPELLANT.

773 N.W.2d 356

Filed October 16, 2009. No. S-08-331.

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. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
3. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection.
4. ____: ____: ____. Because of the factors a trial court must weigh in deciding whether to admit evidence under the residual hearsay exception, an appellate court applies an abuse of discretion standard to review hearsay rulings under this exception.
5. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 and 27-404(2) (Reissue 2008), and the trial court's decision will not be reversed absent an abuse of discretion.
6. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.
7. **Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
8. ____: ____: ____. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Those matters are for the finder of fact.
9. **Trial: Evidence.** A court must determine whether there is sufficient foundation evidence for the admission of physical evidence on a case-by-case basis.
10. ____: ____. Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated.
11. **Trial: Evidence: Appeal and Error.** An appellate court reviews a trial court's ruling on authentication for abuse of discretion.
12. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.

13. **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.
14. **Rules of Evidence: Hearsay.** In determining whether a statement is admissible under the residual exception to the hearsay rule, a court considers five factors: a statement's trustworthiness, the materiality of the statement, the probative importance of the statement, the interests of justice, and whether notice was given to an opponent.
15. ____: ____. In determining admissibility under the residual hearsay exception, a court must examine the circumstances surrounding the declaration in issue and may consider a variety of factors affecting trustworthiness of a statement. A court may compare the declaration to the closest hearsay exception as well as consider a variety of other factors affecting trustworthiness, such as the nature of a statement, that is, whether the statement is oral or written; whether a declarant had a motive to speak truthfully or untruthfully, which may involve an examination of the declarant's partiality and the relationship between the declarant and the witness; whether the statement was made under oath; whether the statement was spontaneous or in response to a leading question or questions; whether a declarant was subject to cross-examination when the statement was made; and whether a declarant has subsequently reaffirmed or recanted the statement.
16. **Criminal Law: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
17. **Criminal Law: Trial: Juries: Appeal and Error.** In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
18. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury 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.
19. **Rules of Evidence: Other Acts: Appeal and Error.** An appellate court's analysis under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.
20. **Evidence: Other Acts.** Other acts evidence may have probative value as to identity where there are overwhelming similarities between the other crime and the charged offense or offenses, such that the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature.

21. ____: ____. In evaluating other acts evidence in criminal prosecutions, the other act must be so related in time, place, and circumstances to the offense or offenses charged so as to have substantial probative value in determining the guilt of the accused.
22. **Trial: Prosecuting Attorneys.** Generally, in assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper; it is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial.
23. **Motions for Mistrial: Prosecuting Attorneys: Proof.** Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.
24. **Convictions: Evidence: Appeal and Error.** A conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. Any conflicts in the evidence or questions concerning the credibility of witnesses are for the finder of fact to resolve.
25. **Criminal Law: Verdicts: Evidence: Appeal and Error.** On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
26. **Sentences: Prior Convictions: Habitual Criminals: Proof.** In a habitual criminal proceeding, the State's evidence must establish with requisite trustworthiness, based upon a preponderance of the evidence, that (1) the defendant has been twice convicted of a crime, for which he or she was sentenced and committed to prison for not less than 1 year; (2) the trial court rendered a judgment of conviction for each crime; and (3) at the time of the prior conviction and sentencing, the defendant was represented by counsel or had knowingly and voluntarily waived representation for those proceedings.
27. **Prior Convictions: Records: Proof.** The existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the oral testimony of the accused and duly authenticated records maintained by the courts or penal and custodial authorities.
28. ____: ____: ____. In reviewing criminal enhancement proceedings, a judicial record of this state, or of any federal court of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, and authenticated by his or her seal of office, if he or she has one.
29. **Sentences.** The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
30. ____. 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.

Appeal from the District Court for Gage County: PAUL W. KORSLUND, Judge. Affirmed.

James R. Mowbray and Todd W. Lancaster, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

William A. Epp appeals his convictions and sentences for robbery and possession of a deadly weapon by a felon. Epp was found to be a habitual criminal and was sentenced to imprisonment for 60 to 60 years on each of the two convictions, with the sentences ordered to be served consecutively. We affirm Epp's convictions and sentences.

STATEMENT OF FACTS

On April 24, 2007, a person wearing a ski mask robbed a Casey's General Store (Casey's) in Wymore, Nebraska. A video recording from the store's security cameras showed that the robber wore a dark ski mask, a green jacket, dark pants, dark gloves, and white shoes with dark stripes. The video recording also showed that the robber pulled from his jacket an object that looked like a handgun. There were three witnesses in the store at the time of the robbery. Their testimonies regarding the robber's clothing were consistent with what was shown in the video recording. At trial, each of the witnesses testified that the robber had a handgun. However, one of the witnesses also stated that at the time of the robbery, she thought that the handgun was not real.

Epp became a suspect in both the Wymore Casey's robbery, which is the subject of this case, and a series of burglaries of a grocery store in Plymouth, Nebraska, that occurred April 6 and 30 and May 21, 2007. A video recording of the May 21 burglary of the Plymouth store showed that the burglar

was wearing clothing similar to that worn by the robber of the Wymore Casey's. Based on information from confidential informants tying Epp to the Plymouth burglaries, police obtained a warrant to search Epp's apartment in Beatrice, Nebraska. In that search, police found various items that were stolen in the Plymouth burglaries and clothing which matched descriptions of clothing worn by the Plymouth burglar and the Wymore Casey's robber.

On September 4, 2007, the State filed an information in the district court for Gage County charging Epp with robbery of the Wymore Casey's, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a felon. The State also alleged that Epp was a habitual criminal. Separate charges were filed in the district court for Jefferson County in connection with the Plymouth burglaries. This appeal is from the Gage County case involving the Wymore Casey's robbery. On August 26, 2008, in case No. A-08-322, the Nebraska Court of Appeals affirmed Epp's conviction and sentence for the May 21 Plymouth burglary (hereinafter the Plymouth burglary).

Prior to trial, the State filed a motion and notice of intent to present evidence pursuant to Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 2008), which relates generally to the admission of evidence of other crimes, wrongs, or acts. The State noted its intent to present evidence regarding the Plymouth burglary, including a video recording of the Plymouth burglary, items taken from the Plymouth store that were found in Epp's apartment, and testimony establishing that Epp committed the Plymouth burglary. At a hearing on the motion, the State argued that it would offer evidence of the Plymouth burglary in the present case for the purpose of proving identity by showing that Epp was the person who committed both the Plymouth burglary and the Wymore Casey's robbery.

The district court granted the State's motion to present evidence of the Plymouth burglary for the purpose of proving identity. The court noted that the person in both the Plymouth burglary and the Wymore Casey's robbery wore a dark ski mask, dark pants, a dark windbreaker jacket, and, most notably, shoes with a diamond-shaped pattern on the soles of the heels. The court also found testimony identifying Epp as the

Plymouth burglar to be credible. The court concluded that there was "a distinct pattern and procedure relating to the identity of the intruder in both the Plymouth grocery store burglaries and the Casey's . . . robbery which goes significantly beyond the common thread of the intruder wearing dark clothing in both instances." At trial, the court gave a limiting instruction prior to admitting evidence regarding the Plymouth burglary. The court instructed that the evidence was being received for the limited purpose of proving identity. The court overruled Epp's objections to admission of the evidence.

Prior to trial, Epp subpoenaed three witnesses who were imprisoned in Lancaster County—Paul Mick, who was imprisoned at the Nebraska State Penitentiary, and Wes Blessing and Bryon Forney, who were both imprisoned at the Diagnostic and Evaluation Center. Epp's trial was to take place in Gage County. Epp moved the district court to order the Nebraska Department of Correctional Services to transport each witness to appear at trial. Epp asserted that Blessing and Forney would both testify that while they and Mick were incarcerated at the Gage County jail, Mick confessed to them that he had committed an armed robbery of a Casey's. The State objected to Epp's motions.

The court denied the motions to transport the witnesses, because the trial was to take place in Gage County and the witnesses were imprisoned in Lancaster County. The court relied on Neb. Rev. Stat. § 25-1233(1) (Reissue 2008), which provides: "A person confined in any prison in this state shall, by order of any court of record, be produced for oral examination in the county where he or she is imprisoned. In all other cases his or her examination must be by deposition." The court noted that § 25-1233 had been held to apply in criminal proceedings. The court also cited *State v. Stott*, 243 Neb. 967, 503 N.W.2d 822 (1993), *disapproved on other grounds, State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999). In *Stott*, this court rejected a challenge to § 25-1233 based on the compulsory process clauses of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and held that "a criminal defendant does not possess an absolute constitutional right to demand the personal attendance of

a prisoner witness incarcerated outside the county of the venue of trial," 243 Neb. at 982, 503 N.W.2d at 833, and that testimony by deposition was constitutionally sufficient.

The district court in the present case granted Epp leave to obtain the testimonies of Mick, Blessing, and Forney by deposition. After the depositions were taken, the State filed a motion in limine prohibiting admission of evidence regarding Mick's purported statements to Blessing and Forney. After a hearing, the court determined that the evidence was not relevant and not trustworthy. The court determined that the statements were inadmissible hearsay and that exceptions to the hearsay rule did not apply. The court sustained the State's motion in limine and ordered that Epp was barred "from mentioning, eliciting, offering and/or adducing any evidence, statement or argument concerning any purported verbal statement or statements made by . . . Mick to . . . Blessing and/or . . . Forney."

At trial, a witness who was working in the Wymore Casey's at the time of the robbery testified that on April 25, 2007, the day after the robbery, she saw Mick in the Casey's acting "nervous and standoffish." She testified that Mick was of a similar height and build to the person who robbed the store and that he had a scratch or mark near his eye that was similar to a mark she noticed through the eyehole of the ski mask worn by the robber. Epp presented testimony of the Wymore police chief, who testified that Mick was involved in a disturbance in Wymore prior to the day the Casey's was robbed. Without objection by the State, the court allowed Epp's counsel to read into evidence a portion of Mick's deposition in which he stated that he was in Wymore on April 25 but that he was in Fairbury, Nebraska, on April 24, the day the Wymore Casey's was robbed. However, the court sustained the State's objections to the remainder of Mick's deposition and to the depositions of Blessing and Forney.

During closing arguments, the prosecution referred to testimony by Epp's landlord regarding statements made by Epp in a conversation with the landlord regarding the reason Epp was in jail after his arrest in this case. Epp objected to this portion of the State's closing argument and argued that it implied Epp

needed to present a defense to explain why he was in jail and that it caused the jury to question why Epp did not testify in his defense. Epp moved for a mistrial based on the prosecutor's statements. The court overruled the motion and did not give a limiting instruction but required the prosecutor to clarify that the jury was to consider Epp's response in the context of his landlord's question.

The jury found Epp guilty of robbery and possession of a deadly weapon by a felon. However, the jury found Epp not guilty of use of a deadly weapon to commit a felony.

The court conducted a habitual criminal enhancement proceeding on March 10, 2008. The State had filed a notice of intention to offer evidence of public official or agency records pursuant to Neb. Evid. R. 803(7), Neb. Rev. Stat. § 27-803(7) (Reissue 2008). Such evidence included certified copies of court records regarding Epp's prior convictions and a "pen packet" certified by the Nebraska Department of Correctional Services with information regarding Epp's commitment and discharge for various offenses. The court received the evidence at the enhancement hearing over Epp's objections based on hearsay, relevance, and foundation. The court deemed Epp to be a habitual criminal based on evidence that established that Epp had two prior felony convictions and was represented by counsel in those proceedings.

The court sentenced Epp to imprisonment for 60 to 60 years on both his conviction for robbery and his conviction for possession of a deadly weapon by a felon. The court ordered the sentences to be served consecutively.

Epp appeals his convictions and sentences.

ASSIGNMENTS OF ERROR

Epp asserts that the district court abused its discretion and violated his constitutional rights to due process and a fair trial when it refused to admit the testimonies of Mick, Blessing, and Forney and denied his requests to transport them to testify at trial. He argues that § 25-1233 violates a defendant's right to equal protection because it distinguishes between defendants based on whether their trials are held in counties where prisons are located. Epp further asserts that the court

erred when it (1) admitted evidence regarding the Plymouth burglary, (2) overruled his motion for a mistrial based on the prosecutor's statement regarding the landlord in closing arguments, (3) admitted the certified court records and "pen packet" at the enhancement proceeding and found him to be a habitual criminal based on such evidence, and (4) imposed excessive sentences. Epp also asserts that there was not sufficient evidence to support his conviction for possession of a deadly weapon by a felon.

STANDARDS OF REVIEW

[1,2] 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. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008). Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, we review the admissibility of evidence for an abuse of discretion. *Id.*

[3,4] Apart from rulings under the residual hearsay exception, we review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination to admit evidence over a hearsay objection. *Id.* Because of the factors a trial court must weigh in deciding whether to admit evidence under the residual hearsay exception, we have applied an abuse of discretion standard to review hearsay rulings under the residual hearsay exception. *Id.*

[5] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rule 404(2) and Neb. Evid. R. 403, Neb. Rev. Stat. §§ 27-403 (Reissue 2008), and the trial court's decision will not be reversed absent an abuse of discretion. *State v. Floyd*, 277 Neb. 502, 763 N.W.2d 91 (2009).

[6] The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Gresham*, 276 Neb. 187, 752 N.W.2d 571 (2008).

[7,8] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Davis*, 277 Neb. 161, 762 N.W.2d 287 (2009). And in our review, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Those matters are for the finder of fact. *Id.*

[9-11] A court must determine whether there is sufficient foundation evidence for the admission of physical evidence on a case-by-case basis. *State v. Draganescu, supra*. Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated. *Id.* We review a trial court's ruling on authentication for abuse of discretion. *Id.*

[12,13] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Moore*, 277 Neb. 111, 759 N.W.2d 698 (2009). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.*

ANALYSIS

The Testimonies of Blessing and Forney Were Inadmissible Hearsay and Properly Excluded, and Any Error in Excluding Mick's Testimony Was Harmless.

Epp first asserts that the court erred when it did not allow him to present the testimonies of Mick, Blessing, and Forney. Epp makes various arguments with respect to such testimonies. He argues that the court erred in denying his request to transport the witnesses to testify at trial, in requiring him to conduct depositions of the witnesses prior to trial, and in not allowing such depositions to be admitted at trial. He also argues that § 25-1233 is unconstitutional because it denies equal protection based on whether a defendant's trial is held in the county in which witnesses are imprisoned.

We conclude that the court did not err in sustaining the State's motion in limine and denying admission of the hearsay testimonies of Blessing and Forney and that any error in excluding Mick's testimony was harmless. We therefore need not consider Epp's arguments regarding transportation of witnesses and the constitutionality of § 25-1233.

Prior to trial, the State filed a motion in limine seeking an order barring "any evidence, statement, or argument concerning any purported verbal statement or statements made by . . . Mick to . . . Blessing and/or . . . Forney." After reviewing transcripts of Mick's, Blessing's, and Forney's videotaped depositions, the court sustained the motion in limine. The court determined that the evidence was not relevant and not trustworthy and that any probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The court further determined that the statements were inadmissible hearsay and that the exceptions argued by Epp did not apply in this case. The court sustained the State's objections when Epp offered the depositions as evidence at trial.

With regard to the testimonies of Blessing and Forney, we conclude that the court did not abuse its discretion in determining that the evidence was inadmissible hearsay. Forney testified in his deposition that Blessing told Forney in Mick's presence that Blessing was in jail because he had robbed a Casey's in Beatrice. Forney testified that Mick responded to Blessing's statement by stating that Mick had "robbed the Casey's too." Forney testified that Mick did not specify the location of the Casey's that he robbed and did not say anything more about the matter. Blessing testified in his deposition that he, Mick, and Forney were talking and Mick told them "about an armed robbery that he committed." Blessing testified that he "cut [Mick] off at that point" and "let him know that [Blessing] did an armed robbery in Beatrice." Blessing testified that Mick did not give further details about the armed robbery but that Mick "specifically said that he did an armed robbery. And I guess that would probably be about it."

Such testimonies of Blessing and Forney constitute hearsay. Under Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3)

(Reissue 2008), 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. Epp sought to use Blessing's and Forney's testimonies regarding Mick's statements to them as proof that Mick committed an armed robbery and that he robbed a Casey's. Epp offered the testimonies of Blessing and Forney to support a defense that Mick rather than Epp robbed the Wymore Casey's. The jury could infer that the robbery that Mick admitted to committing was the robbery of the Wymore Casey's on April 24, 2007.

[14] Hearsay is not admissible except as provided by the rules of evidence. See Neb. Evid. R. 802, Neb. Rev. Stat. § 27-802 (Reissue 2008). Epp asserts that the testimonies of Blessing and Forney are admissible under the residual hearsay exception. This exception is set forth in rule 803(23) (whether or not the declarant is available as a witness) and Neb. Evid. R. 804(2)(e), Neb. Rev. Stat. § 27-804(2)(e) (Reissue 2008) (where the declarant is unavailable). Because there is no indication that Mick was unavailable as defined in rule 804, the applicable residual hearsay exception is that in rule 803(23), which provides in part:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (a) the statement is offered as evidence of a material fact, (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (c) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

We have stated that in determining whether a statement is admissible under the residual exception to the hearsay rule, a court considers five factors: a statement's trustworthiness, the materiality of the statement, the probative importance of the statement, the interests of justice, and whether notice was given to an opponent. *State v. Castor*, 262 Neb. 423, 632 N.W.2d 298 (2001) (applying rule 803(23)). See *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006) (applying rule 804(2)(e)).

[15] In determining admissibility under the residual hearsay exception, a court must examine the circumstances surrounding the declaration in issue and may consider a variety of factors affecting trustworthiness of a statement. See *Robinson, supra*. A court may compare the declaration to the closest hearsay exception as well as consider a variety of other factors affecting trustworthiness, such as the nature of a statement, that is, whether the statement is oral or written; whether a declarant had a motive to speak truthfully or untruthfully, which may involve an examination of the declarant's partiality and the relationship between the declarant and the witness; whether the statement was made under oath; whether the statement was spontaneous or in response to a leading question or questions; whether a declarant was subject to cross-examination when the statement was made; and whether a declarant has subsequently reaffirmed or recanted the statement. See *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996) (applying rule 804(2)(e)) (citing *State v. Toney*, 243 Neb. 237, 498 N.W.2d 554 (1993)). The court in this case specifically found that the statements to which Blessing and Forney testified were not trustworthy.

Epp argues that Mick's statements to Blessing and Forney were trustworthy because they were similar to statements against penal interest, which are hearsay exceptions pursuant to rule 804(2)(c) when the declarant is unavailable as a witness. We note that rule 804(2)(c) provides in part that "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." Thus, under both the penal interest exception and the residual hearsay exception, Epp needed to show that the circumstances of Mick's statements to Blessing and Forney indicated that such statements were trustworthy.

Using the factors affecting trustworthiness set forth above, we note that Mick's alleged statements were oral; that the circumstances of Mick's having a casual conversation with fellow inmates does not clearly indicate a particular motive to speak either truthfully or untruthfully; that Mick's statements were not made under oath; that the statements were

somewhat spontaneous and, though not in response to leading questions, were in response to a fellow inmate's stating that he had committed a robbery; that Mick was not subject to cross-examination when the statement was made; and that Mick subsequently recanted the statements by denying that he had made the statements and denying that he committed the robbery at issue. We note that the logic of the penal interest exception appears to be that under normal circumstances, one would not make a false statement against one's penal interests; in other words, one would not normally admit to committing a crime he or she had not actually committed. However, when speaking to fellow inmates who themselves have admitted to committing similar crimes, there is likely less stigma to such an admission, whether true or false, and therefore less reason that such an admission was inherently trustworthy. The trial court could properly determine that the trustworthiness of these alleged statements was lacking.

We further note that the probative value of the alleged statements is a factor in addition to trustworthiness to be considered under the residual hearsay exception. The probative value of Mick's alleged statements is lessened in this case by the fact that neither Blessing nor Forney testified that Mick admitted to robbing the Wymore Casey's on April 24, 2007. Blessing testified only that Mick stated that he had committed an armed robbery without giving further details, and Forney testified only that Mick stated that he had "robbed the Casey's," without specifying the location of the Casey's or the date of the robbery. We noted that in Forney's testimony, Mick's statement that he had "robbed the Casey's" was prompted by Blessing's testimony that he had robbed a Casey's in Beatrice. Mick's alleged statements to Blessing and Forney had less probative value than they would have if he had said he committed the specific robbery at issue in this case. The diminished probative value of the statements is a factor in addition to trustworthiness that supports our determination that the court did not abuse its discretion in determining that Blessing's and Forney's testimonies were not admissible under the residual hearsay exception.

We therefore conclude that the district court did not abuse its discretion in determining that Blessing's and Forney's testimonies were not admissible under the residual hearsay exception and that the court did not err in excluding such testimony as inadmissible hearsay.

With regard to Mick's testimony, the court excluded Mick's testimony denying that he told Blessing and Forney that he had committed an armed robbery and his testimony specifically denying that he robbed the Wymore Casey's. Without determining whether the district court erred in excluding such testimony, we determine that because the testimony was not helpful to Epp, any error in the court's refusal to admit the evidence was harmless error.

[16-18] In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006). Harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *Id*. Harmless error review looks to the basis on which the jury 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. *Id*.

Whether or not the district court erred in refusing to admit the portions of Mick's testimony at issue, the guilty verdict rendered against Epp was surely unattributable to such error. The court refused portions of Mick's testimony in which he denied that he committed the Wymore Casey's robbery and denied that he told Blessing and Forney that he committed a robbery. Such testimony did not support, and instead refuted, Epp's defense that it was Mick and not Epp who committed the robbery. Epp presented other evidence raising the possibility that Mick rather than Epp robbed the Wymore Casey's. The jury apparently rejected such evidence when it found Epp

guilty, and Mick's testimony denying that he committed the robbery and denying that he told Blessing and Forney he committed a robbery would not have made the jury more likely to believe that Mick had committed the robbery at issue in this case. We therefore conclude that if the court erred when it refused Mick's testimony, the error was harmless.

Because we conclude that the court did not err when it excluded the testimonies of Mick, Blessing, and Forney, we need not determine whether the court erred by denying Epp's request to transport such witnesses for trial, and we further need not determine whether § 25-1233 is unconstitutional. We reject Epp's first assignment of error.

Evidence Regarding the Plymouth Burglary Was Admissible for the Purpose of Proving the Identity of the Wymore Casey's Robber.

Epp next asserts that the district court erred by admitting evidence regarding the Plymouth burglary. He argues that such evidence was inadmissible as evidence of other crimes used to show propensity. We conclude that the court did not err in determining that the evidence was admissible for the purpose of proving identity.

Prior to trial, the court sustained the State's motion pursuant to rule 404 to present evidence regarding the Plymouth burglary. Such evidence included a video recording of the Plymouth burglary, items stolen from the Plymouth store that were found in Epp's apartment, and testimony establishing that Epp committed the Plymouth burglary. The court determined that the evidence was admissible for the purpose of proving the identity of the person who committed the Wymore Casey's robbery at issue in this case. Prior to admitting evidence regarding the Plymouth burglary over Epp's objection at trial, the court gave a limiting instruction stating that the evidence was received for the limited purpose of proving identity.

The admissibility of the Plymouth burglary evidence is controlled by rule 404. Rule 404(1) generally provides that "[e]vidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that he or

she acted in conformity therewith . . . .” However, rule 404(2) further provides that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[19] An appellate court’s analysis under rule 404(2) considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted. *State v. Floyd*, 277 Neb. 502, 763 N.W.2d 91 (2009). In the present case, the court instructed the jury that evidence of the Plymouth burglary was admitted for the limited purpose of proving identity. We therefore need to determine whether the evidence was relevant for that purpose and whether the probative value of the evidence was substantially outweighed by its potential for unfair prejudice.

We first consider whether evidence of the Plymouth burglary was relevant for some purpose other than to show Epp’s propensity to commit the robbery charged in this case. The State urged, and the court agreed, that the evidence was admissible to prove the identity of the person who committed the Wymore Casey’s robbery. The State sought to prove Epp was the person who robbed the Wymore Casey’s by presenting evidence that the same person who committed the Wymore Casey’s robbery also committed the Plymouth burglary and that Epp committed the Plymouth burglary. The jury could then logically infer that Epp committed the Wymore Casey’s robbery.

Identity was at issue in this case, because although witnesses testified regarding the Wymore Casey’s robbery, none of the witnesses were able to identify the person who committed the robbery. Therefore, other acts evidence potentially had probative value on the issue of identity. See *State v. Burdette*, 259

Neb. 679, 611 N.W.2d 615 (2000). Compare *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999) (finding that other acts evidence could have no probative value on issue of identity because witness unequivocally identified defendant as assailant in sexual assault case).

[20,21] We have stated that other acts evidence may have probative value as to identity where there are overwhelming similarities between the other crime and the charged offense or offenses, such that the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature. *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001); *State v. Burdette, supra*. In evaluating other acts evidence in criminal prosecutions, the other act must be so related in time, place, and circumstances to the offense or offenses charged so as to have substantial probative value in determining the guilt of the accused. *Trotter, supra*.

Evidence of the Plymouth burglary is probative with respect to the identity of the Wymore Casey's robber. As the district court noted, the video recordings and other evidence indicate that in each incident, the person who committed the Plymouth burglary or the Wymore Casey's robbery wore a dark ski mask, dark pants, a dark windbreaker jacket, and white tennis shoes with dark stripes. The court further found that there was "a distinct pattern and procedure relating to the identity of the intruder in both the Plymouth grocery store burglaries and the Casey's . . . robbery which goes significantly beyond the common thread of the intruder wearing dark clothing in both instances."

As a general matter, the way that the perpetrator was dressed in both the Plymouth burglary and the Wymore Casey's robbery does not necessarily establish a "signature"—the general description of the clothing appears to be common attire for one committing a robbery or burglary. Evidence such as testimony of witnesses regarding what a person was wearing might not in itself be enough to establish a distinctive identity. However, in the present case, the evidence regarding the two crimes included video recordings which gave the jury much more information regarding the perpetrator of each crime than would witness testimony regarding the perpetrator's clothing.

The jury was able to see exactly what the perpetrator was wearing and was not limited to generic descriptions such as "dark clothes" or "dark ski mask" which could describe any variety of clothing and would not necessarily constitute a signature. But with the video recordings of the two crimes, the jury was able to see exactly what type of clothing the perpetrator was wearing and come to its own conclusions whether the perpetrator in each case was wearing the same clothing and, in this case, whether such clothing was the same clothing that was found in Epp's apartment. In addition to seeing the exact clothing worn in each incident, the jury was able to view and make its own determination regarding similarities in the size and build of the perpetrator in each incident, as well as subtle factors such as the gait and manner in which the perpetrator moved.

The video recording evidence in this case provided significant information regarding the perpetrator of each crime which went beyond general descriptions of the clothing worn by the perpetrator of each crime. Such visual evidence was sufficient to allow the jury to make an informed determination of whether the same person committed both crimes. We therefore conclude that evidence of the Plymouth burglary was relevant for the purpose of proving the identity of the person who committed the robbery charged in this case.

Having concluded that the evidence of the Plymouth burglary was relevant for a proper purpose under rule 404(2), we next consider whether the probative value of such evidence is outweighed by its potential for unfair prejudice. An analysis under rule 403 requires a court to weigh the probative value of particular evidence against the danger of unfair prejudice. As we concluded above, the evidence of the Plymouth burglary is probative as to the identity of the Wymore Casey's robber. The evidence also indicated that the Plymouth burglary was "so related in time, place, and circumstances" to the Wymore Casey's robbery "so as to have substantial probative value in determining the guilt of the accused." See *State v. Trotter*, 262 Neb. 443, 459, 632 N.W.2d 325, 339 (2001). The two crimes occurred within 1 month of one another, and the targets of the crimes were small stores in small towns in

adjoining counties. Therefore, the probative value of the evidence is substantial.

The potential for unfair prejudice with respect to rule 404 is that the evidence could be used to show that because Epp committed the Plymouth burglary, he had a propensity to commit the robbery charged in this case. However, because the evidence has substantial probative value with respect to the proper purpose of identity and because the court gave a limiting instruction to the jury that it should consider the evidence only for the purpose of identity, we conclude that the probative value of the evidence was not substantially outweighed by the potential for unfair prejudice.

We conclude that the district court did not abuse its discretion by admitting evidence of the Plymouth burglary. Epp's assignment of error is without merit.

The District Court Did Not Abuse Its Discretion by Overruling Epp's Motion for a Mistrial Based on the Prosecutor's Statements in Closing Arguments.

Epp next asserts that the district court erred by overruling his motion for a mistrial based on the prosecutor's statements in closing arguments regarding the testimony of Epp's landlord. We conclude that the court did not abuse its discretion by overruling the motion for a mistrial.

Epp moved for a mistrial based on the following statements made by the prosecutor during closing arguments:

> Another thing . . . Epp had said, he talk [sic] to his landlord while in jail. The landlord is there to find out what should be done with the stuff left behind in his apartment. A conversation is, what happened, why are you here? And what is his response? Times were tough, out of work, short on money. So that's a reason. It wasn't, I got framed; I'm here because I didn't do anything; I don't know why I'm here.

Epp argues that by making these comments, the prosecutor implied Epp should have testified at trial, and that the comments caused the jury to question why Epp did not testify. He

notes that this court has stated that prosecutor's comments in closing arguments regarding a criminal defendant's invocation of the right to remain silent are improper. See *State v. Lopez*, 274 Neb. 756, 743 N.W.2d 351 (2008). We understand Epp's arguments to be a discussion of a defendant's right not to testify. We have observed that commenting on a criminal defendant's decision not to testify is improper. See *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989).

[22,23] Generally, in assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper; it is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial. *State v. Gresham*, 276 Neb. 187, 752 N.W.2d 571 (2008). Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred. *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007).

The prosecutor's statements in this case were not an improper reference to the invocation of the right not to testify. The prosecutor made no reference to Epp's asserting such right. Instead, the prosecutor referred to a statement Epp made in a conversation with his landlord and contrasted such statement to statements he might have made if he had not committed the crime for which he had been arrested. Epp's argument that the prosecution improperly remarked on Epp's invocation of his right not to testify is not a fair reading of the prosecutor's comment.

We further note that when the court overruled Epp's motion for a mistrial, it required the prosecutor to clarify that the jury was to consider Epp's response in the context of his landlord's question. The clarification required by the court mitigated the risk that the jury would consider the statement as a comment on Epp's failure to testify at trial.

We conclude that the district court did not abuse its discretion when it overruled Epp's motion for a mistrial based on the prosecutor's statements in closing arguments. Epp's assignment of error is without merit.

The Evidence Was Sufficient to Support Epp's Conviction for Possession of a Deadly Weapon by a Felon.

Epp next asserts that there was not sufficient evidence to support his conviction for being a felon in possession of a deadly weapon. He argues that because the jury acquitted him of use of a deadly weapon to commit a felony, the jury obviously found the State failed to prove beyond a reasonable doubt he used a deadly weapon in the robbery, and that therefore, there was not sufficient evidence to support the charge that he was a felon in possession of a deadly weapon at the time of the robbery. We conclude that there was evidence that Epp was in possession of a deadly weapon during the robbery and at other times and that therefore, there was sufficient evidence to convict him of being a felon in possession of a deadly weapon.

Epp stipulated to the fact that he had a prior felony conviction, and therefore the only question is whether there was sufficient evidence that he was in possession of a deadly weapon. We note that three witnesses to the robbery testified at trial. One witness testified that the robber had a handgun and that it "looked like a real gun." The second witness testified that the robber had a gun. However, on cross-examination, she conceded that at the time of the robbery, she "didn't think it was real" and referred to both her written report to police and an earlier deposition wherein she had said that the gun looked fake. The third witness testified at trial that the robber had a handgun and that she had thought it was real. She denied that she had told a police officer investigating the robbery that she thought it was a toy gun. The police officer testified at trial that both the second and the third witnesses told him that they thought the gun was a toy gun.

Epp argues that the jury's verdict of not guilty on the charge of use of a deadly weapon to commit a felony indicates the jury had a reasonable doubt whether he used a real gun to commit the robbery and that such doubt was likely raised by evidence that two of the three witnesses thought the gun was a toy gun. Epp argues that because the jury had a reasonable doubt whether he used a deadly weapon to commit the

robbery, there was not sufficient evidence for the jury to find that he was in possession of a deadly weapon at the time of the robbery.

The State asserts that Epp's argument focusing on the testimonies of the three witnesses to the robbery ignores other evidence in the case that Epp was in possession of a handgun at other times. The State notes that the information charged that Epp had a firearm in his possession "on or about April 24, 2007." The State argues that whether or not there was sufficient evidence that Epp possessed a deadly weapon during the robbery on April 24, 2007, sufficient evidence was presented to the jury that he possessed a handgun "on or about" that date. In this regard, the State notes the testimony of two witnesses who were not witnesses to the robbery. One of the witnesses testified that he had seen Epp with a handgun on an unspecified date prior to April 30. The other witness testified that she saw Epp with a handgun on an unspecified date prior to May 31. Epp argues in reply that such testimony was too vague regarding the date he was seen with a handgun and therefore could not support a conviction for being in possession of a deadly weapon on April 24.

[24,25] A conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Branch*, 277 Neb. 738, 764 N.W.2d. 867 (2009). Any conflicts in the evidence or questions concerning the credibility of witnesses are for the finder of fact to resolve. *Id.* On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *Id.*

The jury's guilty verdict on the charge of possession of a deadly weapon by a felon in this case was supported by sufficient evidence. The three witnesses to the robbery testified at trial that the robber had a handgun, although one of three conceded at trial that at the time of the robbery, she thought the handgun was not real. Two other witnesses also testified

that Epp possessed a handgun, and although neither witness was precise about the date, the jury could properly infer from the dates indicated in the witnesses' testimony that the possession occurred around the date of the robbery on April 24, 2007. Such evidence, when viewed and construed most favorably to the State, supported Epp's conviction for being a felon in possession of a handgun on or about April 24.

We recognize that there was evidence indicating that the handgun used by the robber was a toy gun rather than a real gun. To the extent such testimony conflicts with evidence that Epp possessed a handgun during the period alleged, such conflict in the evidence was for the jury to resolve, and it is apparent that with regard to the possession charge, the jury resolved such conflicting evidence in favor of the State. Epp asks us to speculate as to the reason the jury acquitted him of use of a deadly weapon to commit a robbery and how such reasoning would, nevertheless, result in a conviction for possession by a felon. However, we cannot speculate as to the reason for the jury's verdict with respect to the use charge, and such speculation cannot override the fact that there was sufficient evidence from which the jury could have found Epp guilty with respect to the possession charge.

We conclude that there was sufficient evidence to support Epp's conviction for possession of a deadly weapon by a felon. We reject Epp's assignment of error.

The District Court Did Not Err in Admitting Evidence of Epp's Prior Convictions and Finding Him to Be a Habitual Criminal Based on Such Evidence.

Epp next asserts that the court erred in admitting the certified court records and "pen packet" at the enhancement proceeding and in finding him to be a habitual criminal based on such evidence. We conclude that such evidence was admissible and was sufficient to support the court's finding that Epp was a habitual criminal.

At the habitual criminal enhancement proceeding, the court received into evidence, over Epp's objections, certified copies of court records regarding Epp's prior convictions and a "pen packet" certified by the Nebraska Department of Correctional

Services with information regarding Epp's commitment and discharge. Epp objected on the bases of hearsay, relevance, and foundation.

Upon review of the evidence, the court found that the evidence established that Epp had two prior felony convictions and was represented by counsel in those proceedings. The court therefore deemed Epp to be a habitual criminal as to each of his convictions in the present case.

Neb. Rev. Stat. § 29-2221(1) (Reissue 2008) provides, in relevant part, that

> [w]hoever has been twice convicted of a crime, sentenced, and committed to prison, in this or any other state or by the United States or once in this state and once at least in any other state or by the United States, for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be a habitual criminal and shall be punished by imprisonment in a Department of Correctional Services adult correctional facility for a mandatory minimum term of ten years and a maximum term of not more than sixty years . . . .

[26] In a habitual criminal proceeding, the State's evidence must establish with requisite trustworthiness, based upon a preponderance of the evidence, that (1) the defendant has been twice convicted of a crime, for which he or she was sentenced and committed to prison for not less than 1 year; (2) the trial court rendered a judgment of conviction for each crime; and (3) at the time of the prior conviction and sentencing, the defendant was represented by counsel or had knowingly and voluntarily waived representation for those proceedings. *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006).

[27,28] The existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the oral testimony of the accused and duly authenticated records maintained by the courts or penal and custodial authorities. *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004). In reviewing criminal enhancement proceedings, a judicial record of this state, or of any federal court of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or the

person having the legal custody thereof, and authenticated by his or her seal of office, if he or she has one. *Id.*

In the present case, the State presented evidence that Epp had two previous convictions—a conviction in 1978 for second degree murder, a felony for which he was sentenced to 50 years in prison, and a 1983 conviction for escape, a felony for which he was sentenced to imprisonment for 18 months to 3 years. Evidence of the prior convictions included exhibits 196 through 199. Exhibit 196 consists of court records regarding the 1978 conviction for second degree murder. Epp makes no complaint on appeal regarding exhibit 196. Exhibit 197 consists of court records regarding the 1983 conviction for escape. Exhibit 198 consists of records of the plea and sentencing proceedings regarding the 1983 conviction for escape. Exhibit 199 consists of a "pen packet" provided by the Nebraska Department of Correctional Services containing information regarding Epp's history of incarceration for offenses including the 1978 second degree murder and the 1983 escape. Epp argues on appeal that the court erred in admitting exhibits 197, 198, and 199.

The exhibits were admitted over hearsay objections pursuant to rule 803(7), which allows for admission of

> records, reports, statements, or data compilations made by a public official or agency of facts required to be observed and recorded pursuant to a duty imposed by law, unless the sources of information or the method or circumstances of the investigation are shown by the opposing party to indicate a lack of trustworthiness.

With regard to exhibit 197, Epp argues that the exhibit lacks trustworthiness as required by rule 803(7), because the exhibit does not meet the requirements for self-authentication under Neb. Evid. R. 901 and 902, Neb. Rev. Stat. §§ 27-901 and 27-902 (Reissue 2008). He notes that only the last page of the exhibit bears the certification of the deputy clerk of the district court for Lancaster County. He contrasts this to exhibit 196, wherein each page of the exhibit contains a certification. Epp also notes that exhibit 197 does not contain a judgment of conviction signed by the district court judge and that the order of commitment is signed by the deputy clerk of the district court

but does not contain the seal of the court or the signature of the sentencing judge.

Authentication and identification of documentary evidence is governed by rules 901 and 902. Rule 901 provides, generally, that the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims. *State v. King*, 272 Neb. 638, 724 N.W.2d 80 (2006). Rule 902 further provides that certain documents are self-authenticating; that is, no extrinsic evidence of authenticity as a condition precedent to admissibility is required. *King, supra*.

We determine that the certification of the clerk of the district court contained at the end of the exhibit was adequate to authenticate the entirety of exhibit 197 and that it was not necessary to have a certification on each page. We further note that at the time of the 1983 conviction for escape, the signature of the district court judge was not required for rendition of judgment, as it is now under Neb. Rev. Stat. § 25-1301(2) (Reissue 2008). See *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

Epp next argues that exhibit 198, the transcription of the plea and sentencing proceedings regarding the 1983 conviction for escape, is inadmissible because it contains the court reporter's signature but not a seal. In *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985), *overruled on other grounds, State v. Kuehn*, 258 Neb. 558, 604 N.W.2d 420 (2000), and in *King, supra*, we held that a transcription of proceedings bearing the certification of a court reporter in compliance with court rules pertaining to the preparation of bills of exceptions was self-authenticating pursuant to rule 902(4). Although the certificate in this case contained no seal, the certificate was signed by the court reporter and complied with Neb. Ct. R. App. P. § 2-105, which requires a certificate by the court reporter but does not specify that a seal is required. The court did not err in admitting exhibit 198.

With regard to exhibit 199, the "pen packet" from the Department of Correctional Services, Epp argues that the exhibit was not admissible because it was not sufficiently

trustworthy. In part, he argues that the pen packet is not trustworthy, because it contains the same order of commitment contained in exhibit 197 that was not signed by the district court judge. We rejected Epp's argument regarding the order of commitment in connection with our analysis regarding exhibit 197, and we reject the argument here for the same reasons. With regard to the remainder of the pen packet, we note that the pen packet contains the certification of the records custodian for the Department of Correctional Services. In *State v. Muse*, 15 Neb. App. 13, 27, 721 N.W.2d 661, 673 (2006), the Nebraska Court of Appeals found a pen packet to be sufficiently authenticated to be admissible where the packet contained a certification from the records custodian which certified that "'the (1) photograph(s), (2) fingerprint card(s), (3) commitment, and (4) discharge order attached hereto are copies of the original records of'" the defendant. The pen packet in this case contained the same certification, and we find exhibit 199 to be sufficiently authenticated.

Epp finally argues that the district court erred in finding him to be a habitual criminal based on the evidence admitted at the enhancement hearing. Epp's argument that the evidence was not sufficient depends on the success of his previous argument that exhibits 197, 198, and 199 were not admissible; Epp argues that if such exhibits were excluded, there would not be sufficient evidence to establish he had two prior felony convictions. However, we determined above that the court did not err in admitting the exhibits, and the exhibits provided sufficient evidence to support the court's finding that Epp was a habitual criminal. We reject this assignment of error.

The District Court Did Not Impose Excessive Sentences.

Finally, Epp asserts that the district court imposed excessive sentences. We conclude that the court did not abuse its discretion in sentencing Epp.

Epp was convicted of robbery, a Class II felony under Neb. Rev. Stat. § 28-324 (Reissue 2008), and possession of a deadly weapon by a felon, a Class III felony under Neb. Rev. Stat.

§ 28-1206 (Reissue 2008) when the weapon is a firearm. Epp was found to be a habitual criminal under § 29-2221, which provides that a person found to be a habitual criminal shall upon conviction of a felony be punished by imprisonment for a mandatory minimum term of 10 years with a maximum term of 60 years. The court sentenced Epp to imprisonment for 60 to 60 years on each of the two convictions and ordered the sentences to be served consecutively.

Epp argues that the court based its sentences on improper considerations. He notes that at sentencing, the court referred to the robbery and stated that in addition to the monetary loss, the "victims were placed in fear, and there was certainly a potential of physical harm. . . . [A] gun was stuck in the face of the people there." Epp argues that the court's statement was contrary to the jury's verdict that Epp was not guilty of using a deadly weapon to commit a felony. We note, however, that the court acknowledged that "there was an issue as to whether it was a real gun or a toy gun" but stated that "certainly, these people were put in great fear. That was obvious from their testimony." We do not read the court's statements as contradicting the jury's verdict but instead as indicating that whether or not the object was a real gun, the victims of the robbery were placed in great fear.

Epp also argues that the court improperly based the sentences on his past crimes rather than the crimes for which he was convicted. He observes the court noted that he had a "very serious history of dangerous criminal activity" and specifically mentioned his 1978 conviction for second degree murder, stating that the victim in that case "got no second chance."

[29,30] 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. *State v. Payan*, 277 Neb. 663, 765 N.W.2d 192 (2009). 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. *Id.*

Both the nature of the offense for which a defendant is being sentenced and the defendant's past criminal record are appropriate considerations in sentencing. The court in this case made mention of the victim in the 1978 murder, but such mention was in the context of the court's consideration of Epp's criminal history, which is a proper consideration in sentencing.

Epp argues that imposing the maximum sentence of 60 years' imprisonment for each of the offenses was excessive, considering that the crime at issue was "essentially a convenience store robbery with a 'toy gun', in which no one was injured." Brief for appellant at 42.

The court in this case noted various reasons for the sentences it imposed, including (1) the nature of the robbery, in that it caused serious monetary harm, placed the victims in fear, and created a potential for physical harm; (2) the lack of excuse or justification for the crimes; (3) the innocence of the victims; (4) Epp's "serious history of dangerous criminal activity," including consideration of the fact that the present crimes occurred "relatively shortly" after Epp was released from prison after serving sentences for second degree murder and escape; (5) Epp's character and attitude, which indicated to the court that Epp would likely commit more crimes and place other victims in danger; (6) Epp's demonstrated use of his intelligence and abilities for negative purposes, including convincing others to join him in criminal conduct; and (7) Epp's demonstrated inability to rehabilitate himself, which the court determined to be predictive of his future behavior. The court concluded that the evidence before it indicated that Epp was "a habitual criminal in every sense of that term" and that "imprisonment is absolutely necessary for a long period of time for the protection of the public."

The factors noted by the court were proper considerations in sentencing, and in light of such considerations, we conclude that the sentences imposed by the court were not an abuse

of the court's discretion. We reject Epp's final assignment of error.

CONCLUSION

Having rejected each of Epp's assignments of error, we affirm Epp's convictions and sentences for robbery and possession of a deadly weapon by a felon.

AFFIRMED.

FRANK KORICIC, AS TRUSTEE FOR THE HEIRS AND NEXT OF KIN OF MANDA BAKER, APPELLANT, V. BEVERLY ENTERPRISES - NEBRASKA, INC., FORMERLY DOING BUSINESS AS BEVERLY HALLMARK, ET AL., APPELLEES.

773 N.W.2d 145

Filed October 16, 2009. No. S-08-1167.

1. **Principal and Agent.** Generally, whether an agency relationship exists presents a factual question.
2. ____. The scope of an agent's authority is a question of fact.
3. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
4. **Principal and Agent: Words and Phrases.** An "agent" is a person authorized by the principal to act on the principal's behalf and under the principal's control.
5. **Agency.** For an agency relationship to arise, the principal manifests assent to the agent that the agent will act on the principal's behalf and subject to the principal's control and the agent manifests assent or otherwise consents so to act.
6. **Agency: Intent.** An agency relationship may be implied from the words and conduct of the parties and the circumstances of the case evidencing an intention to create the relationship irrespective of the words or terminology used by the parties to characterize or describe their relationship.
7. **Principal and Agent.** Actual authority is authority that the principal expressly grants to the agent or authority to which the principal consents.
8. ____. A subcategory of actual authority is implied authority, which courts typically use to denote actual authority either to (1) do what is necessary to accomplish the agent's express responsibilities or (2) act in a manner that the agent reasonably believes the principal wishes the agent to act, in light of the principal's objectives and manifestations.
9. ____. When a principal delegates authority to an agent to accomplish a task without specific directions, the grant of authority includes the agent's ability to

exercise his or her discretion and make reasonable determinations concerning the details of how the agent will exercise that authority.

10. ____. Apparent authority is authority that is conferred when the principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon an agent's apparent authority.
11. **Principal and Agent: Words and Phrases.** Apparent authority gives an agent the power to affect the principal's legal relationships with third parties.
12. **Principal and Agent: Proof.** Apparent authority for which a principal may be liable exists only when the third party's belief is traceable to the principal's manifestation and cannot be established by the agent's acts, declarations, or conduct.
13. **Principal and Agent.** For apparent authority to exist, the principal must act in a way that induces a reasonable third person to believe that another person has authority to act for him or her.
14. ____. Whether an agent has apparent authority to bind the principal is a factual question determined from all the circumstances of the transaction.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Reversed and remanded for further proceedings.

Brian G. Brooks, P.L.L.C., Richard F. Hitz, of Hauptman, O'Brien, Wolf & Lathrop, P.C., and S. Drake Martin, of Nix, Patterson & Roach, L.L.P., for appellant.

Rodney M. Confer and Jeanelle R. Lust, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellees.

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

CONNOLLY, J.

The appellant, Frank Koricic (Frank), lived with his elderly mother, Manda Baker (Manda), and assisted her in her daily affairs. When her health declined, she was admitted to Beverly Hallmark, a nursing home in Omaha, Nebraska. At Manda's admission, Frank signed several documents for her. One of the documents was an optional arbitration agreement.

This appeal presents the issue whether Frank had authority to act as Manda's agent and to enter into the arbitration agreement for her. The district court determined that because Frank had actual authority to enter into the arbitration agreement, the agreement bound her estate. Although we agree that Frank had authority to sign the mandatory paperwork for

admission, we conclude that Frank did not have authority to sign the arbitration agreement because it was not a condition of admission. We reverse the district court's order dismissing Frank's complaint.

Born in what is now Croatia in 1912, Manda immigrated to Omaha in 1958. She had a limited ability to read, speak, or understand English. Frank immigrated to Omaha in 1966 and lived with Manda for most of the following 40 years.

As Manda aged, Frank assisted her in managing her affairs. In 1998, when Manda's health started declining, Frank began signing medical authorizations for her. He testified that he signed only medical documents at the hospital and that Manda signed all other documents. Frank stated that he would explain documents to Manda and that if she wanted them signed, she would have Frank sign for her. Frank testified that he never signed anything without discussing it with Manda and that he never signed anything she did not agree with. Frank described their relationship as a collaborative effort, with him serving as Manda's advisor and interpreter. While he might offer advice, he took only the actions Manda directed him to take. Manda was never declared incompetent, and she never granted Frank power of attorney over her affairs.

In November 2005, Frank took Manda to Beverly Hallmark. It is undisputed that Manda was competent when she was admitted to Beverly Hallmark. Frank accompanied Manda during her admission, and after Frank placed her in her room, an employee of Beverly Hallmark took Frank to the office where he signed the paperwork for her admission. Manda was not present when Frank signed the admission papers, and Frank never discussed the content of the admission paperwork with her. Frank claimed that he did not read any of the paperwork and that the employee did not explain any of the documents.

One of the papers Frank signed was a "Resident and Facility Arbitration Agreement" that Beverly Hallmark presented to all residents upon admission. At the top of the agreement, it states that it is not a condition of admission. The agreement provides that "any and all claims, disputes, and controversies . . . arising out of, or in connection with, or relating in any way to the Admission Agreement or any service or health care provided

by the Facility to the Resident shall be resolved exclusively by binding arbitration . . . ."

Before Manda died in September 2007, she allegedly sustained injuries and pain and suffering because of Beverly Hallmark's negligence. Frank, as Manda's next of kin and trustee of her estate, filed suit against Beverly Enterprises - Nebraska, Inc., formerly doing business as Beverly Hallmark; Beverly Health and Rehabilitation Services, Inc.; and Beverly Enterprises, Inc. (collectively Beverly Hallmark), alleging negligence, breach of contract, and breach of fiduciary duty. Beverly Hallmark moved to dismiss the case and to compel arbitration under the arbitration agreement. Frank argued that Beverly Hallmark could not enforce the arbitration agreement against Manda's estate because Frank, not Manda, had signed the arbitration agreement.

The district court concluded that the arbitration agreement was valid and enforceable against Manda's estate. Because Manda had authorized Frank to sign medical authorizations for her as early as 1998, the court concluded that Frank had actual authority to sign the arbitration agreement. And because all allegations, if true, would fall under the arbitration agreement, the district court dismissed the case without prejudice to arbitration.

Frank asserts that the trial court erred in determining (1) that Frank had authority as Manda's agent to sign the arbitration agreement for her and (2) that the agreement bound her estate.

[1-3] Generally, whether an agency relationship exists presents a factual question.[1] The scope of an agent's authority also is a question of fact.[2] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.[3]

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[1] See, *Broad v. Randy Bauer Ins. Agency*, 275 Neb. 788, 749 N.W.2d 478 (2008); *Metropolitan Life Ins. Co. v. SID No. 222*, 204 Neb. 350, 281 N.W.2d 922 (1979).

[2] *State ex rel. Medlin v. Little*, 270 Neb. 414, 703 N.W.2d 593 (2005).

[3] *Albert v. Heritage Admin. Servs.*, 277 Neb. 404, 763 N.W.2d 373 (2009); *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 748 N.W.2d 626 (2008).

Because arbitration is purely a matter of contract, we first determine whether an agreement to arbitrate exists under basic contract principles.[4] Here, because Manda did not sign the arbitration agreement, we focus on whether Frank acted as Manda's agent with authority to enter into the arbitration agreement. So we begin with a discussion of agency law. Beverly Hallmark bears the burden of proving Frank's authority and that his acts were within the scope of his authority.[5] Beverly Hallmark claims that Frank, as an agent, had actual authority to bind Manda to the arbitration agreement or, in the alternative, that he had apparent authority.

[4-6] An "agent" is a person authorized by the principal to act on the principal's behalf and under the principal's control.[6] For an agency relationship to arise, the principal "manifests assent" to the agent that the agent will "act on the principal's behalf and subject to the principal's control."[7] And the agent "manifests assent or otherwise consents so to act."[8] An agency relationship may be implied from the words and conduct of the parties and the circumstances of the case evidencing an intention to create the relationship irrespective of the words or terminology used by the parties to characterize or describe their relationship.[9]

[7-9] Actual authority is authority that the principal expressly grants to the agent or authority to which the principal consents.[10] A subcategory of actual authority is implied authority, which courts typically use to denote actual authority either to (1) do what is necessary to accomplish the agent's express responsibilities or (2) act in a manner that the agent reasonably

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[4] *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996), *disapproved on other grounds, Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004).

[5] See *Western Fertilizer v. BRG*, 228 Neb. 776, 424 N.W.2d 588 (1988).

[6] *McCurry v. School Dist. of Valley*, 242 Neb. 504, 496 N.W.2d 433 (1993).

[7] Restatement (Third) of Agency § 1.01 at 17 (2006).

[8] *Id.*

[9] See *McCurry, supra* note 6. See, also, *State ex rel. Medlin, supra* note 2.

[10] Restatement, *supra* note 7, § 2.01, comment *c*.

believes the principal wishes the agent to act, in light of the principal's objectives and manifestations.[11] When a principal delegates authority to an agent to accomplish a task without specific directions, the grant of authority includes the agent's ability to exercise his or her discretion and make reasonable determinations concerning the details of how the agent will exercise that authority.[12]

Frank signed medical documents for Manda under her instructions for 10 years. Frank and Manda discussed her health care treatment options, and she repeatedly consented to his signing for her. Frank testified that Manda expressly gave him permission to sign medical documents for her but that he never signed for her without her express permission. He testified that "when she was kind of more sick I was signing, you know, all the time in the hospital." Manda never objected to Frank's signing medical documents for her.

The record shows that in November 2005, Frank and Manda went to Beverly Hallmark to admit her to the nursing home. During his deposition, Frank recounted their conversation, stating that Manda understood she was being admitted to the nursing home and that Frank would take care of the necessary admission documents:

> [Beverly Hallmark's counsel:] Before you got to the nursing home, had you talked with [Manda] about the fact that you were going to take her there?
>
> [Frank:] **Yeah** . . . .
>
> . . . .
>
> Q. And she understood that you were going to meet with the office people?
>
> A. **What everybody, whatever was going to be done, she trusts me. And I went over there and done the best I can.**
>
> Q. You talked to her about that before you got there that day?
>
> A. **Right.**

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[11] *Id.*, comment *b*.

[12] *Id.*, § 2.02.

Q. She understood that, you know, whatever needed to be done in the office, you were going to do it for her?

A. **Right.**

Q. You talked about that with her?

A. **Together, again together, we agree together, we do it together.**

Based on Frank's testimony, Manda authorized Frank to sign the paperwork required for her admission to Beverly Hallmark.

But the arbitration agreement is another matter—Beverly Hallmark did not require it as a condition of Manda's admission. The agreement was optional and was not required for Manda to remain at the facility. We agree with the district court's finding that an agency relationship existed between Manda and Frank. We also agree that as Manda's agent, Manda authorized Frank to sign the required admission papers. But we conclude that his actual authority did not extend to signing an arbitration agreement that would waive Manda's right of access to the courts and to trial by jury. The district court's finding that Frank had actual authority to sign the arbitration agreement was clearly erroneous.

Having concluded that Frank's actual authority did not extend to signing the arbitration agreement, we now turn to Beverly Hallmark's contention that Frank had apparent authority to bind Manda to the arbitration agreement. Beverly Hallmark claims that because Manda allowed Frank to leave her room with an employee of Beverly Hallmark to sign the required admission papers, it reasonably believed that Frank had authority to sign the arbitration agreement.

[10-14] Apparent authority is authority that is conferred when the principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon an agent's apparent authority.[13] Apparent authority gives an agent the power to affect the principal's legal relationships with third parties. The power arises from and is limited to the principal's manifestations to those third parties about the relationships.[14]

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[13] See *Franksen v. Crossroads Joint Venture*, 245 Neb. 863, 515 N.W.2d 794 (1994).

[14] See *State ex rel. Medlin, supra* note 2, citing *Franksen, supra* note 13.

Stated another way, apparent authority for which a principle may be liable exists only when the third party's belief is traceable to the principal's manifestation and cannot be established by the agent's acts, declarations, or conduct.[15] Manifestations include explicit statements the principal makes to a third party or statements made by others concerning an actor's authority that reach the third party and the third party can trace to the principal.[16] For apparent authority to exist, the principal must act in a way that induces a reasonable third person to believe that another person has authority to act for him or her.[17] Whether an agent has apparent authority to bind the principal is a factual question determined from all the circumstances of the transaction.[18] Whether Beverly Hallmark can trace Frank's alleged authority to sign the arbitration agreement to Manda's actions and whether Beverly Hallmark reasonably relied upon Frank's actions in signing the arbitration agreement present factual questions.

Here, Manda and Frank discussed her admission before she reached the facility. Frank left with an employee of Beverly Hallmark to sign the admission papers while Manda remained in her room. No evidence suggests that (1) Manda knew Frank would be asked to sign an arbitration agreement, (2) Manda represented to a Beverly Hallmark employee that she authorized Frank to sign the arbitration agreement, or (3) she later ratified the agreement. And we do not believe that the Beverly Hallmark employee could reasonably believe that Frank had authority to sign the arbitration agreement under these circumstances. Beverly Hallmark knew of Manda's limited ability to understand these documents, or she would not have been asking her son Frank to sign them for her. Nothing in the

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[15] Restatement, *supra* note 7, § 2.03. See, also, *State ex rel. Medlin, supra* note 2; Restatement, *supra* note 7, § 3.03, comment *b*.

[16] Restatement, *supra* note 7, § 2.03, comment *c*. See, also, Restatement, *supra* note 7, § 1.03.

[17] See *id.* See, also, *Nebraska Tractor & Equipment Co. v. Great Lakes Pipe Line Co.*, 156 Neb. 366, 56 N.W.2d 288 (1953); *First Nat. Bank of Omaha v. Acceptance Ins. Cos.*, 12 Neb. App. 353, 675 N.W.2d 689 (2004).

[18] See *Western Fertilizer, supra* note 5.

record suggests that a reasonable person should have expected an arbitration agreement to be included with admission documents for a nursing home. So Beverly Hallmark was not justified in relying solely on Manda's authorization of Frank to sign admission papers as apparent authority to bind her to an arbitration agreement. We conclude that these circumstances preclude Beverly Hallmark from relying on the doctrine of apparent authority.

We reverse the trial court's order to dismiss Frank's complaint and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. KIMBERLY K. CARBULLIDO, RESPONDENT.

773 N.W.2d 141

Filed October 16, 2009. No. S-08-1203.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **Disciplinary Proceedings.** An attorney against whom formal charges have been filed is subject to a judgment on the pleadings if he or she fails to answer those charges.
3. ____. The Nebraska Supreme Court evaluates each attorney discipline case in light of its particular facts and circumstances.
4. ____. To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
5. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding as well as all aggravating or mitigating factors.
6. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, and they justify more serious sanctions.
7. ____. An attorney's failure to respond to inquiries and requests for information from the Counsel for Discipline is an important matter and is a threat to the credibility of attorney disciplinary proceedings.

Original action. Judgment of disbarment.

John W. Steele, Assistant Counsel for Discipline, for relator.

No appearance for respondent.

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

PER CURIAM.

NATURE OF CASE

This is an attorney discipline case involving, among other things, repeated instances of the unauthorized practice of law on the part of the respondent, Kimberly K. Carbullido. Judgment on the pleadings was entered against Carbullido after she failed to respond to any of the allegations against her, finding that she had violated Neb. Ct. R. of Prof. Cond. §§ 3-501.1, 3-501.4, 3-505.5, 3-508.1, and 3-508.4. We address the appropriate sanction for those violations.

BACKGROUND

Carbullido was admitted to the practice of law in the State of Nebraska on September 28, 1995. She was engaged in the private practice of law in Douglas and Sarpy Counties. Her misconduct in issue stems from her repeated engagement in the practice of law while under suspension and from several convictions of driving under the influence (DUI) and driving under suspension (DUS).

UNAUTHORIZED PRACTICE OF LAW

Carbullido was suspended from the practice of law on June 14, 2004, as a result of nonpayment of her Nebraska State Bar Association dues. Between the dates of her suspension and reinstatement on February 20, 2006, Carbullido was engaged in the unauthorized practice of law. She was given a private reprimand, and her license was eventually reinstated.

On July 7, 2008, Carbullido was again suspended for nonpayment of her bar dues. While suspended, she again engaged in the unauthorized practice of law. Specifically, between July 9 and 30, Carbullido signed and entered not guilty pleas on behalf of her clients in four different cases and signed and filed a pretrial motion to continue in at least one other case.

On August 1, 2008, the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, sent a letter to Carbullido advising her that it appeared that she was engaging in the unauthorized practice of law and that she needed to submit a written response to relator. Carbullido signed the return receipt for the notice on August 2, but did not file a written response.

Despite this notice, Carbullido continued to practice law while her license was suspended. According to the amended formal charges, from August 12 to September 23, 2008, Carbullido signed and filed for different clients one not guilty plea, two motions to continue, and one request for a bond review. She also appeared in court on October 28 to represent a client and enter a plea she had negotiated with the prosecutor during the time she was suspended. Carbullido did not advise any of her clients that she was operating under a suspended license to practice law.

DUI and DUS Convictions

The investigation into Carbullido's unauthorized practice of law revealed a criminal history that included multiple DUI convictions. Specifically, as will be explained in greater detail below, Carbullido was convicted of four DUI's between November 2003 and July 2008. And, in relation to those convictions, Carbullido failed to appear for at least two hearings and failed to pay her fines on time. Carbullido was also convicted three times of DUS.

Carbullido's first DUI was charged on July 10, 2002. Her second DUI charge was filed on September 6, 2003, before the trial and conviction on her first DUI was able to take place. A joint sentencing order was imposed for the first two DUI's, giving her probation. But 11 days after the order of probation, Carbullido was ticketed for a third DUI.

Carbullido failed to appear at a hearing for the prosecution of the third DUI, and a warrant was issued for her arrest. Her counsel later appeared and obtained a continuance, and the warrant was canceled. However, Carbullido failed to appear at the rescheduled hearing, and another arrest warrant was issued. Carbullido eventually appeared voluntarily and pled

guilty to the third-offense DUI charge. On September 2, 2004, she was sentenced to 24 months' probation, her license was impounded for a year, she was ordered to have a drug abuse evaluation, and she was fined $600.

On October 6, 2004, an arrest warrant was issued for Carbullido based on her failure to pay her fines. On November 29, counsel obtained a recall of the warrant and a hearing was set for March 31, 2005. Before that hearing took place, on February 24, Carbullido was ticketed for DUS. In relation to these activities, on March 30, Carbullido was charged with violating probation. Carbullido apparently did not appear for the scheduled hearing on March 31, and a warrant was again issued for her arrest.

On April 28, 2005, Carbullido was stopped a second time for DUS. That eventually resulted in a conviction, and she was sentenced to probation and fined $300.

On May 20, 2005, the complaint against Carbullido for violating probation was amended to include a charge for failure to appear. On August 25, Carbullido pled guilty to the February DUS charge. She also pled guilty to the charge of violating probation. Carbullido was ordered to have an interlock device placed on her ignition, sentenced to probation, and fined $200.

On December 5, 2005, an arrest warrant was issued based on Carbullido's failure to pay the $200 fine. Carbullido finally paid all fines and costs on June 15, 2006. But on July 12, 2007, Carbullido was stopped a third time for DUS. She later pled guilty and was fined, placed on probation, and given a stayed 90-day jail sentence. She eventually received a satisfactory discharge from probation.

On July 21, 2008, Carbullido was ticketed for her fourth DUI. The record in this case does not reflect whether she has been convicted.

ANALYSIS

[1,2] A proceeding to discipline an attorney is a trial de novo on the record.[1] An attorney against whom formal charges

[1] *State ex rel. Counsel for Dis. v. Wickenkamp*, 277 Neb. 16, 759 N.W.2d 492 (2009).

have been filed is subject to a judgment on the pleadings if he or she fails to answer those charges.[2] The disciplinary rules provide that if no answer is filed, the court may dispose of the matter on a motion for judgment on the pleadings as long as an opportunity for oral argument is given before disbarment is ordered.[3] In this case, we granted relator's motion for judgment on the pleadings based on the fact that Carbullido, after receiving notice, failed to respond to the allegations against her. Carbullido failed to appear at oral argument. Relator suggests that the proper discipline for Carbullido is disbarment. We agree.

[3-5] We evaluate each attorney discipline case in light of its particular facts and circumstances.[4] To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.[5] For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding as well as all aggravating or mitigating factors.[6]

[6] The evidence establishes that Carbullido has repeatedly violated the law, court orders, and the Nebraska Rules of Professional Conduct. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, and they justify more serious sanctions.[7] Indeed, we have said that ordinarily, cumulative acts of misconduct can, and often do, lead to

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[2] *Id.*

[3] See, *id.*; Neb. Ct. R. § 3-310(I).

[4] *State ex rel. Counsel for Dis. v. Bouda, ante* p. 380, 770 N.W.2d 648 (2009).

[5] *Id.*

[6] See *id.*

[7] See *State ex rel. Counsel for Dis. v. Wickenkamp, supra* note 1.

disbarment.[8] In this case, Carbullido demonstrates a continued pattern of disregard for the rules she must abide by as a lawyer and as a law-abiding citizen. She has continued to flaunt these rules after being given multiple warnings and less severe punishments.

[7] We also note that Carbullido failed to respond to requests from relator for information, failed to respond to the formal charges, and failed to file a brief with this court. An attorney's failure to respond to inquiries and requests for information from relator is an important matter and is a threat to the credibility of attorney disciplinary proceedings.[9] The failure to respond to formal charges in this court is of even greater moment.[10] Carbullido's failures to cooperate with relator and respond to the charges at any point during this disciplinary process indicate a disrespect for this court's disciplinary jurisdiction.[11] As there is no record of mitigating factors, we conclude that Carbullido's behavior warrants disbarment.

CONCLUSION

We order that Carbullido be disbarred from the practice of law in the State of Nebraska, effective immediately. Carbullido is directed to comply with Neb. Ct. R. § 3-316, and upon failure to do so, she shall be subject to punishment for contempt of this court. Carbullido is further directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and § 3-310(P) and Neb. Ct. R. § 3-323 within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] See *id.*

IN RE ESTATE OF LEONA M. HEDKE, DECEASED. JOHN NOWAK, SPECIAL ADMINISTRATOR OF THE ESTATE OF DOLORES NOWAK, DECEASED, APPELLANT AND CROSS-APPELLEE, AND NATHAN A. SCHNEIDER, CONSERVATOR OF LEONA M. HEDKE, APPELLEE AND CROSS-APPELLEE, V. CHARLES HEDKE, AS TRUSTEE OF THE LEONA M. HEDKE REVOCABLE TRUST, DATED DECEMBER 30, 2004, AS ATTORNEY IN FACT FOR LEONA M. HEDKE, AND INDIVIDUALLY, APPELLEE AND CROSS-APPELLANT.

775 N.W.2d 13

Filed October 23, 2009. No. S-08-980.

1. **Decedents' Estates: Appeal and Error.** Absent an equity question, an appellate court reviews probate matters 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 an appellate court 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 an appellate court will not set those findings aside unless they are clearly erroneous.
5. **Wills: Undue Influence: Proof.** To show undue influence, a will contestant must prove the following elements by a preponderance of the evidence: (1) The testator was subject to undue influence; (2) there was an opportunity to exercise such influence; (3) there was a disposition to exercise such influence; and (4) the result was clearly the effect of such influence.
6. **Wills: Undue Influence.** Undue influence sufficient to defeat a will is manipulation that destroys the testator's free agency and substitutes another's purpose for the testator's.
7. **Undue Influence: Evidence: Proof.** The trier of fact should view the entire evidence and decide whether the evidence as a whole proves each element of undue influence.
8. **Undue Influence: Proof.** A party seeking to prove the exercise of undue influence is entitled to all reasonable inferences deducible from the circumstances proved.
9. ____: ____. Undue influence rests largely on inferences drawn from facts and circumstances surrounding the testator's life, character, and mental condition. In determining whether undue influence existed, a court must also consider whether the evidence shows that a person inclined to exert improper control over the testator had the opportunity to do so.

10. **Undue Influence: Proof: Presumptions.** Suspicious circumstances that, when coupled with proof of a confidential or fiduciary relationship, can give rise to a presumption of undue influence include: (1) a vigorous campaign by a principal beneficiary's family to maintain intimate relations with the testator, (2) a lack of advice to the testator from an independent attorney, (3) an elderly testator in weakened physical or mental condition, (4) lack of consideration for the bequest, (5) a disposition that is unnatural or unjust, (6) the beneficiary's participation in procuring the will, and (7) domination of the testator by the beneficiary.
11. **Agency.** A confidential relationship exists between two persons if one has gained the confidence of the other and purports to act or advise with the other's interest in mind.
12. **Actions: Parties: Standing.** Whether a party who commences an action has standing and is therefore the real party in interest presents a jurisdictional issue.
13. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional issue that does not involve a factual dispute presents a question of law, which an appellate court independently decides.
14. **Decedents' Estates: Actions: Standing.** Under the Nebraska Probate Code, the right and duty to sue and recover assets for an estate reside in the estate's appointed personal representative, not the devisees.
15. **Trusts: Equity: Appeal and Error.** Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record.
16. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions concerning the matters at issue.
17. **Trusts: Agency.** Like a power of attorney, a trust creates a fiduciary relationship regarding property.
18. **Agency.** A person in a fiduciary relation to another is under a duty to act for the benefit of the other as to matters within the scope of the relation.
19. **Trusts: Agents.** A trustee shall administer the trust solely in the interests of the beneficiaries.
20. ____: ____. A trustee is under a duty not to profit at the expense of the beneficiary and not to enter into competition with him without his consent, unless authorized to do so by the terms of the trust or by a proper court.
21. **Trusts: Agents: Conflict of Interest.** Except in discrete circumstances, a trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests.
22. **Trusts: Fraud: Proof.** Unless an exception under Neb. Rev. Stat. § 30-3867 (Reissue 2008) applies, a beneficiary establishes a prima facie case of fraud by showing that a trustee's transaction benefited the trustee at the beneficiary's expense. The burden of going forward with evidence then shifts to the trustee to establish the following by clear and convincing evidence: The transaction was made under a power expressly granted in the trust and the clear intent of the settlor; and the transaction was in the beneficiary's best interests.
23. **Agency: Fraud: Proof.** Showing a fiduciary relationship alone does not establish constructive fraud. Constructive fraud is the breach of a duty arising out of a fiduciary or confidential relationship.

24. **Final Orders.** Generally, when a trial court clearly intends its order to serve as a final adjudication of the rights and liabilities of the parties, the order's silence on requests for relief can be construed as a denial of those requests.
25. **Trusts: Agents: Records.** A trustee has a duty to keep adequate records of the administration of the trust and to promptly respond to a beneficiary's request for information related to the administration.
26. **Trusts: Agents: Costs.** While the Nebraska Uniform Trust Code permits a trustee to retain a reasonable amount of assets to pay winding-up costs, it requires a trustee to distribute trust property to the designated beneficiaries upon the termination or partial termination of a trust.
27. **Trusts: Time.** A trust's termination date can be implied from its terms.
28. **Trusts.** A trustee's payments for the settlor's outstanding debts, taxes, and expenses are part of the trustee's winding-up duties after a trust terminates.
29. **Trusts: Agents.** After a trust terminates, a trustee continues to have a nonbeneficial interest in the trust for timely winding up the trust and distributing its assets.
30. **Trusts: Agents: Property.** After a trust terminates, a trustee's property management powers are limited to those that are reasonable and appropriate in preserving the trust property pending the winding up and distribution of assets.
31. **Trusts: Agents.** Under the Nebraska Uniform Trust Code, a trustee's duty to pay the settlor's debts, expenses, and taxes does not normally justify a trustee's failure to make distributions.
32. **Trusts: Agents: Property.** A trustee has a duty of impartiality in administering trust property, which duty plays particular importance in distributing assets.

Appeal from the District Court for Hitchcock County: DAVID URBOM, Judge. Reversed and vacated, and cause remanded for further proceedings.

J. Bryant Brooks, of Brooks Law Offices, P.C., for appellant.

Nathan A. Schneider, of Mousel & Garner, pro se.

Steve W. Hirsch, of Hirsch & Pratt, L.L.P., and Terry L. Rogers, of Terry L. Rogers Law Firm, for appellee Charles Hedke.

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

CONNOLLY, J.

I. SUMMARY

Shortly before her death at age 92, while suffering from dementia, Leona M. Hedke created a trust. She deeded all her real estate to the trust and executed a new will that devised

all her remaining property to the trust. In the trust, she left the bulk of her estate to her son, Charles Hedke, and nominal assets to her daughter, Dolores Nowak. Dolores contested the will, objecting, in part, to Charles' undue influence.

In a separate action, Dolores also sued to set aside the trust and to impose a constructive trust on assets that Charles had wrongfully taken while acting as Leona's attorney in fact. In addition, she sued to recover assets that Charles had wrongfully taken while acting as trustee of Leona's trust.

After Dolores transferred the probate action to district court, the court dismissed as time barred her claim challenging the trust's validity. After consolidating the cases, the court concluded that Dolores had failed to carry her burden on two issues: She failed to show that Leona (1) lacked testamentary capacity and (2) had executed the will and quitclaim deed because of Charles' undue influence. The court found that these documents were valid. But the court found that Charles had abused his fiduciary duties both while he was attorney in fact and while he was trustee. It ordered him to pay for many unauthorized expenditures and to return assets that he had wrongfully taken.

Our holding will be spelled out with some specificity in the following pages, but briefly stated, it is this:

(1) We reverse the district court's order finding no undue influence, because the evidence shows that Charles improperly influenced Leona in making her will.

(2) We vacate the district court's order finding that the deed was valid and that Charles had misappropriated Leona's assets while attorney in fact, because Dolores, as a devisee, lacked standing to recover assets for the estate, so the court did not have jurisdiction over these claims.

(3) We conclude that Dolores, as a trust beneficiary, had standing to challenge Charles' actions while he was trustee.

(4) We remand the cause to the district court to make further findings and determinations regarding Charles' transactions during the trust's winding-up period.

II. BACKGROUND

When his father became ill, Charles moved back to the Trenton, Nebraska, area to help manage the family farm. After

his father died, he and Leona agreed to split the farm expenses and income evenly, and Leona would pay the taxes. In 1993, Leona signed a will which provided that Charles would receive the farmland but compensate Dolores for her share in cash. Leona's attorney had drafted the 1993 will. In 1998, Charles took Leona to see her attorney to draw up a power of attorney naming both Charles and Dolores as her joint attorneys in fact.

Later, in December 2003, Leona was hospitalized after falling because of a seizure. While she was at the hospital, her doctor diagnosed her with dementia, and she was later admitted to a nursing home. Before entering the nursing home, Leona lived alone in Trenton, and Charles and his wife lived on Leona's farmland. Dolores lived in Arizona. After Leona entered the nursing home, Charles handled all her financial affairs.

Leona had frequently told a neighbor and Leona's sister-in-law, close friends of Leona, that she had a will. And she said that she had treated her children equally: Charles was to get the farm and Dolores was to get an equal share of Leona's estate through a cash payment from Charles. She had also discussed her will several times with her neighbor while in the nursing home and had never indicated that she wanted a new will. The record shows that Dolores and Leona were close and maintained regular contact. And before entering the nursing home, Leona equally divided her oil royalty money between herself and her children.

Even before entering the nursing home, Leona had problems with confusion and memory loss. In October 2004, after she entered the nursing home, her doctor signed a report characterizing her dementia as "[s]ignificant Alzheimer's." The same month, he sent a letter to Dolores' attorney regarding Dolores' pending conservatorship application. He stated that Leona was usually confused and disoriented and could not make decisions in her best interests regarding her health care or finances.

Later, at trial, her doctor stated that on December 10, 2004—the date Leona allegedly requested a new estate plan from Charles' attorney—he believed that someone should have been overseeing her best interests. Because her condition would have only gotten worse, he believed she would have had

a difficult time reading or understanding the estate planning documents that she signed on December 30, 2004. He also testified that Leona was vulnerable to suggestion and could be manipulated. He explained that she probably would have remembered who her family members were and that a person might not recognize her condition without probing because she could carry on a short conversation. Her nurses also considered Leona's cognitive abilities, short- and long-term memory, and decisionmaking to be severely impaired.

Both Leona's neighbor and Leona's sister-in-law testified that Leona was vulnerable to suggestion and that she relied upon Charles for every decision. Leona had paid off his defaulted business loan, and she had paid his child support arrears.

Charles claimed that before Leona entered the nursing home but while he was her attorney in fact, she gave him money because of his financial hardships. His wife had been unable to work since 2000 because of multiple sclerosis, his business had failed, and because of drought, the farm income had dropped. He stated that Leona would tell him to write out a check and then she would sign it. Charles admitted to keeping some of his mother's valuable items when her personal property was sold at auction; he claimed that Leona wanted him to have them. While Leona was in the nursing home, Charles also wrote himself checks from her account if he needed money. He said that he told her about the checks and that she did not object. Charles also admitted that in 2004, he cashed five of her monthly oil royalty checks and used the money for himself; he claimed that Leona had given him permission.

While Leona was in the nursing home, Dolores was being treated for terminal lung cancer but called Leona weekly and sometimes daily. Having access to Leona's financial statements, Dolores discovered that Charles was not paying the nursing home bills. Nor was he depositing farm income or oil royalty payments into Leona's account. She also discovered that Charles had written checks to himself from Leona's account. When confronted, he told Dolores he needed the money for his expenses. Dolores demanded that he account for

these funds. He refused. In September 2004, she applied for an appointment of a guardian and conservator.

Dolores stated that she dismissed her first application because Leona was upset, but she had asked the guardian ad litem to further investigate, which he did. At the January 2005 hearing on Dolores' second application, the guardian ad litem reported to the court that a conservatorship was necessary. He had learned that Leona had incorrectly reported facts about her life during his first interview. He had concluded that she did not understand any specifics about her finances or assets.

In November 2004, Charles sold Leona's house and auctioned her personal property. The proceeds were several thousand dollars for the personal property and $45,500 for the house. Charles stated that he wrote a check for the full amount of the house proceeds to the nursing home to cover arrears. Yet, his 2005 accounting shows that he deposited $52,499.55 from the house and auction proceeds and paid only $22,400 to the nursing home. Dolores became concerned because large sums of Leona's money were still disappearing and because Charles had told her that Leona did not have enough money to remain in the nursing home. So in November 2004, she applied again for an appointment of a guardian and conservator. Charles claims that after this filing, Leona became very upset and wanted an attorney to fight the action.

Shortly after Dolores filed the second application, Charles removed Leona from the nursing home—over Dolores' objections—and took her to his home. At that time, Leona had $42,923 in three bank accounts. In 2004, her farm property was assessed for tax purposes at $174,630. The nursing home cost about $3,989 a month.

Leona's doctor agreed to discharge her from the nursing home after Charles assured him that he and his wife could care for Leona. Although Charles' wife was a registered nurse, she was disabled and, like Leona, needed a wheelchair. Charles used Leona's funds to pay his housekeeper for helping his wife with Leona's care and to build wheelchair ramps. Charles, his wife, and his housekeeper testified that Leona was happy living with Charles. The nursing home staff, however, was concerned about Leona's living with Charles because of her confusion and

high risk for falling. Because Charles had declined all supportive services, they notified Adult Protective Services.

Just before her discharge from the nursing home, Leona told her neighbor that Charles had said Dolores was trying to steal the farm. He admitted this. He also admitted that after Dolores applied for a guardian and conservator, he began suggesting to Leona that she create a trust because it would easier for him to take care of her with a trust.

1. Charles Asks His Attorney to Represent Leona

Charles testified that Leona had repeatedly told him that she wanted to change her will. Yet, he did not attempt to contact Leona's longtime attorney, who had drafted her 1993 will and power of attorney. He testified that in late 2004, in response to Leona's inquiry, he told her that she could discuss changing her estate plan with his attorney, Terry Rogers. He further stated that she agreed to Charles' contacting Rogers, which he did. Rogers' billing statement shows that Charles contacted him on December 2, 3 days after removing Leona from the nursing home. According to Charles, Rogers suggested a trust.

On December 10, 2004, Rogers met with Leona at Charles' house. At this time, Rogers was also representing Charles on an unrelated assault charge. Rogers knew that Dolores and Charles were Leona's joint attorneys in fact, and he knew that Dolores was concerned Charles was misappropriating Leona's assets. Rogers admitted that he knew he "might have" a conflict of interest. He was representing Charles and his wife, and Charles would benefit from Dolores' disinheritance. Charles could not remember whether he had paid Rogers for Charles' personal legal matters out of Leona's funds. Rogers stated that Leona orally agreed to waive any conflict regarding his past and present representation of Charles and his wife. He stated that he agreed to represent Leona only after Charles and his wife understood that his advice to Leona could be contrary to what they would prefer.

In contrast to Charles' statements, Rogers testified that he was not asked to meet with Leona to discuss her will. According to Rogers, he had the following discussion with Leona on December 10, 2004: While discussing the conservatorship

proceeding with him out of Charles' presence, Leona asked Rogers to do some estate planning. Leona stated that she thought she had made a will, but that she could not remember what it said and that she wanted a new one. On cross-examination, however, Rogers admitted Leona had told him that she did not know where the will was and that she wanted to dispose of her property as her father had—with her son getting the land and her daughter getting the cash. Rogers advised her to create a revocable trust before a court ordered a conservatorship against her wishes. Leona was purportedly unconcerned when he explained that Dolores might receive nothing from the trust if Leona lived a long time. Leona agreed with Charles to include the farm equipment as a trust asset and agreed to convey all her farmland to the trust in a quitclaim deed.

Rogers stated that Leona knew that Charles was taking her money, but that Leona did not want him to pay it back. According to Rogers, she was dismissive of Charles' attempt to include as a trust asset any money he had borrowed. Rogers, however, insisted that the debt be included. He stated that Leona's anger at Dolores was rational because Leona did not want Charles to account for his conduct.

Both Charles and Rogers stated that Charles was not present when Rogers discussed the will and trust with Leona. And Charles claimed he could not recall whether he had talked to Rogers about the terms of the trust or will. But he admitted that Rogers had advised him a trust would be the best solution for the farm business. Charles also admitted that he participated in discussions with Rogers and Leona about a trust and that he had encouraged her to create it. Charles did not, however, explain to Leona that Dolores would likely not receive any property if Leona created the trust.

The record also shows that Charles consulted with Rogers on December 15, 2004, regarding Leona's estate plans. Apparently, this is the date when Charles told Rogers that he and Leona had agreed to include as a trust asset a $20,000 debt from Charles. This loan did not, however, include the royalty checks he had cashed, and he could not remember whether it included any "cash payments" to himself. Rogers included this "loan" as a trust asset. Charles also told Rogers that Leona had agreed

to have an "old friend of Charles," a farmer in the community whom Leona "seemed to know," serve as her trustee. Rogers said that he did not speak to Leona again until December 30, when she signed the documents.

On December 16, 2004, Rogers sent a letter to Charles explaining his "possible" conflict of interest, to ensure that he and his wife did not object to Rogers' representing Leona. But he did not send a corresponding letter to Leona. Also on December 16, Charles called Rogers to say that he had found Leona's 1993 will. Charles knew that Leona had made a will because she had shown it to him in 2003 before entering the nursing home. And he knew that under that will, he was required to make a cash payment to Dolores. Charles faxed a copy of the will to Rogers. Rogers knew that the 1993 will contained a provision that either gave Dolores a lien against the property or required Charles to pay money to Dolores so that she would receive her share of the estate. But Rogers instructed Charles to shred the old will, and Rogers shredded his copy. He stated that this was his standard practice to avoid confusion between wills when a client executes a new will. Charles admitted that he had probably burned the earlier will. Neither Rogers nor Charles ever informed Leona that her old will had been found. Charles' housekeeper testified that Leona had told her she had a will but that she was executing a new one because the old one was lost. Leona also told her that the new will was the same as the old one.

On Christmas 2004, Dolores spoke to Leona on the telephone. Angry, Charles called Dolores and accused her of trying to steal the farm. Leona's sister-in-law also spoke to Leona on Christmas. Leona was upset and repeated that Charles had told her Dolores was trying to steal the farm.

2. Leona Signs New Estate Plan Documents While Her Competency Hearing Was Pending for January 12, 2005

On December 30, 2004, Charles took Leona to the courthouse to review the estate plan documents and then to the bank for witnessing and notarization. Rogers stated that he left Leona alone to review the documents. He then spent 5 to 10

minutes reviewing the documents with her, including the trust provision that left Dolores only Leona's remaining personal property. He stated that Leona affirmed that this division was what she wanted. Leona signed a quitclaim deed conveying all her farm property to the Leona M. Hedke Revocable Trust. The trust named Charles' friend as trustee and Dolores and Charles as the beneficiaries. After Leona's death, the trust required the trustee to (1) pay her debts, taxes, and burial expenses; (2) distribute all real estate to Charles; and (3) distribute any remaining trust property to Dolores. Leona also signed a new will, making Dolores the residuary beneficiary. But the new will contained a pour-over provision that bequeathed all her property to the revocable trust.

Three bank employees witnessed Leona sign the documents. One of them stated that Leona was unsure whether she had reviewed the documents. But she knew who the banker and another employee were, and she told the employees she was signing the documents of her own free will. She also stated in a "disappoint[ed] tone" that she did not know what had happened to Dolores. She stated that Dolores had not been there but that Charles had stayed and helped.

All three employees reported that Leona had stated she was dividing her assets the same way her parents or father had: The sons received the real estate, and the daughters received cash and other assets. The banker stated that while he believed Leona knew what she was doing, he was worried that she was being influenced.

3. Court Accepts Parties' Stipulation That a Conservator Should Be Appointed

Before the hearing on January 12, 2005, the parties had signed a stipulation. They stipulated as follows: (1) Leona needed a conservator because she was unable to manage her property; (2) the court would appoint attorney Nathan A. Schneider as Leona's conservator; (3) Schneider would amend the trust to appoint Charles as trustee instead of Charles' friend; (4) the trustee would account to the conservator quarterly; (5) both Dolores and Charles would account to Schneider within 30 days for all Leona's assets that they had held,

received, or transferred under their power of attorney authority from December 2003 forward; and (6) Dolores would reserve her right to contest the will and trust but would dismiss her request for a guardian. While at the courthouse, Leona amended her trust to make Charles her trustee. She also signed a codicil making Charles her personal representative. The court appointed Schneider as conservator. Schneider testified that Charles failed to file an accounting within 30 days as the parties agreed.

After Charles became the trustee, Rogers represented him in the conservatorship action and as trustee. In January 2005, Schneider met with Leona at Charles' house to assess her mental capacity and explain his role as her conservator. He had arranged to meet there with an Adult Protective Services worker, but Charles refused to allow the worker in his house. Schneider stated that Leona could not follow the conversation. After being hospitalized with pneumonia, Leona died on April 4.

4. Events After Leona's Death

After Leona's death, Charles conveyed the trust's real estate to himself, but, on Rogers' advice, he did not distribute any personal property or cash to Dolores. He had previously opened a trust account with a beginning balance of $32,814. He did not account for Leona's assets until compelled to do so by a contempt order. And he did not reimburse the trust for the money he had paid to himself or kept, nor did he pay the trust for the outstanding $20,000 loan. In April 2005, he wrote himself a $5,000 check from the trust account to reimburse himself for Leona's rent and care he provided. The same month, he purchased a truck with trust money and titled it in his name.

Charles provided a partial accounting to Schneider in September 2005. In October, the county court issued a contempt order. In January 2006, Charles filed an accounting prepared by Rogers. But Schneider asserted that Charles still had not fully accounted for checks or provided documentation to show that his expenditures were on Leona's behalf. The record shows that Charles' accounting also did not include Leona's income that Charles had kept. In addition, Charles

had written some checks for his own expenses. In January 2006, the county court found this accounting purged Charles of contempt but was still incomplete. Schneider never filed a complete accounting because Charles never fully accounted for Leona's assets.

III. PROCEDURAL HISTORY

In January 2006, Dolores filed a probate petition seeking a determination that Leona died intestate and requesting that the court appoint her as personal representative. Afterward, Charles filed a petition for formal probate of Leona's 2004 will; he requested appointment of himself as personal representative. Dolores contested his request. She objected that Leona did not have testamentary capacity and that the purported will was the result of undue influence. In April 2006, Dolores transferred the will contest to the district court.[1] At that time, the county court had not appointed a personal representative or special administrator,[2] nor had the conservator, Schneider, sought appointment as personal representative.[3]

Later, in June 2006, Dolores filed the nonprobate action, in her individual capacity. She alleged three claims: (1) Charles engaged in self-dealing while he was Leona's attorney in fact; (2) Charles exercised undue influence over Leona to get her to execute the December 2004 trust; and (3) Charles violated his duties as trustee to distribute assets to Dolores. Charles moved to dismiss the undue influence claim as time barred under Neb. Rev. Stat. § 30-3856(a)(1) (Reissue 2008). That section requires a contestant to challenge the validity of a revocable trust within 1 year of the settlor's death. The court sustained the motion.

1. Allegations Against Charles

In February 2007, Dolores joined Schneider as a plaintiff in the nonprobate action. In March, the plaintiffs filed

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[1] See Neb. Rev. Stat. § 30-2429.01(1) (Reissue 2008).

[2] See Neb. Rev. Stat. § 30-2457 (Reissue 2008).

[3] See Neb. Rev. Stat. § 30-2654(e) (Reissue 2008).

an amended complaint. This complaint did not contain the undue influence claim regarding execution of the trust, but it retained the claims of self-dealing and breach of fiduciary duties. They claimed that while Charles was attorney in fact, he (1) fraudulently transferred Leona's assets to himself and (2) misrepresented or concealed information which caused Leona to transfer her personal property and real estate to the trust. They also claimed that while he was trustee, his misrepresentations or concealments resulted in the fraudulent transfer of trust assets to himself. They asked the court to (1) order a full accounting of Charles' conduct while attorney in fact and trustee; (2) impose a constructive trust for the benefit of the estate; (3) set aside all real estate conveyances to the trust and all real estate conveyances executed by Charles to himself as trustee, or remove Charles as trustee and appoint a receiver; (4) award damages caused by Charles' self-dealing; and (5) award costs and attorney fees.

Charles moved to dismiss the plaintiffs' claims for an accounting, a constructive trust, restitution, and damages. He alleged that both plaintiffs lacked standing to assert claims for the estate. He asked the court to dismiss, as an attack on the trust's validity, that part of the complaint praying that transfers to the trust be set aside. He sought summary judgment on the remaining claims.

2. District Court's Orders and Judgment

The court rejected Charles' claim that the plaintiffs lacked standing. It concluded that heirs can maintain an action to recover an estate's assets. But it dismissed the plaintiffs' request for a constructive trust on property conveyed to the trust. It also dismissed their request to set aside conveyances to the trust and the conveyances from the trust to Charles. The court concluded that these requests were a challenge to the trust's validity, which challenge was time barred. Later, however, the court reversed its decision and allowed the plaintiffs to seek a constructive trust and to set aside the deed.

Dolores died before trial, but the court admitted her deposition testimony. After a consolidated trial, the court issued an order, detailing many transactions that were made in violation

of Charles' fiduciary duties while attorney in fact or trustee. The court ordered him to pay the conservator, Schneider, $14,528.58 for the fraudulent transfers Charles had made while attorney in fact. The court further ordered him to pay Leona's estate $18,138.57 for fraudulent transfers made while he was trustee. It also awarded prejudgment interest.

Regarding the constructive trust, the court found that Dolores and the conservator had proved that Charles had obtained some of Leona's personal property from the auction through constructive fraud. It also found that Charles had violated his fiduciary duties by purchasing a truck with trust assets. The court ordered Charles to return those assets to the estate. But it concluded that real estate that Leona transferred to the trust was not obtained by fraud, misrepresentation, or abuse of a confidential relationship.

Regarding the 2004 will, the court found the plaintiffs had failed to show that the deed and will were the result of undue influence or that Leona lacked testamentary capacity. The court found that Leona had validly executed the deed and will. It transferred the probate action back to county court for further proceedings. It then allowed Dolores' son, John Nowak, to represent her interests and substituted him as a party. Finally, it overruled the plaintiffs' motion for a new trial in both cases.

IV. ASSIGNMENTS OF ERROR

Nowak filed a notice of appeal, and Schneider joined in the reply brief. For convenience, we will refer to Nowak and Schneider as "the appellants." The appellants assign that the court erred in (1) putting the burden of proof on Dolores on the issues of undue influence and testamentary capacity, (2) finding that Leona validly executed her 2004 will, (3) finding that Leona validly executed the 2004 quitclaim deed, and (4) failing to recover all assets proved to be fraudulently conveyed to Charles or for his benefit while he was acting as attorney in fact or trustee.

On cross-appeal, Charles assigns that the district court erred in failing to dismiss all claims brought by the appellants for lack of standing.

V. ANALYSIS

1. Probate Issues

We first address the court's judgment in the probate action.

(a) Standard of Review

[1-4] Absent an equity question, we review probate matters for error appearing on the record.[4] 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.[5] In reviewing a judgment of the probate court in a law action, we do not reweigh evidence, but consider the evidence in the light most favorable to the successful party. And we resolve evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.[6] The probate court's factual findings have the effect of a verdict, and we will not set those findings aside unless they are clearly erroneous.[7]

(b) Undue Influence

The court's order does not state its reasoning, but it found that Dolores had failed to prove Leona's 2004 will was the product of Charles' undue influence. Dolores contends that the court did not apply the proper burden of proof regarding undue influence. Relying on our decision in *In re Estate of Novak*,[8] she argues that the evidence established a presumption of undue influence and that Charles failed to overcome this presumption. And so she contends that the evidence established that the will was the product of undue influence.

Charles does not specifically address the court's undue influence ruling regarding the will; his brief addresses undue influence regarding only the quitclaim deed. But he argues that the court correctly found that the will and codicil were valid.

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[4] See *In re Estate of Cooper*, 275 Neb. 322, 746 N.W.2d 663 (2008).

[5] *In re Estate of Lamplaugh*, 270 Neb. 941, 708 N.W.2d 645 (2006).

[6] See *id.*

[7] See *id.*

[8] *In re Estate of Novak*, 235 Neb. 939, 458 N.W.2d 221 (1990).

The thrust of his evidence and argument at trial was that Leona created her will and revocable trust because she wanted to protect him financially and because she was upset that Dolores had initiated a conservatorship proceeding.

[5,6] Before proceeding with the analysis, we set forth some general principles regarding undue influence. To show undue influence, a will contestant must prove the following elements by a preponderance of the evidence: (1) The testator was subject to undue influence; (2) there was an opportunity to exercise such influence; (3) there was a disposition to exercise such influence; and (4) the result was clearly the effect of such influence.[9] Yet not every exercise of influence will invalidate a will.[10] Undue influence sufficient to defeat a will is manipulation that destroys the testator's free agency and substitutes another's purpose for the testator's.[11]

[7,8] But it is not necessary for a court in evaluating the evidence to separate each fact supported by the evidence and pigeonhole it under one or more of the above four essential elements. The trier of fact should view the entire evidence and decide whether the evidence as a whole proves each element of undue influence.[12] And a party seeking to prove the exercise of undue influence is entitled to all reasonable inferences deducible from the circumstances proved.[13]

(i) Presumption of Undue Influence

[9] One does not exert undue influence in a crowd. It is usually surrounded by all possible secrecy; it is usually difficult to prove by direct evidence; and it rests largely on inferences drawn from facts and circumstances surrounding the testator's life, character, and mental condition. In determining whether

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[9] See, *In re Estate of Wagner*, 246 Neb. 625, 522 N.W.2d 159 (1994); *In re Estate of Novak, supra* note 8.

[10] *In re Estate of Peterson*, 232 Neb. 105, 439 N.W.2d 516 (1989).

[11] See *In re Estate of Novak, supra* note 8.

[12] See *In re Estate of Price*, 223 Neb. 12, 388 N.W.2d 72 (1986), citing *Andersen v. Andersen*, 177 Neb. 374, 128 N.W.2d 843 (1964).

[13] *Pruss v. Pruss*, 245 Neb. 521, 514 N.W.2d 335 (1994); *In re Estate of Villwok*, 226 Neb. 693, 413 N.W.2d 921 (1987).

undue influence existed, a court must also consider whether the evidence shows that a person inclined to exert improper control over the testator had the opportunity to do so.[14] Thus, we have recognized a presumption of undue influence if the contestant's evidence shows a confidential or fiduciary relationship, coupled with other suspicious circumstances.[15]

[10] We have previously summarized suspicious circumstances that, when coupled with proof of a confidential or fiduciary relationship, can give rise to a presumption of undue influence. Those circumstances include: (1) a vigorous campaign by a principal beneficiary's family to maintain intimate relations with the testator, (2) a lack of advice to the testator from an independent attorney, (3) an elderly testator in weakened physical or mental condition, (4) lack of consideration for the bequest, (5) a disposition that is unnatural or unjust, (6) the beneficiary's participation in procuring the will, and (7) domination of the testator by the beneficiary.[16]

But the ultimate burden of persuasion for undue influence remains with the contestant throughout the trial.[17] We have not, however, determined what quantity of proof will rebut a presumption of undue influence. In *In re Estate of Novak*, we stated that when a contestant's evidence gives rise to a presumption of undue influence, the burden of going forward with evidence to rebut the presumption shifts to the proponent. We stated that if the proponent's "evidence establishes *there was no undue influence*, the presumption disappears."[18] We also stated that the presumption of undue influence may be rebutted by proof that the testator had competent independent advice and that the will was his or her own voluntary act, or by other

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[14] See *In re Estate of Villwok, supra* note 13.

[15] See, e.g., *In re Estate of Novak, supra* note 8.

[16] See *id.*

[17] See, *McGowan v. McGowan*, 197 Neb. 596, 250 N.W.2d 234 (1977); *In re Estate of Goist*, 146 Neb. 1, 18 N.W.2d 513 (1945); *In re Estate of Hagan*, 143 Neb. 459, 9 N.W.2d 794 (1943).

[18] See *In re Estate of Novak, supra* note 8, 235 Neb. at 942, 458 N.W.2d at 224 (emphasis supplied), citing *Loomis v. Estate of Davenport*, 192 Neb. 461, 222 N.W.2d 369 (1974).

evidence of the circumstances surrounding the execution of the will.[19] These statements suggest that the proponent's rebuttal evidence must do more than support an opposing inference. But we also stated that "after evidence has been introduced, the presumption disappears."[20] It appears that we have made contradictory statements regarding the quantity of proof that would satisfy the proponent's burden to rebut the presumption.

Our case law on the proof necessary to rebut a presumption of undue influence is inconclusive. We have not treated every similar presumption as disappearing upon the opponent's introduction of contradictory evidence sufficient to support an opposing inference.[21] But the parties have not presented arguments on the quantity of proof issue, and we do not need to resolve this tension here. Even if the presumption of undue influence disappeared upon Charles' production of contradictory evidence, we believe the court was clearly wrong. As discussed below, under any standard of proof, the evidence overwhelmingly outweighed any evidence Charles adduced to rebut the presumption.

(ii) The Evidence Showed Both a Confidential Relationship and Suspicious Circumstances

[11] A confidential relationship exists between two persons if one has gained the confidence of the other and purports to act or advise with the other's interest in mind.[22] Here, obviously, a confidential relationship existed. Further, as Leona's attorney in fact, Charles not only had a confidential relationship but also had a fiduciary relationship with Leona. And this fiduciary relationship required him to act solely for her benefit even at the expense of his own interest.[23]

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[19] *In re Estate of Novak, supra* note 8.

[20] See *id.* at 947, 458 N.W.2d at 227, citing *McGowan, supra* note 17.

[21] See, *Crosby v. Luehrs*, 266 Neb. 827, 669 N.W.2d 635 (2003); *Molholm v. Lynes*, 185 Neb. 707, 178 N.W.2d 566 (1970); *Cunningham v. Quinlan*, 178 Neb. 687, 134 N.W.2d 822 (1965); *Muse v. Stewart*, 173 Neb. 520, 113 N.W.2d 644 (1962).

[22] See *Schaneman v. Schaneman*, 206 Neb. 113, 291 N.W.2d 412 (1980).

[23] See *Archbold v. Reifenrath*, 274 Neb. 894, 744 N.W.2d 701 (2008).

The evidence clearly established that Leona had a history of relying on Charles in making important decisions and that she was vulnerable to his requests for financial help. After entering the nursing home, she totally depended upon him to handle her finances. The evidence showed that when she left the nursing home, she could not understand her finances and assets. Twelve days after Leona signed her 2004 will—which was a little more than 1 month after Charles had removed her from the nursing home—Charles stipulated to the following in the conservatorship proceeding: "Appointment of a Conservator is necessary because [Leona] is unable to manage her property and has property which will be wasted or dissipated unless proper management is provided due to her lack of capacity to make or communicate responsible decisions . . . ."

Moreover, the evidence established more than a confidential and fiduciary relationship. It also showed that Charles had breached his fiduciary duties. Even before Leona became totally dependent upon him for her physical needs, he was exploiting the power of attorney and self-dealing as Leona's attorney in fact.

Further, the record is littered with other suspicious circumstances that raise a presumption of undue influence. Testimony from Dolores, Leona's physician and caretakers at the nursing home, her guardian ad litem, and her conservator, Schneider, established that Leona was impaired physically and mentally long before she was under Charles' exclusive control. Because of Charles' factual stipulations for the appointment of a conservator, he could not reasonably dispute Leona's impaired condition. Yet, despite Leona's sufficient assets to pay for her care at the nursing home and the belief of Leona's caretakers and Dolores that Leona should remain there, Charles insisted upon removing Leona to his home.

After Leona went to live with Charles, he immediately began efforts to postpone the conservatorship hearing and have her estate plan rewritten. His ongoing financial problems, his knowledge that a conservator would likely soon be appointed, and his refusal of supportive services strongly support the inference that his campaign to remove Leona from the nursing home was motivated not by his concern for Leona's

best interests, but by his desire to preserve her assets for himself. Other evidence also supports this inference. Leona had never told her close friends that she wanted to change her will. And Charles and Rogers made inconsistent statements regarding Charles' purpose for initially contacting Rogers on Leona's behalf.

The evidence also supports another strong inference: Charles used his influence over Leona to turn her away from Dolores. As noted previously, Charles admitted telling Leona that Dolores was trying to steal the farm. At the time Charles was removing Leona from the nursing home, he was also influencing Leona to believe that Dolores had filed a guardianship and conservatorship application solely for personal gain. Both Leona's neighbor and Leona's sister-in-law testified that Leona was never upset with Dolores until Charles convinced her that Dolores was attempting to steal the farm. The neighbor and sister-in-law knew the parties well. Their testimony showed that Dolores and Leona had been close before and after Leona entered the nursing home. Leona's actions and statements also illustrate that she and Dolores had a close relationship before Charles removed Leona from the nursing home. Remember, Leona was dividing her oil royalty payments with both Charles and Dolores before she entered the nursing home. Even after entering the nursing home, she had repeatedly stated that she intended to divide her assets equally between her children, as her father had. Charles' manipulation and dominion infected Leona's attitude toward Dolores.

Charles and Rogers also failed to provide Leona with information that would have permitted her to compare her new estate plan with her previous intentions in her earlier will. Rogers' billing statements and Charles' testimony showed that Charles was involved in the planning of Leona's new estate plan. Yet, he admitted that he did not explain to Leona that her new estate plan would effectively disinherit Dolores. Rogers told Leona that her medical expenses could deplete her cash assets if she lived a long time. But he did not discuss the money in her accounts at that time. Most important, neither Charles nor Rogers informed Leona that Charles had found her old will and that there were substantial differences.

Nor did Leona have independent legal advice from an attorney solely dedicated to her interests. Despite her age, her infirmity, and allegations of Charles' theft, Rogers did not attempt to determine whether a conservatorship might be in Leona's best interests. He admitted that he did not explain to Leona that Dolores believed Charles was misappropriating her assets. And, at trial, Charles admitted that he had used trust funds for his benefit without authorization. We note that Rogers now represents Charles in this appeal. He argued Charles' case before this court.

Rogers also failed to independently verify Leona's competency by asking her questions about her assets or speaking to her physician to determine if a guardianship or conservatorship was necessary. To the contrary, he successfully continued the competency hearing scheduled for December 15, 2004, until January 12, 2005, after Leona had executed new estate plan documents. Although Leona had told Rogers that she wanted to divide her property as her father had and that she did not know where her earlier will was, he did not verify that the differences in the new will represented her wishes. On this record, Rogers' testimony that Leona was not mentally impaired rings hollow.

The evidence was sufficient to support a judgment for Dolores if unrebutted. The evidence clearly showed that Leona was subject to Charles' undue influence and that he had the opportunity to exercise such influence. The court's finding that Charles had engaged in self-dealing while he was Leona's attorney in fact and trustee established his disposition to exercise such influence. Finally, even if Leona could have understood that she was disinheriting Dolores, the evidence showed that she would not have done so but for Charles' ability to turn Leona against Dolores.

In contrast, Charles' evidence established that Leona was unhappy at the nursing home and happy to be living with him. This evidence was intended to negate the inference that he had removed her from the nursing home to influence her to change her estate plan. But it also supported rather than negated an inference that she was susceptible to Charles' influence. Fleshed out, the testimony of Charles, his wife, and his

attorney tended to support the following inferences: Leona was not close to Dolores; Leona was unconcerned about disinheriting Dolores; Leona wanted Charles to have her assets; and Leona never wanted Charles to account for funds that he had taken from her.

But Charles' self-dealing and constructive fraud punctured his credibility. And Rogers' zeal of approval failed to resuscitate it. Further, their claims that Leona was clear about how she wanted to distribute her assets were undermined because neither Charles nor Rogers told Leona about finding her 1993 will, despite evidence that she believed she was creating the same estate plan. And even the banker suspected that Leona was being influenced. Above all, the court clearly did not believe Charles or Rogers when it found that Charles had helped himself to Leona's funds as her attorney in fact. Despite the testimony that these funds were included as a trust asset in the form of a "loan," the court nonetheless found the appellants had proved constructive fraud. If the testimony of Charles and Rogers was not credible on that issue, we wonder how they were nonetheless credible regarding the absence of undue influence.

While we recognize our deferential standard of review regarding the trial court's factual findings, we cannot ignore the overwhelming evidence that Leona would not have created this estate plan absent Charles' improper influence and manipulation. The record shows Charles' rushed and concerted effort to have Leona create new estate documents before the county court held a hearing on Leona's competency. Moreover, we cannot reconcile the trial court's finding of no undue influence regarding the will with its separate conclusion that Charles, as attorney in fact and trustee, had exploited his positions of trust for his own benefit both before and after Leona's death.

The district court was clearly wrong in not finding that Leona's 2004 will was the result of undue influence. So, the 2004 will was invalid and we need not reach the issue of her testamentary capacity. We next turn to the parties' arguments regarding the nonprobate action.

2. The Appellants Did Not Have Standing to Set Aside Quitclaim Deed or Seek Recovery of Property Charles Misappropriated While He Was Leona's Attorney in Fact

The appellants assign that the court erred in finding that the quitclaim deed Leona executed was valid. They argue that the court failed to address their claim that Charles fraudulently concealed information from Leona that resulted in her execution of the quitclaim deed. Specifically, they argue that Leona would not have executed the will, trust, or quitclaim deed if Charles or Rogers had informed her that Charles had found her 1993 will. On cross-appeal, Charles argues that the appellants did not have standing to seek recovery of Leona's real estate conveyed to the trust in the quitclaim deed.

(a) Standard of Review

[12,13] Whether a party who commences an action has standing and is therefore the real party in interest presents a jurisdictional issue.[24] A jurisdictional issue that does not involve a factual dispute presents a question of law, which we independently decide.[25]

(b) No Exception to Standing Rule Applies

[14] Whether the appellants' claim regarding the quitclaim deed is labeled undue influence or fraudulent concealment, it challenged Charles' conduct while he was Leona's attorney in fact before her death. But under the Nebraska Probate Code, the right and duty to sue and recover assets for an estate reside in the estate's appointed personal representative, not the devisees.[26] The code specifically provides that "to acquire the powers and undertake the duties and liabilities of a personal representative of a decedent, a person must be appointed by order of the court or registrar, qualify and be issued letters."[27]

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[24] See *Burnison v. Johnston*, 277 Neb. 622, 764 N.W.2d 96 (2009).

[25] *Id.*

[26] See Neb. Rev. Stat. §§ 30-2464(c), 30-2470, and 30-2476 (Reissue 2008).

[27] Neb. Rev. Stat. § 30-2403 (Reissue 2008).

We have previously noted that before the Legislature adopted the Uniform Probate Code, we had permitted an heir to maintain an action to enforce an obligation owed to the estate when the administrator refused to act.[28] And we have recognized that there is general authority for this exception.[29] But even if the Nebraska Probate Code permits that exception, an issue we do not decide, here the problem is not a personal representative's refusal or inability to act. Instead, there is no personal representative. The Nebraska Probate Code anticipates this problem by providing for the appointment of a special administrator to administer an estate when a personal representative cannot or should not act.[30] Therefore, there is no need to recognize an exception that permits a devisee to sue on behalf of an estate. We conclude that the appellants did not have standing to recover real property for the estate because of undue influence. Similarly, they did not have standing to recover personal property from Charles for the time that he served as Leona's attorney in fact. Because they did not have standing, the district court did not have jurisdiction to decide these claims.[31] We vacate those parts of the court's order that concluded there was no undue influence in the execution of the quitclaim deed and that ordered Charles to pay for or return assets fraudulently transferred to himself while he was attorney in fact. But regarding its award to the estate for fraudulent transfers while he was trustee, the appellants have standing.

3. Dolores Had Standing to Contest Trustee Actions

We reject Charles' argument in his cross-appeal that all the claims in the nonprobate action belonged to the estate and not to Dolores. This contention is incorrect as far as it is directed to Charles' constructive fraud while he was trustee of Leona's

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[28] See *Beachy v. Becerra*, 259 Neb. 299, 609 N.W.2d 648 (2000), citing *Prusa v. Everett*, 78 Neb. 250, 113 N.W. 571 (1907).

[29] See *Beachy, supra* note 28. See, also, *Hampshire v. Powell*, 10 Neb. App. 148, 626 N.W.2d 620 (2001).

[30] See § 30-2457.

[31] See *Citizens Opposing Indus. Livestock v. Jefferson Cty.*, 274 Neb. 386, 740 N.W.2d 362 (2007).

trust. Dolores was the beneficiary of all non-real-estate property left to the trust. She clearly had standing to raise Charles' self-dealing and to seek damages, an accounting, and a constructive trust regarding Charles' duties as trustee.[32] Although the court should have ordered Charles to reimburse the trust for distribution to Dolores, instead of requiring him to pay the estate for his misappropriations as trustee, this error did not prejudice Charles and can be corrected on remand.

4. Court's Order Regarding Charles' Misappropriations While Trustee Requires Remand for Further Proceedings

The court found that Dolores had proved constructive fraud for the transactions that are set out in its order. These transactions occurred both while Charles was Leona's attorney in fact and while he was the trustee of her trust. The court found that Dolores had proved that Charles, "using a power of attorney, made gifts to himself or made payments to others for his benefit." It further found that Charles had not shown by clear and convincing evidence that the power of attorney or Leona authorized the listed check transactions. The court then determined that any checks before Leona's date of death, on April 4, 2005, were written by Charles as attorney in fact and that any checks after her date of death were written by Charles as trustee. It ordered Charles to pay the estate for the listed transactions occurring after April 4. This amount was $18,138.57. It also ordered him to return to the estate a truck he had purchased with trust assets after this date.

(a) Standard of Review

[15,16] Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record.[33] In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and

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[32] See Neb. Rev. Stat. §§ 30-3812, 30-3890, and 30-3891 (Reissue 2008).

[33] *In re Trust Created by Isvik*, 274 Neb. 525, 741 N.W.2d 638 (2007).

reaches its own independent conclusions concerning the matters at issue.[34]

(b) Start Date for Trustee Transactions

Before addressing the parties' arguments, we note that the court failed to segregate the listed transactions into attorney-in-fact transactions and trustee transactions. The scheduled trust assets included the funds in Leona's main bank account. Leona amended her trust to substitute Charles as trustee on January 12, 2005. The next day, Charles closed Leona's main account. He then opened a trust account with a beginning balance of $32,814. The trust account contained the funds that Charles was responsible for as trustee. Although Leona's will devised her remaining property into the trust upon her death, Charles did not make any disputed transactions through her other bank accounts. Therefore, the relevant start date for trustee transactions was January 12, 2005, when Charles became Leona's trustee.

(c) Parties' Contentions

The appellants assign that the court erred in failing to enter judgment against Charles for all the sums that they proved he fraudulently transferred to himself or to others for his benefit while he was attorney in fact or trustee. They list transactions in their brief that were not included in the order. They argue that because Charles was a fiduciary in both capacities, he had the burden to show that these transactions were equitable to Dolores as beneficiary. We do not address the appellants' argument regarding Charles' transactions as attorney in fact because we have already determined that they did not have standing to prosecute those claims. But we will address some of Charles' transactions as trustee. Charles argues that the appellants had the burden to prove a prima facie case of fraud. He argues that they failed to prove that the excluded transactions were gifts he made to himself. Thus, before deciding whether the court properly excluded the disputed transactions, we determine which party had the burden of proof.

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[34] See *id.*

(d) Burdens of Production and Persuasion Regarding Trustee's Constructive Fraud

The appellants rely on our cases dealing with an attorney in fact's self-dealing to argue that the burden was on Charles to prove that these transactions were equitable to Dolores. The rules in those cases were largely based upon fiduciary duties. An agency creates a fiduciary relationship, subjecting the agent to a duty to refrain from doing any harmful act to the principal. An agent must act solely for the principal's benefit in all matters connected with the agency, even at the expense of the agent's own interest.[35] An agent is prohibited from profiting from the agency relationship to the detriment of the principal. Also, an agent is prohibited from having a personal stake that conflicts with the principal's interest in a transaction in which the agent represents the principal.[36]

In the attorney-in-fact cases, we were also concerned about the potential for fraud when a fiduciary has broad powers to control another person's property. We have stated that the policy concern underlying the law is primarily focused on the potential for fraud that exists when an agent acting under a durable power of attorney has the power to make gifts, especially after the principal becomes incapacitated.[37] Because of these concerns, we have held that a party establishes a prima facie case of fraud by showing that an attorney in fact used the principal's power of attorney to make a gift of the principal's assets to himself or herself or to make a gift to a third party with a close relationship to the attorney in fact.[38] Whether the fiduciary acted in good faith or had actual intent to defraud is immaterial; when these circumstances are shown, the law presumes constructive fraud.[39] What is significant is that the burden of going forward with evidence then shifts to the fiduciary

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[35] See *Crosby, supra* note 21.

[36] *Id.*

[37] *Id.*

[38] See, *Eggleston v. Kovacich*, 274 Neb. 579, 742 N.W.2d 471 (2007); *Crosby, supra* note 21. See, also, *First Colony Life Ins. Co. v. Gerdes*, 267 Neb. 632, 676 N.W.2d 58 (2004) (discussing case law).

[39] See *Eggleston, supra* note 38, citing *Crosby, supra* note 21.

to establish by clear and convincing evidence that (1) the transaction was made under the power expressly granted in the instrument and the clear intent of the donor and (2) the fairness of the transaction.[40]

[17-19] It is correct that we have not applied these constructive fraud rules to the fiduciary relationship between a trustee and beneficiary. But like a power of attorney, a trust creates a fiduciary relationship regarding property. "A person in a fiduciary relation to another is under a duty to act for the benefit of the other as to matters within the scope of the relation."[41] And "[a] trustee shall administer the trust solely in the interests of the beneficiaries."[42] This provision of the Nebraska Uniform Trust Code (Nebraska UTC) is patterned after the corresponding provision of the Uniform Trust Code,[43] which, in turn, is taken from the Restatement (Second) of Trusts.[44]

[20,21] The Restatement comments set forth the same underlying fiduciary principles regarding trusts that we have applied in attorney-in-fact cases. A trustee "is under a duty not to profit at the expense of the beneficiary and not to enter into competition with him without his consent, unless authorized to do so by the terms of the trust or by a proper court."[45] "The trustee violates his duty to the beneficiary . . . where he uses the trust property for his own purposes."[46] The Restatement (Third) of Trusts rule is even more explicit: It adds that "[e]xcept in discrete circumstances, the trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests."[47] And because trustees have great control over the beneficiaries' property interests

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[40] See, *Eggleston, supra* note 38; *Crosby, supra* note 21.

[41] Restatement (Second) of Trusts § 2, comment *b.* at 6 (1959).

[42] See Neb. Rev. Stat. § 30-3867(a) (Reissue 2008).

[43] See Unif. Trust Code § 802, 7C U.L.A. 588, comment (2006).

[44] Restatement (Second), *supra* note 41, § 170(1).

[45] *Id.*, comment *a.* at 364.

[46] *Id.*, comment *l.* at 369.

[47] Restatement (Third) of Trusts § 78(2) at 93-94 (2007).

and beneficiaries cannot readily terminate their fiduciaries or dispose of their interests, "[t]he duty of loyalty is, for trustees, particularly strict even by comparison to the standards of other fiduciary relationships."[48] Beyond abstaining from self-dealing, a trustee "must refrain from placing himself in a position where his personal interest or that of a third person does or may conflict with the interest of the beneficiaries," even if the trustee has not profited by a transaction.[49]

The above principles are codified in § 30-3867. That statute allows a beneficiary to void any conflict-of-interest transaction unless a listed exception applies.[50] As in agency relationships, trusts also raise policy concerns regarding the potential for self-dealing. Like incapacitated principals in an agency relationship, trust beneficiaries often have inferior knowledge about a transaction. Trust beneficiaries also have a limited ability to protect their interests absent the trustee's full disclosure or court approval.[51]

[22] The same fiduciary principles and policy concerns about the potential for fraud are present in a trust relationship. Accordingly, we will apply to trustees the same common-law rules that we have applied to attorneys in fact. So unless an exception under § 30-3867 applies, a beneficiary establishes a prima facie case of fraud by showing that a trustee's transaction benefited the trustee at the beneficiary's expense. The burden of going forward with evidence then shifts to the trustee to establish the following by clear and convincing evidence: The transaction was made under a power expressly granted in the trust and the clear intent of the settlor; and the transaction was in the beneficiary's best interests.

[23] We emphasize, however, that because these rules are prompted by the concern for self-dealing, they apply only when a beneficiary shows the trustee benefited from a transaction at the beneficiary's expense. We recognize that under § 30-3867,

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[48] See *id.*, comment *a*. at 94.

[49] George T. Bogert, Trusts § 95 at 341 (6th ed. 1987). See, also, Unif. Trust Code, *supra* note 43.

[50] See § 30-3867.

[51] See Bogert, *supra* note 49, § 95.

a beneficiary could also show a breach of duty by proving that the trustee's conflict of interest affected a transaction, even if the transaction did not involve self-dealing.[52] But not every circumstance involving a conflict of interest would impose the same burden on the trustee to produce clear and convincing evidence that the transaction was authorized by the trust.[53] And showing a fiduciary relationship alone does not establish constructive fraud. Constructive fraud is *the breach of a duty* arising out of a fiduciary or confidential relationship.[54]

(e) Applying the Rules to the Disputed Transactions

[24] The court's order did not include the specific transactions that the appellants complain about. Generally, however, when a trial court clearly intends its order to serve as a final adjudication of the rights and liabilities of the parties, the order's silence on requests for relief can be construed as a denial of those requests.[55] And so, we consider whether the court properly denied relief for the disputed transactions after January 12, 2005, the date Charles became the trustee.

Many disputed transactions concern Charles' claimed expenditures for Leona's care, for which he failed to provide records. Other transactions are deposits for farming income, for which he failed to provide records showing that he equally split the income between himself and the trust. These transactions may or may not have benefited Charles. But because Charles failed to fully account for his management of the trust property, the appellants could not prove that these disputed transactions benefited Charles.

[25] As trustee, Charles had a duty to keep adequate records of the administration of the trust and to promptly respond to a beneficiary's request for information related to the

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[52] See Unif. Trust Code, *supra* note 43.

[53] See, § 30-3867(e) through (g); Bogert, *supra* note 49, § 96.

[54] See *Crosby, supra* note 21.

[55] See *D'Quaix v. Chadron State College*, 272 Neb. 859, 725 N.W.2d 558 (2007).

administration.[56] And a failure to keep such records is reason, among other things, for a court reviewing a judicial accounting to resolve doubts against the trustee.[57] But the appellants have not assigned as error that the court failed to order an accounting. And on this record, we cannot say that the appellants established a prima facie case of fraud regarding many transactions. The record does show, however, that at least four excluded transactions occurring after Leona's death benefited Charles at Dolores' expense.

On direct examination, Charles admitted to making his personal car insurance payment out of trust funds. He also admitted that he had paid the full amount of three crop service bills—for $5,039.26, $999.22, and $1,211.26—out of the trust fund. Even assuming that continued farming operations were legitimately required to preserve the trust property until he distributed the assets, his failure to pay for half of these farming expenses with his own funds—as agreed upon—clearly benefited him. It also depleted the trust property allocated to Dolores. The court would have undoubtedly benefited from the same type of list the appellants have provided to us on appeal. But the court's failure to include at least half of these crop service payments in its order would require reversal even if the trust authorized farming operations past Leona's death. The postdeath transactions, however, raise issues that the parties have not directly argued—when did the trust terminate and what was Charles authorized to do past the termination date?

(f) Trust Terminated on Leona's Death

[26] Under the trust, Charles was required to hold and invest all trust property for Leona's benefit, during her lifetime, and to pay its principal or income for her support, needs, and care. Upon Leona's death, he was required to take the following actions: (1) pay Leona's outstanding debts, taxes, and expenses, and trust administration expenses; (2) distribute any specific devises Leona had made; and (3) distribute the trust's

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[56] See Neb. Rev. Stat. §§ 30-3875 and 30-3877 (Reissue 2008).

[57] See Restatement (Third), *supra* note 47, § 83, comment *a(1)*.

real estate to himself and "any and all remaining trust property" to Dolores. As noted, Charles distributed the real estate to himself in September 2005. We assume that he has yet to wind up the trust pending this appeal. But while the Nebraska UTC permits a trustee to retain a reasonable amount of assets to pay these winding-up costs, it requires a trustee to distribute trust property to the designated beneficiaries upon the termination or partial termination of a trust:

> Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.[58]

The Nebraska UTC also defines the termination of the trust: "[A] trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve."[59]

[27,28] Leona's trust did not contain a termination clause, but a trust's termination date can be implied from its terms.[60] Here, the terms imply that the trust terminated with Leona's death, not the end of the winding-up period, because this is when her beneficial interests in the trust ended.[61] And providing for her care and support was the only purpose for establishing the trust.[62] Obviously, paying the outstanding debts, taxes, and expenses upon her death was not the purpose of her trust. This interpretation is consistent with Restatement provisions[63] and

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[58] Neb. Rev. Stat. § 30-3882(b) (Reissue 2008).

[59] Neb. Rev. Stat. § 30-3836(a) (Reissue 2008).

[60] See, *Thorson v. Nebraska Dept. of Health & Human Servs.*, 274 Neb. 322, 740 N.W.2d 27 (2007); *In re Trust Created by Hansen*, 274 Neb. 199, 739 N.W.2d 170 (2007); Restatement (Third) of Trusts § 61 (2003).

[61] See Neb. Rev. Stat. § 30-3830 (Reissue 2008).

[62] See, Restatement (Third), *supra* note 60, comment *b.*; Restatement (Third), *supra* note 47, § 89, comment *a.*

[63] See, Restatement (Second), *supra* note 41, § 344; Restatement (Third), *supra* note 47, § 89.

the Nebraska UTC provisions. Instead, a trustee's payments for the settlor's outstanding debts, taxes, and expenses are part of the trustee's winding-up duties after a trust terminates.

[29,30] So after the trust terminated, Charles, as trustee, continued to have a nonbeneficial interest in the trust for timely winding up the trust and distributing its assets.[64] But after a trust terminates, a trustee's property management powers are limited to those that are reasonable and appropriate in preserving the trust property pending the winding up and distribution of assets.[65] The court made no finding that Charles' continued farming operations were necessary to preserve trust property.

[31] Also, under the Nebraska UTC, a trustee's duty to pay the settlor's debts, expenses, and taxes does not normally justify a trustee's failure to make distributions. Even assuming continued farming operations were necessary, Charles must also demonstrate that some realistic complication prevented him from determining in a timely manner a reasonable sum to reserve for winding-up costs.[66] If not, then he breached a duty of care when he unduly delayed distributions.[67]

[32] Finally, a trustee has a duty of impartiality in administering trust property,[68] which duty plays particular importance in distributing assets.[69] Even if continued farming operations were necessary, the court also made no finding that Charles reasonably paid for farming expenses with only Dolores' trust property without making any adjustments in the assets allocated to himself.[70] Nor did it find that he reasonably held back only

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[64] See, Restatement (Third), *supra* note 60, § 42, comment *b*.; Restatement (Third), *supra* note 47, § 89.

[65] See, Neb. Rev. Stat. § 30-3881(26) (Reissue 2008); Restatement (Third), *supra* note 47, § 89, comment *d*.

[66] Compare Restatement (Third), *supra* note 47, § 89, comment *b*.

[67] See Neb. Rev. Stat. § 30-3869 (Reissue 2008). See, also, Restatement (Third), *supra* note 47, § 89, Reporter's Note comment *e.*

[68] See, Neb. Rev. Stat. § 30-3868 (Reissue 2008); Restatement (Third), *supra* note 47, § 79.

[69] See Restatement (Third), *supra* note 47, § 89, comment *e(2)*.

[70] See § 30-3881(22).

the trust property allocated to Dolores to pay debts, expenses, and taxes. Because Charles was both trustee and beneficiary, a breach of his duty of impartiality in making trust expenditures would also be a breach of his duty of loyalty. Without these determinations, we cannot effectively review Charles' post-termination transactions.

In sum, the court should permit Charles to charge the trust for farming operations only if two conditions are satisfied: (1) The farming operations were reasonably necessary to preserve the trust property and (2) Charles did not charge the trust for farming operations past the time when he should have reasonably made distributions. If these conditions are met, the court should further determine whether Charles breached his duty of impartiality in making trust expenditures and, if so, the appropriate remedy.

Regarding the remaining transactions, the appellants have not argued how they constituted constructive fraud, and we have concluded that the record fails to support such contentions. But because this is the first time that we have pronounced some of the posttermination rules for trustees, we believe the parties should have an opportunity to argue their application on remand. We remand for further proceedings as the district court determines are necessary for that purpose.

VI. CONCLUSION

We conclude that the district court was clearly wrong in not finding that Charles had improperly influenced Leona to create a new will. But because the county court had not appointed a personal representative or special administrator before Dolores transferred the case to the district court, neither she nor the conservator had standing to set aside the quitclaim deed or transactions that Charles made as attorney in fact. We vacate those parts of the court's order that found no undue influence in procuring the quitclaim deed and that required Charles to pay for unauthorized expenditures or to return property he took while he was attorney in fact.

We remand for further proceedings regarding Charles' farming transactions after the trust terminated on Leona's death. First, the court should determine whether continued

farming operations were reasonably necessary to preserve the trust property. If so, under his preexisting agreement, Charles was still personally liable for half of the farming expenses for trust property incurred during the winding up of the trust's administration. If farming operations were not reasonably necessary, then any payment made for farming operations past the date of Leona's death breached his duty of loyalty not to benefit at a beneficiary's expense. Second, the court should determine whether Charles' failure to expeditiously determine a reasonable amount of trust property to reserve for debts, taxes, and expenses was justified by some unusual property or tax complication. Finally, the court must determine whether Charles breached his duty to impartially administer and distribute trust property. If the court finds that Charles beached any trustee duties regarding farming operations past the termination date of the trust, it must further determine the appropriate remedy.

REVERSED AND VACATED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

SWIFT AND COMPANY, APPELLEE AND CROSS-APPELLANT, V.
NEBRASKA DEPARTMENT OF REVENUE, AN AGENCY OF THE
STATE OF NEBRASKA, AND DOUGLAS A. EWALD, TAX
COMMISSIONER, APPELLANTS AND CROSS-APPELLEES.

GIBBON PACKING, INC., APPELLEE AND CROSS-APPELLANT, V.
NEBRASKA DEPARTMENT OF REVENUE, AN AGENCY OF THE
STATE OF NEBRASKA, AND DOUGLAS A. EWALD, TAX
COMMISSIONER, APPELLANTS AND CROSS-APPELLEES.

SKYLARK MEATS, INC., APPELLEE AND CROSS-APPELLANT, V.
NEBRASKA DEPARTMENT OF REVENUE, AN AGENCY OF THE
STATE OF NEBRASKA, AND DOUGLAS A. EWALD, TAX
COMMISSIONER, APPELLANTS AND CROSS-APPELLEES.

O'BRIEN'S FINE SAUSAGE, APPELLEE AND CROSS-APPELLANT, V.
NEBRASKA DEPARTMENT OF REVENUE, AN AGENCY OF THE
STATE OF NEBRASKA, AND DOUGLAS A. EWALD, TAX
COMMISSIONER, APPELLANTS AND CROSS-APPELLEES.

773 N.W.2d 381

Filed October 23, 2009. Nos. S-08-1095 through S-08-1099.

1. **Judgments: Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
2. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
3. **Administrative Law: Legislature.** The Legislature has power to authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations.
4. **Administrative Law.** Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.
5. **Administrative Law: Statutes.** An administrative agency cannot use its rule-making power to modify, alter, or enlarge provisions of a statute which it is charged with administering.

Appeals from the District Court for Lancaster County: JODI NELSON, Judge. Reversed and remanded.

Jon Bruning, Attorney General, and L. Jay Bartel for appellants.

Michael L. Schleich and Timothy J. Thalken, of Fraser Stryker, P.C., L.L.O., for appellees.

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

HEAVICAN, C.J.

INTRODUCTION

The Nebraska Department of Revenue (Department) and the Tax Commissioner appeal the decision of the Lancaster County District Court reversing the decision of the Department to deny appellees' requests for a refund. Appellees, four meatpacking plants, had paid sales taxes on cleaning services, then filed for a refund, which was denied by the Department. The district court reversed the decision of the Department, found that the regulation passed by the Department in its decision was beyond the scope of its power, and remanded for further proceedings. The Department and the Tax Commissioner appeal, and the appellees cross-appeal.

BACKGROUND

The Nebraska Legislature passed 2002 Neb. Laws, L.B. 1085, defining which "gross receipts" from services were subject to state sales tax. The law, which has been amended without substantive changes during the applicable time period and is now codified at Neb. Rev. Stat. § 77-2701.16(4) (Cum. Supp. 2008), provides in pertinent part that "[g]ross receipts for providing a service means: (a) The gross income received for building cleaning and maintenance, pest control, and security."

After § 77-2701.16 was passed, the Department promulgated 316 Neb. Admin. Code, ch. 1, § 098.03A (2003) (Reg. 1-098.03A), defining the types of "cleaning and maintenance" covered by the statute as including "[c]leaning and maintenance of tangible personal property located in a building, and fixtures or any property annexed to real estate that is attached to, is a part of, or is enclosed in, a building[.]"

The four meatpacking plants—Swift and Company; Gibbon Packing, Inc.; Skylark Meats, Inc.; and O'Brien's Fine Sausage (hereinafter collectively the taxpayers)—had contracts with two different sanitation services. Mossberg Sanitation, Inc., and Packers Sanitation Services, LLC, provided specialized services to clean the packing plants and equipment in accordance with U.S. Department of Agriculture standards. All five contracts provided that the cleaning services would sanitize the industrial equipment in the packing plants, as well as clean other parts of the buildings.

The taxpayers paid sales taxes on those cleaning services and then filed for a refund, claiming that the cleaning contracts applied to the industrial equipment and therefore did not fall under the definition of "gross receipts" contained in the statute. Swift and Company claimed a refund of $442,240.76 for overpayments made between October 1, 2002, and April 30, 2004, and a refund of $538,454.38 for overpayments made on a second contract between April 1, 2003, and September 12, 2005. Gibbon Packing claimed a refund of $191,633.05, Skylark Meats claimed a refund of $102,092.05, and O'Brien's Fine Sausage claimed a refund of $52,749.35. The latter three companies' returns were claimed for the period between April 1, 2003, and September 12, 2005. The five cases were consolidated for appeal.

The Department denied the refund, citing the statute and Reg. 1-098.03A, which interpreted "gross receipts" as applying to all "tangible personal property" located within a structure. The taxpayers appealed the denial of their refund under the Administrative Procedure Act, see Neb. Rev. Stat. § 84-901 to § 84-920 (Reissue 2008). The district court found that Reg. 1-098.03A was an impermissible expansion of § 77-2701.16 and struck down Reg. 1-098.03A. The district court remanded the case to the Department to determine what cleaning activities should have been taxed. The Department and the Tax Commissioner appealed. The taxpayers cross-appealed, arguing that the district court did not have the authority to reverse and remand the case under § 84-917(6)(b) and that the portion of the order remanding the case should be vacated. We reverse the decision of the district court.

ASSIGNMENTS OF ERROR

The Department and the Tax Commissioner assign, consolidated and restated, that the district court erred when it reversed the decision of the Department denying the refund. The taxpayers cross-appeal, assigning that the district court erred when it remanded the case to the Department for further proceedings, because there was no factual dispute regarding the amount of the refund owed.

STANDARD OF REVIEW

[1] Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.[1]

When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[2]

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.[3]

ANALYSIS

The Department and the Tax Commissioner argue that the district court erred when it reversed the Department's refusal of the taxpayers' refund requests, because Reg. 1-098.03A was a valid use of its powers. The Department and the Tax Commissioner claim that § 77-2701.16(4)(a) is broad enough to include the cleaning of tangible personal property located within the building and that Reg. 1-098.03A is a permissible clarification of the statute.

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[1] *Japp v. Papio-Missouri River NRD*, 271 Neb. 968, 716 N.W.2d 707 (2006).

[2] *Lackawanna Leather Co. v. Nebraska Dept. of Rev.*, 259 Neb. 100, 608 N.W.2d 177 (2000).

[3] *Id.*

[2] We first address the issue of whether Reg. 1-098.03A impermissibly expands the definition of services covered by § 77-2701.16(4)(a), and whether, therefore, the services rendered are not taxable. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[4]

[3-5] It is well established that the Legislature has power to authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations.[5] Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.[6] However, an administrative agency cannot use its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering.[7]

The question, therefore, is whether Reg. 1-098.03A was an impermissible expansion of the statute or merely a clarification of the statute. In support of their argument, the taxpayers point out that other statutes within the same section specifically mention tangible personal property. For example, § 77-2701.16(4)(d) taxes "[t]he gross income received for installing and applying tangible personal property if the sale of the property is subject to tax." And § 77-2701.16(4)(f) taxes "[t]he gross income received for labor for repair or maintenance services performed with regard to tangible personal property the sale of which would be subject to sales and use taxes . . . ."

The Department and the Tax Commissioner counter by arguing that the phrase "building cleaning and maintenance" is broad enough to encompass the cleaning of tangible personal

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[4] *Capitol City Telephone v. Nebraska Dept. of Rev.*, 264 Neb. 515, 650 N.W.2d 467 (2002).

[5] *Robbins v. Neth*, 273 Neb. 115, 728 N.W.2d 109 (2007).

[6] *Id.*

[7] *Capitol City Telephone, supra* note 4.

property within a building and that Reg. 1-098.03A is a permissible clarification of § 77-2701.16(4)(a). The Department and the Tax Commissioner also argue that distinguishing the cleaning of tangible personal property from cleaning the building in which it is located is illogical, particularly in a case such as this, when cleaning the personal property is incidental to cleaning the building. In support of their argument, the Department and the Tax Commissioner note that none of the subject contracts distinguish between cleaning the building and cleaning the property located within the building.

In deciding the case in the taxpayers' favor, the district court reasoned that the Legislature had been specific about services regarding personal property in the past. The district court also noted that the cleaning services at issue were specialized cleaning services which had to be performed up to high standards and that the type of sanitization services performed in these cases did not fall under the statute. Accordingly, the district court found that Reg. 1-098.03A exceeded the Department's scope of rulemaking authority.

No case law exists interpreting § 77-2701.16(4)(a). However, this court in *Lackawanna Leather Co. v. Nebraska Dept. of Rev.*[8] addresses the interpretation of Department regulations in the context of the statutes they are meant to clarify. In that case, the question was whether a variety of chemicals used in the leather-tanning process could be considered a "component part" of the leather.[9] We stated that the focus was on the function of the chemicals, because the question was one of sales and use tax. Essentially, the Legislature imposed either a sales or a use tax on each item of property sold. A product that becomes a component of an item sold is exempt from taxation. Because the chemicals did not become a part of the final product, but were instead used up during the process, they were not exempt from taxation. As we stated, "[a]n exemption from taxation is never presumed,"[10] and the same is true of the

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[8] *Lackawanna Leather Co., supra* note 2.

[9] *Id.* at 102, 608 N.W.2d at 180.

[10] *Id.* at 107, 608 N.W.2d at 184.

current case. We cannot presume that the highly specialized cleaning services involved in this case are exempt from taxation, nor can we presume that a contract for cleaning a building that also involves cleaning tangible personal property within the building is not taxable.

The Department and the Tax Commissioner concede that a contract for cleaning only tangible personal property would not be taxable under the statute, but insist that such was not the case here. We agree. The contracts generally do not distinguish between the "building" and the "tangible personal property" to be cleaned. The contract between Swift and Company and Mossberg Sanitation lists areas to be cleaned, including drive chutes, rails, skinning stands, eviscerating area, carcass wash area, back saws, tables, chutes, conveyors, floors, and lunchroom. The other contracts provide similarly, and the taxpayers admitted during oral argument that it would be impossible to meet U.S. Department of Agriculture regulations without both cleaning the building and cleaning the tangible personal property, although the taxpayers also insisted that separate cleaning contracts could be created.

In this case, we find that the Department did not exceed the scope of its rulemaking authority. Although other sections of the statute specifically mention personal property, those situations are distinguishable. As previously noted, subsections (4)(d) and (f) of § 77-2701.16 explicitly apply to "installing and applying tangible personal property" and "labor for repair or maintenance services performed." The installation of personal property and the repair and maintenance of personal property are entirely separate from the installation and/or the repair and maintenance of real property. The Department and the Tax Commissioner argued, and the taxpayers could not sufficiently refute, that cleaning personal property and cleaning the building in which the personal property is located are nearly indistinguishable in this case.

We also find Reg. 1-098.03A contemplates that the cleaning of tangible personal property must be incidental to cleaning the building. As pointed out by the Department, most cleaning contracts contemplate at least some cleaning of personal property located within the building. Moreover, Reg. 1-098.03A shows

it clearly contemplates that taxable cleaning and maintenance of tangible personal property be incidental and related to the cleaning and maintenance of the building and fixtures, which it was in this case. Therefore, we find that Reg. 1-098.03A did not exceed the Department's rulemaking authority and that the taxpayers are not entitled to a refund. Because we have reinstated the decision of the Department, we do not need to reach the taxpayers' cross-appeal.

CONCLUSION

We find that the Department did not go beyond its authority when it passed Reg. 1-098.03A and that it did not err when it denied the requests for a refund. Therefore, we find that the district court erred when it invalidated Reg. 1-098.03A, and we remand the cause for proceedings consistent with this opinion.

REVERSED AND REMANDED.

IN RE ESTATE OF SAMUEL JOSEPH FAILLA, SR., DECEASED. SAMUEL J. FAILLA, JR., AND LISA A. FAILLA, HUSBAND AND WIFE, AND TERESA A. KRESAK AND GENE KRESAK, WIFE AND HUSBAND, APPELLEES, V. DIANA L. FAILLA, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SAMUEL JOSEPH FAILLA, SR., APPELLANT, AND BRADLEY SCHWEER, TRUSTEE, ET AL., APPELLEES.

773 N.W.2d 793

Filed October 23, 2009. No. S-09-170.

1. **Decedents' Estates: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 2008), are reviewed for error 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.

Appeal from the County Court for Cass County: JOHN F. STEINHEIDER, Judge. Reversed and remanded with directions.

Steven J. Riekes and David P. Wilson, of Marks, Clare & Richards, L.L.C., for appellant.

William R. Reinsch, of Reinsch, Slattery & Bear, P.C., L.L.O., for appellees Samuel J. Failla, Jr., Lisa A. Failla, Teresa A. Kresak, and Gene Kresak.

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

WRIGHT, J.

NATURE OF CASE

Diana L. Failla, as personal representative of the estate of her husband, Samuel Joseph Failla, Sr. (the decedent), sought an order allowing her to sell the real property of the estate to pay administrative costs. The decedent's two children, Teresa A. Kresak and Samuel J. Failla, Jr., as well as their spouses (collectively the children), sought partition of the property. The county court ordered partition and directed that the real estate be sold and divided among the heirs. It dismissed Diana's petition for an order to sell the real estate. Diana appeals.

SCOPE OF REVIEW

[1,2] Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 2008), are reviewed for error on the record. *In re Estate of Dueck*, 274 Neb. 89, 736 N.W.2d 720 (2007). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

FACTS

The decedent died intestate on November 30, 2007. His heirs included Diana and the two children. Diana was appointed personal representative of the estate, and an order for supervised administration was entered.

The decedent owned two tracts of land in Cass County, Nebraska. The tract alleged to be subject to partition is described as "Lots 1 and 2 in the NW ¼ of the SE ¼ of Section 13, Township 12N, Range 9 East, of the 6th P.M., Cass County,

Nebraska" (tract one). Tract one contained 15.15 acres and included a house. An appraiser set the fair market value of the property at the time of the decedent's death as $190,000. The house was 89 years old and included 1,442 square feet. There were two outbuildings on the property. The first was described as "newer" with a "dirt floor." The second was described as "older" and in "fair condition," but no value was given to it. In November 2008, a real estate agent appraised the property and set the value as $180,000.

The children sought partition as to tract one pursuant to § 30-24,109. They asked that if the tract could not be equitably divided, it be sold and the proceeds applied to payment of any liens and encumbrances. Any balance would be divided among the heirs according to their proportionate interests.

An amended inventory showed the total value of the estate to be $608,776.03. The estate included tract one, valued at $190,000; jointly owned property valued at $129,755.06; other miscellaneous property valued at $15,386.27; and annuities valued at $273,634.70.

Diana petitioned the county court for authority to sell tract one and moved to dismiss the partition action. She alleged that she had incurred administration expenses, attorney fees, and costs in the amount of $35,096.65, and she estimated that the total administration expenses, attorney fees, and costs by the time the estate was closed would be not less than $42,000. She claimed that in order to generate funds to pay the estate's obligations, it would be necessary to sell tract one. She requested that distribution of the remaining funds be made to her (a one-half interest as widow) and to the two children (each entitled to a one-fourth interest). She had consulted a real estate agent who recommended that tract one be listed for sale at a price between $165,000 and $180,000.

Diana alleged that because she had authority as personal representative to sell tract one, the complaint for partition should be considered moot and should be dismissed. She sought an order from the county court allowing her to sell tract one in a commercially reasonable manner.

The parties stipulated that tract one could not be partitioned in kind without prejudice to the owners and could not be

conveniently allotted to any one party and that therefore, tract one should be sold.

The county court directed Diana, as personal representative, to sell tract one and to perform the duties and responsibilities otherwise incumbent upon a referee. The order implied that the property should be sold at a public, judicially ordered sale. The court divided the proceeds of the sale as follows: Diana, one-half; Teresa, one-fourth; and Samuel, one-fourth. It sustained the children's motion for summary judgment, finding there was no material issue of fact or law regarding the ownership of tract one. It dismissed Diana's petition for authority to sell the property and overruled her motion for dismissal of the partition action.

ASSIGNMENTS OF ERROR

Diana assigns that the county court erred in granting summary judgment on the complaint seeking partition of real property and dismissing her petition for authority to sell the real property. She also claims that her right of sale as the personal representative is superior to the heirs' right of partition.

ANALYSIS

The sole issue is the manner in which the real property should be sold. The parties agree the property should be sold and the interests divided accordingly. Diana claims a private sale would bring the best price. The children want the property sold at a public sale. The county court's order implied that the property should be sold through a public sale. We conclude the order is not supported by competent evidence.

Diana presented testimony from Richard A. Mikuls, a real estate agent with more than 20 years of experience. He visited the property after reviewing an appraisal. He testified that the best way to sell the property was through a commercial real estate agency. Mikuls testified that he had experience with real estate auctions. He stated it is an exception for a property to be sold at auction for a price greater than the list price.

Mikuls said tract one should be listed for between $140,000 and $180,000. It would be reasonable to expect the property to sell in 4 to 6 months. Mikuls stated the house would need to be sold "as is" because it needs a new roof, the basement walls are

bowed (indicating a foundation problem), its windows need to be replaced, and the air conditioning works only intermittently. The property includes two outbuildings, but one had no value due to its poor condition.

The residence was originally a two-story farmhouse but had been converted to a ranch-style home with only one bedroom and one bathroom. Mikuls stated that the acreage would appeal to a buyer who wanted a residential lot in the country as a single-family residence with a large outbuilding for storage or a hobby. However, the existence of only one bedroom would prevent many buyers from looking at the property, and the bowed walls in the basement would scare some potential buyers.

Both parties claim that *In re Estate of Kentopp*, 206 Neb. 776, 295 N.W.2d 275 (1980), is supportive of their respective positions. In *In re Estate of Kentopp*, the will devised certain farmland to eight parties: three of the decedent's children and five grandchildren who shared their deceased father's portion. One of the decedent's grandsons filed a partition action in district court. In the county court, the personal representative claimed the land could not be partitioned without prejudice to the owners nor conveniently allotted to one party and asked the county court to order him to sell the real estate. The issue was which court had jurisdiction: the county court, which was acting as the probate tribunal, or the district court, where the partition action was filed.

This court held:

> The partition and sale of real estate of a decedent is clearly a matter relating to a decedent's estate and jurisdiction to partition and sell real estate of a decedent is [acquired] by the county court at the time jurisdiction is acquired for all other "matters relating to decedents' estates." . . . [T]he county court clearly has exclusive original jurisdiction to authorize the personal representative . . . to sell real estate for the purpose of paying . . . costs of administration.

Id. at 786, 295 N.W.2d at 280.

Thus, under § 30-24,109, if a county court finds that the property is subject to partition, it may direct the personal representative to sell the property. The personal representative is

to perform the duties and responsibilities otherwise incumbent upon a referee. *In re Estate of Kentopp, supra*.

In the case at bar, the question is what method should be attempted in order to sell the real estate. Diana, as personal representative, offered evidence that a private sale of tract one would result in a greater return to the estate. The children presented no evidence on the issue. Under § 30-2476(6) and (23), the personal representative may dispose of an asset at private sale and sell real property unless restricted by order of the court. The personal representative must act reasonably for the benefit of the interested persons. Here, the county court restricted Diana, as personal representative, from selling the property by private sale when it dismissed Diana's petition for authority to sell the property. It is this restriction with which we take issue. The order implied that Diana must sell the property at a public sale. However, the record does not support a finding that such a sale would be the most economically efficient method.

The evidence regarding the method of sale was that properties sold at auction are usually sold for less than the list price. There was evidence that the best way to sell this property was through a commercial real estate agency. Mikuls opined why it would be better to list the property than hold a public sale.

Appeals of matters arising under the Nebraska Probate Code are reviewed for error on the record. *In re Estate of Dueck*, 274 Neb. 89, 736 N.W.2d 720 (2007). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*. The county court correctly determined that the property should be sold and the interests divided accordingly. However, its order dismissing Diana's petition and directing a public sale was not supported by competent evidence. The court's order is therefore reversed, and the cause is remanded with directions to enter an order allowing Diana to proceed with an attempt to sell the real estate in the manner described herein.

CONCLUSION

Under the circumstances of this case, Diana's function, as personal representative, is to perform the duties incumbent

upon a referee and to sell the property in the most commercially reasonable manner possible. The personal representative should attempt to sell the property in the manner which will bring the best price for the property. In this instance, the evidence supported Diana's contention that the property should be listed with a real estate agent.

We conclude that this procedure would be consistent with our direction that the Nebraska Probate Code should be liberally construed and applied in accordance with the underlying purpose of the code to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors. See *In re Estate of Kentopp*, 206 Neb. 776, 295 N.W.2d 275 (1980). The evidence supports the conclusion that Diana should first attempt to sell the property by listing it at its appraised value. The county court is given discretion to determine how long the listing should continue. If this method of sale does not prove satisfactory, the court should direct that the property be sold at a public sale.

We therefore reverse the judgment of the county court, which dismissed Diana's request for an order to sell the real estate, and remand the cause with directions.

REVERSED AND REMANDED WITH DIRECTIONS.

ANGELINA MANCHESTER, APPELLANT AND CROSS-APPELLEE, V. DRIVERS MANAGEMENT, LLC, A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT.

775 N.W.2d 179

Filed October 30, 2009. No. S-09-062.

1. **Workers' Compensation: Appeal and Error.** Under Neb. Rev. Stat. § 48-185 (Reissue 2004), 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 findings of fact 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: Evidence: Appeal and Error.** If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court.
4. **Workers' Compensation: Mental Health.** A worker is entitled to recover compensation for a mental illness if it is a proximate result of the worker's injury and results in disability.
5. **Workers' Compensation: Proof.** In order to recover under the Nebraska Workers' Compensation Act, a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of and occurring in the course of employment proximately caused an injury which resulted in disability compensable under the act.
6. **Proximate Cause: Words and Phrases.** A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred.
7. **Workers' Compensation.** A preexisting disease and an aggravation of that disease may combine to produce a compensable injury.
8. ____. Whether a plaintiff in a Nebraska workers' compensation case is totally disabled is a question of fact.
9. **Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.
10. **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.
11. **Workers' Compensation: Evidence: Testimony.** A trial judge can rely on a claimant's testimony regarding his or her own limitations to determine the extent of the claimant's disability.
12. **Workers' Compensation: Time.** Neb. Rev. Stat. § 48-125 (Cum. Supp. 2008) requires an employer to pay the 50-percent waiting-time penalty in the following circumstances: if (1) the employer fails to pay compensation within 30 days of the employee's notice of a disability and (2) no reasonable controversy existed regarding the employee's claim for benefits.
13. **Workers' Compensation.** A reasonable controversy may exist (1) if there is a question of law previously unanswered by the appellate courts, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part.
14. **Workers' Compensation: Attorney Fees: Penalties and Forfeitures: Words and Phrases.** Whether a reasonable controversy exists under Neb. Rev. Stat. § 48-125 (Cum. Supp. 2008) is a question of fact.

Appeal from the Workers' Compensation Court. Affirmed in part, and in part reversed with directions.

James E. Harris and Britany S. Shotkoski, of Harris Kuhn Law Firm, L.L.P., for appellant.

Daniel R. Fridrich, of Werner Enterprises, Inc., for appellee.

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

MILLER-LERMAN, J.

NATURE OF THE CASE

Appellant, Angelina Manchester, was employed by appellee and cross-appellant, Drivers Management, LLC, as a truck-driver. On January 8, 2006, Manchester was in an accident and suffered injuries to her shoulder and a recurrence of her depression and agoraphobia. The Workers' Compensation Court awarded Manchester temporary total disability (TTD) benefits from January 8, 2006, through July 30, 2007, and penalties and attorney fees. On appeal, the three-judge review panel affirmed the award of benefits but reversed the award of penalties, interest, and attorney fees. Manchester appeals the review panel's reversal of the award of penalties, interest, and attorney fees. Drivers Management cross-appeals, claiming that Manchester was not entitled to an award of benefits. We find no merit to the cross-appeal and affirm the award of benefits. We find merit in the appeal, and we reverse the order of the review panel with respect to penalties, interest, and attorney fees and direct the compensation court to reinstate the award of penalties and attorney fees.

STATEMENT OF FACTS

Manchester has a history of suffering from mental illness, which history has been documented since 2002. In June 2002, Manchester was admitted to a hospital in Boise, Idaho, for a "[m]ajor depressive disorder[,] recurrent." Manchester was hospitalized in a State Hospital in Blackfoot, Idaho, from July 10 through July 25, 2002.

On July 16, 2002, while residing in the State hospital, Manchester applied for Social Security benefits. The Social Security Administration had Manchester examined by a doctor who identified that Manchester suffered from avoidant personality disorder, dependent personality disorder, problems related to the social environment, occupational problems, and problems with access to health care services. On December 19, the Social Security Administration awarded her total disability benefits, and Manchester was found to be totally disabled as of June 1, 2002.

In 2004, Manchester was assessed with recurrent major depression, and with panic disorder, agoraphobia, posttraumatic stress disorder in partial remission, borderline traits, and moderate stressors. In March, her therapist recommended that she obtain a service dog, and within the same year, it was noted that she was becoming more independent with the use of her service dog.

Manchester participated in vocational rehabilitation programs through the Social Security Administration and went to school to become a truckdriver. On December 6, 2004, after finishing her truckdriving program, Manchester was hired by Drivers Management. Manchester's last recorded visit to her doctors for psychological treatment was on December 2.

Manchester drove a truck for Drivers Management from December 2004 until January 8, 2006, without incident. On January 8, 2006, Manchester was westbound on Interstate 84 following another truck when she hit some ice and left the road. Manchester testified that the left side of the truck's tractor came around and hit the truck's trailer. Suffering from a shoulder injury, Manchester was taken to a hospital and was instructed to be off work for 1 week.

On February 3, 2006, Manchester was diagnosed with a shoulder strain, cervical strain, and lumbar strain. The doctor noted that Manchester could return to work with restrictions of no repetitive lifting over 20 pounds, no pushing or pulling over 20 pounds of force, and limited use of the left arm.

On February 6, 2006, Drivers Management fired Manchester because she was in an accident due to negligence. After many visits to doctors concerning her shoulder injury, on June 29,

Manchester was informed that she likely suffered from a labral tear, and she was ordered not to drive for work. Manchester had shoulder surgery on August 18. Manchester was to be off work until September 28. Ultimately, Manchester was physically unable to drive a truck until November 21, 2007.

At the same time Manchester was seeking treatment for her shoulder injury, Manchester was seeking treatment for a recurrence of her depression and agoraphobia. In early September 2006, Manchester called her former psychologist, with whom she had not met since December 2, 2004. Manchester told him that she was terminated from work and was falling apart, and he advised her to seek help.

Manchester went to Columbus Psychological Associates, L.L.P., and began receiving treatment from Paul Guinane, Ph.D., on November 7, 2006. In his notes discussing his sessions with Manchester, Guinane noted that Manchester's affect remained flat and that she had a sense of being an unproductive worker. Guinane noted that in addition to her physical pain, Manchester had other stressors in her life, including stress with her boyfriend and the litigation over her workers' compensation benefits.

In a letter dated December 5, 2006, Guinane stated that Manchester suffered from "Major Depressive Disorder" and "Panic Disorder with Agoraphobia." Guinane stated that the two main stressors preventing Manchester from reaching maximum medical recovery in her psychological functions were (1) her constant physical pain related to her work-related injury and (2) the pendency of her legal actions against Drivers Management which have not been resolved.

In January 2007, Manchester enrolled in a community college in Alabama. Ultimately, Manchester dropped out of school because of her severe agoraphobia and depression. In a note by Guinane dated May 15, 2007, he stated that Manchester's agoraphobic symptoms had significantly worsened to the point of forcing her to suspend her studies at college. Guinane noted that Manchester's prognosis would improve once the current stress of her litigation case against Drivers Management ceased. He noted that Manchester should be employable in a field that provides her with significant support and low levels

of stress. The trial judge found that the date of maximum medical improvement for Manchester's mental health injuries was July 30, 2007.

Drivers Management paid Manchester benefits from January 8, 2006, until her termination of employment on February 6. Drivers Management contended that it did not owe Manchester benefits from February 7 through August 18, the date of her shoulder surgery, because if Manchester's employment had not been terminated, she could have engaged in light-duty work.

The trial judge awarded Manchester TTD benefits for the period of January 8, 2006, through July 30, 2007. In its award, the trial judge concluded that Manchester was not prohibited from the receipt of workers' compensation benefits simply because she had previously been found by the Social Security Administration to be totally disabled and was receiving Social Security benefits. The court reasoned that Manchester had an earning capacity that she could lose and was, therefore, entitled to workers' compensation benefits. Further, the trial judge found that there was a causal link between the accident and Manchester's psychological injuries. The trial judge awarded Manchester TTD benefits of $544.76 per week beginning on January 8, 2006, and ending July 30, 2007. The trial judge found that Manchester was not totally disabled and did not award permanent benefits. The court did award Manchester $299.44 per week for a 55-percent loss of earning capacity beginning July 31, 2007.

The trial judge also awarded Manchester waiting-time penalties and attorney fees because of Drivers Management's failure to pay Manchester benefits from February 7 through August 18, 2006. The trial judge stated:

> If an employer is entitled to a credit against any workers' compensation benefits for payments it would have made to the employee had the employee not been fired, most, if not all employers would fire employees as soon as they suffered an injury in an accident arising out of and in the course of their employment. Such conduct is not acceptable. In this case, as in most cases, the employer has a choice. That choice is to put the employee to work in a

> light duty position or pay workers' compensation benefits. Termination is not an option.

Drivers Management appealed to the review panel. The review panel affirmed in part and reversed in part. The review panel affirmed the trial judge's determination that there was a causal link between the accident and Manchester's psychological injuries, stating that it was satisfied that the trial judge had a sufficient basis in fact to substantiate, or otherwise justify, the decision reached on causation.

The review panel also affirmed the trial judge's decision that Manchester was not prohibited from receiving benefits simply because she had previously been found totally disabled by the Social Security Administration. The review panel noted that Manchester was gainfully employed at the time of the accident, and it reasoned that she had an earning capacity to lose and that but for the accident, Manchester would likely have been released from her eligibility for Social Security disability benefits through the "Ticket to Work" program.

The review panel reversed the trial judge's award of penalties, interest, and attorney fees. In reviewing the trial judge's award, the review panel observed that the trial judge had concluded that any termination of employment following an accident represented "'conduct [that was] not acceptable'" and triggered penalties against the employer. On appeal, the review panel concluded that this statement of law was contrary to the decision of this court in *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000), in which we stated that the issue of whether to terminate an individual's employment for his or her behavior should be resolved on a case-by-case basis. The review panel determined that the award of penalties by the trial judge based solely on termination of Manchester's employment was premised on a misstatement of the law. Further, the review panel determined that there was a reasonable controversy as to Manchester's right to benefits "owing to her actions leading to the subject accident." The review panel reversed the award of penalties, interest, and attorney fees. Manchester appeals, and Drivers Management cross-appeals.

ASSIGNMENTS OF ERROR

On appeal, Manchester claims that the review panel erred as a matter of law in reversing the trial judge's award of penalties, interest, and attorney fees.

On cross-appeal, Drivers Management claims that the Nebraska Workers' Compensation Court erred by (1) awarding Manchester TTD benefits after the Social Security Administration had found her to be totally disabled; (2) finding that Manchester's depression was causally related to the accident and resulted in injuries suffered on January 8, 2006; (3) awarding Manchester TTD benefits from January 8, 2006, through July 30, 2007, because she was able to obtain light-duty work and attend school; and (4) ordering Drivers Management to pay Columbus Psychological Associates $6,780.

STANDARDS OF REVIEW

[1] Under Neb. Rev. Stat. § 48-185 (Reissue 2004), 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. *Obermiller v. Peak Interest*, 277 Neb. 656, 764 N.W.2d 410 (2009).

[2,3] On appellate review, the findings of fact 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. *Murphy v. City of Grand Island*, 274 Neb. 670, 742 N.W.2d 506 (2007). If the record contains evidence to substantiate the factual conclusions reached by the trial judge in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002).

ANALYSIS

In view of the manner in which the parties have framed the issues, we will first address the issues raised in Drivers Management's cross-appeal and thereafter consider the merits of the appeal.

Cross-Appeal: Manchester's Receipt of Social Security Disability Payments Did Not Preclude Her From Recovering Workers' Compensation Benefits.

Drivers Management argues on cross-appeal, as it did before the trial judge and the review panel, that because Manchester was previously determined by the Social Security Administration to be totally disabled, she had no earning capacity to lose and was therefore ineligible to receive workers' compensation benefits as a result of the January 8, 2006, accident.

In support of this argument, Drivers Management relies on *Neneman v. Falstaff Brewing Corp.*, 237 Neb. 421, 466 N.W.2d 97 (1991). The trial judge and the review panel in the instant case found that *Neneman* was distinguishable and rejected this argument. We agree that *Neneman* is distinguishable.

In *Neneman*, the employee became totally disabled for Social Security purposes based on osteomyelitis in his right ankle, a non-work-related injury. After becoming totally disabled for Social Security purposes based on this non-work-related injury, the employee discovered that he had developed asbestosis due to his former employment. At the time of discovering this work-related injury, the employee had already stopped working and was receiving full disability benefits due to his osteomyelitis, and he therefore was deemed ineligible to receive workers' compensation benefits.

The trial judge and review panel herein distinguished *Neneman* from Manchester's case, noting that at the time the employee in *Neneman* discovered his asbestosis, he had no earning power, whereas at the time of Manchester's accident, she was in the labor force and actually working her way off of Social Security disability. The trial judge concluded that Manchester's ability to drive a truck and earn wages for Drivers Management "shows that she had an earning power which could be reduced as a result of the accident of January 8,

2006." The review panel agreed with this determination as well as the conclusion of the trial judge to the effect that the receipt of Social Security benefits does not disqualify an employee from receiving a workers' compensation award.

We agree that *Neneman* is distinguishable from the facts of this case and further conclude that the trial judge and the review panel were correct in concluding that because Manchester had an earning power to lose, her receipt of Social Security benefits based on an earlier determination of total disability did not prevent her from recovering workers' compensation benefits. Our conclusion is consistent with the weight of authority in this area.

Courts have considered the issue of whether an individual who had previously been determined to be totally disabled for Social Security purposes, but who thereafter resumed gainful employment that resulted in an injury, is precluded from receiving workers' compensation benefits for loss of earning capacity arising out of the work-related injury. The courts have generally concluded that such an individual may receive workers' compensation benefits. See *Wal-Mart Stores, Inc.* v. *Bratton*, 678 So. 2d 1071 (Ala. Civ. App. 1995), *reversed on other grounds, Ex Parte Bratton*, 678 So. 2d 1079 (Ala. 1996). See, also, *Francis Powell Enterprises v. Andrews*, 21 So. 3d 726 (Ala. Civ. App. 2009). See, similarly, *Walls v. Hodo Chevrolet Company, Inc.*, 302 So. 2d 862 (Miss. 1974); *Reed v. Young*, 196 N.E.2d 350 (Ohio Com. Pl. 1963). It has been stated, for example, that "[t]he fact that an individual has once received Social Security disability benefits does not make that individual forever ineligible for [workers'] compensation disability benefits, in the event the individual recovers to the point that he or she is able to resume gainful employment." *Wal-Mart Stores, Inc.*, 678 So. 2d at 1076.

Indeed, the provisions of the Social Security Act anticipate the instance where an individual receives both Social Security and workers' compensation benefits. By its terms, the act has ensured that an employee will not recover a windfall, by statutorily providing for an offset from the individual's Social Security payments. See 42 U.S.C. § 424a (2006) (reducing

computation of Social Security benefits if employee receives workers' compensation benefits). Moreover, the existence of the Social Security rehabilitative programs indicates that an individual once assessed by the Social Security Administration to be totally disabled is not expected to be forever unable to work. See 42 U.S.C. § 422 (2006).

In this case, Manchester was involved in the Social Security "Ticket to Work" program and was working her way off Social Security disability. Because Manchester was able to resume gainful employment and had worked for Drivers Management for 13 months before the accident, the Social Security Administration's determination that at one point in time she was totally disabled does not logically prevent her from later recovering workers' compensation benefits for her loss of earning capacity due to a disability incurred in the course of her employment. Therefore, we reject Drivers Management's argument and affirm the decision of the review panel on this issue.

There Was Sufficient Proof in the Record of Causation Between the Accident and the Recurrence of Manchester's Depression and Agoraphobia.

We next address Drivers Management's argument on cross-appeal that the Workers' Compensation Court erred in finding that there was sufficient evidence in the record to conclude that the recurrence of Manchester's depression and agoraphobia was causally related to the accident and her subsequent injuries. Specifically, Drivers Management argues that the causation opinion of Guinane was insufficient to establish the necessary causal link between the accident and Manchester's depression and agoraphobia. Drivers Management claims that the majority of the evidence in the record shows that Manchester's depression and agoraphobia may have worsened after the accident, but that this was due to family problems and other stressors.

The review panel affirmed the decision of the trial judge to the effect that there was a causal link between the accident and Manchester's psychological issues. After reviewing Guinane's opinion in its entirety, the review panel concluded that the trial

judge had a sufficient basis in fact to "substantiate or, otherwise, justify the conclusion he reached on causation."

[4] It is well settled in Nebraska workers' compensation law that a worker is entitled to recover compensation for a mental illness if it is a proximate result of the worker's injury and results in disability. *Sweeney v. Kerstens & Lee, Inc.*, 268 Neb. 752, 688 N.W.2d 350 (2004); *Kraft v. Paul Reed Constr. & Supply*, 239 Neb. 257, 475 N.W.2d 513 (1991).

[5,6] In order to recover under the Nebraska Workers' Compensation Act, a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of and occurring in the course of employment proximately caused an injury which resulted in disability compensable under the act. *Sweeney, supra*. A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred. *Id*.

[7] Further, a preexisting disease and an aggravation of that disease may combine to produce a compensable injury. *Miller v. Goodyear Tire & Rubber Co.*, 239 Neb. 1014, 480 N.W.2d 162 (1992). This court has expressly disapproved of a heightened standard of proof when a preexisting disease or condition was involved, stating: "'[A] workers' compensation claimant may recover when an injury, arising out of and in the course of employment, combines with a preexisting condition to produce disability, notwithstanding that in the absence of the preexisting condition no disability would have resulted. . . .'" *Id*. at 1020, 480 N.W.2d at 167 (quoting *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990)).

Drivers Management argues that the instant case is similar to *Sweeney*, where this court concluded that an employee had not established the requisite causal link between the employee's mental health issues and his physical pain. In *Sweeney*, the expert opinion relied on for causation stated that the employee's depression was entirely attributable to the loss of earning capacity report that the employee believed would have a negative impact on the compensation litigation. The expert testified that in his opinion, the depression was triggered by

the employee's unhappiness with a court ruling. *Id.* The court in *Sweeney* distinguished that case from *Kraft, supra*, where the expert testified that a worker's neurosis was attributed to both his physical injury and the psychological loss resulting from the worker's immobility and inability to work and was therefore compensable.

The causation opinion upon which the Workers' Compensation Court relied in this case was that of Guinane, which stated: "It is my professional opinion that [Manchester's] depressive and anxiety related symptoms were substantially caused (mainly depressive symptoms) and significantly exacerbated (panic disorder with agoraphobia) subsequent to the physical injuries, as well as her unexpected and perceived unfair dismissal from her previous place of employment." Guinane also opined that Manchester's psychological condition combined with her physical injuries to render her disabled from working. Guinane expressly stated that Manchester's depression and anxiety were reactivated by her accident and subsequent release from her employment. Importantly, Guinane further concluded that Manchester had not reached maximum medical improvement in her psychological functioning because of her constant physical pain related to her work injury.

On appellate review, the findings of the Workers' Compensation Court will not be reversed unless clearly wrong. We will affirm the order of the Workers' Compensation Court unless there is insufficient evidence in the record to support its decision. Here, based on the reports of Guinane, there was sufficient evidence to support the conclusion that Manchester's depression and agoraphobia were caused and exacerbated by her accident. Guinane expressly stated that Manchester's depression and anxiety were reactivated by the accident and that her mental health conditions were related to the physical pain she suffered from the accident. In addition to the reports of Guinane, it is notable that Manchester had not sought psychological help while employed with Drivers Management until after her accident.

Based on the record in this case, we reject Drivers Management's argument, and we affirm the decision of the review panel on this issue.

The Award of TTD Benefits Was Not Error.

Drivers Management next argues on cross-appeal that the Workers' Compensation Court erred in awarding Manchester TTD benefits for the period of February 3 through August 17, 2006, and January through July 30, 2007. Drivers Management argues that because Manchester was released to light-duty work during the time period of February 3 through August 17, 2006, and Drivers Management would have had light-duty work available for her if her employment had not been terminated, the award of benefits was error. Drivers Management also argues that because Manchester attended college courses after January 2007, she was not eligible for benefits. Manchester responds and claims that the evidence was sufficient to support the award of TTD.

Compensability under the Nebraska Workers' Compensation Act is determined by Neb. Rev. Stat. § 48-101 (Reissue 2004), which provides:

> When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer if the employee was not willfully negligent at the time of receiving such injury.

For the sake of completeness, we interject here that there is some suggestion by Drivers Management in this appeal that Manchester was willfully negligent, and her employment terminated therefor, thereby precluding an award of workers' compensation benefits. See *id.* The evidence does not support a finding of willful negligence related to Manchester's January 8, 2006, accident wherein she slid off the icy roadway. See *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000). Indeed, the jurisprudence in this area indicates, albeit fact specific, that a finding of willful negligence associated with driving accidents is rare. See 2 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 34.02 (2009). See, also, *Dept. of Public Safety v. Collins*, 140 Ga. App. 884, 232 S.E.2d 160 (1977); *Buzzo v. Woolridge Trucking, Inc.*, 17 Va. App. 327, 437 S.E.2d 205 (1993).

[8-10] Whether a plaintiff in a Nebraska workers' compensation case is totally disabled is a question of fact. See *Kaufman v. Control Data*, 237 Neb. 224, 465 N.W.2d 727 (1991). In testing the sufficiency of the evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence. See *Hagelstein v. Swift-Eckrich*, 261 Neb. 305, 622 N.W.2d 663 (2001). Moreover, 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. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002).

In this case, the trial judge determined that Manchester was temporarily totally disabled. In response to Drivers Management's contention that Manchester could work a light-duty job, the trial judge stated that "[i]t is unreasonable to believe that a person who has a pending workers' compensation claim for a shoulder and neck injury would be able to find employment." The review panel affirmed this decision.

[11] The record supports the trial judge's finding that Manchester was temporarily totally disabled. On February 3, 2006, after Manchester was diagnosed with shoulder strain, cervical strain, and lumbar strain it was noted by the doctor that Manchester could return to work with restrictions of no repetitive lifting over 20 pounds, no pushing or pulling over 20 pounds of force, and limited use of the left arm. However, Manchester testified that she was totally disabled and unable to work from the date of the accident through the date of her shoulder surgery on August 18. A trial judge can rely on a claimant's testimony regarding his or her own limitations to determine the extent of the claimant's disability. See *Luehring v. Tibbs Constr. Co.*, 235 Neb. 883, 457 N.W.2d 815 (1990).

In addition to Manchester's testimony, a functional capacity evaluation dated March 26, 2007, stated that Manchester was unable to return to full-time driving. Further, during the time period of January 8, 2006, through July 30, 2007, there were various doctor reports limiting Manchester's ability to

work. Guinane stated in a letter dated December 5, 2006, that Manchester's psychological injuries combined with her physical pain had rendered her disabled to work up to that time and that the incapacitation would remain until the source of her pain was significantly reduced "and she ha[d] gained significant improvement in her psychological functioning."

While there was evidence in the record that Manchester attended college classes in January 2007, this was at the recommendation of her therapist in an effort to help Manchester's agoraphobia. Indeed, the record shows that Manchester had to discontinue her classwork due to her ongoing mental health problems.

On an issue of fact, this court will not substitute its judgment for that of the trial judge. Rather, we take every inference in favor of the successful party. Doing so here, we determine that on this record there was sufficient evidence to support the trial judge's finding that Manchester was entitled to TTD benefits beginning January 8, 2006, and ending July 30, 2007, and we affirm the decision of the review panel which affirmed this finding. It is of note that the review panel corrected the ruling of the trial judge and altered the last date that Manchester could receive TTD benefits from July 30 to July 29, 2007, because July 30 was the date of maximum medical improvement. To the extent that Drivers Management's cross-appeal complains in its assignments of error of an award covering July 30, this claim has been resolved in its favor and we affirm. We reject Drivers Management's argument regarding the award of TTD benefits.

The Payment of Fees to Columbus Psychological Associates Was Not Error.

Drivers Management claims on cross-appeal that the Workers' Compensation Court erred in awarding fees to Columbus Psychological Associates for Manchester's treatment for her agoraphobia and depression.

Neb. Rev. Stat. § 48-120(1)(a) (Cum. Supp. 2006) states that "[t]he employer is liable for all reasonable medical, surgical, and hospital services . . . subject to the approval of and

regulation by the Nebraska Workers' Compensation Court, not to exceed the regular charge made for such service in similar cases."

As discussed earlier in this opinion, Manchester's depression and agoraphobia were causally related to her accident, and therefore, payment to Guinane for treatment is proper. We have previously stated that mental health care charges are contemplated by the Nebraska Workers' Compensation Act. See *Canas v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990). We reject Drivers Management's argument and affirm the decision of the Workers' Compensation Court.

Appeal: The Review Panel Erred When It Reversed the Award of Penalties, Interest, and Attorney Fees.

Manchester claims on appeal that the review panel erred in reversing the trial judge's award of waiting-time penalties, interest, and attorney fees based on Drivers Management's failure to pay benefits from February 7 through August 18, 2006. Because there was no real controversy, we agree with Manchester that the trial judge's award of penalties, interest, and attorney fees was warranted, and we reverse the decision of the review panel in this regard.

[12] Neb. Rev. Stat. § 48-125 (Cum. Supp. 2008) requires an employer to pay the 50-percent waiting-time penalty in the following circumstances: if (1) the employer fails to pay compensation within 30 days of the employee's notice of a disability and (2) no reasonable controversy existed regarding the employee's claim for benefits. *Lagemann v. Nebraska Methodist Hosp.*, 277 Neb. 335, 762 N.W.2d 51 (2009).

[13,14] A reasonable controversy may exist (1) if there is a question of law previously unanswered by the appellate courts, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim,

in whole or in part. See *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000). Whether a reasonable controversy exists under § 48-125 is a question of fact. *Id.*

In this case, the review panel reversed the trial judge's award of penalties, interest, and attorney fees. The review panel determined that there was a reasonable factual controversy whether Manchester was owed temporary benefits after being terminated from her employment at Drivers Management, where she could have been offered light-duty work but for the fact that she was fired from her position owing to her actions leading to the accident at issue. Referring to the record, the review panel noted that Manchester was cited for speeding, and an employee of Drivers Management testified that if Manchester had not been terminated from her employment, Drivers Management would have had light-duty work available for her.

As previously stated in this opinion, compensability under the Nebraska Workers' Compensation Act is determined by § 48-101, which provides:

> When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer *if the employee was not willfully negligent at the time of receiving such injury.*

(Emphasis supplied.)

In this case, the record shows that Manchester was injured as a result of the January 8, 2006, accident and that due to the injuries Manchester sustained, she was unable to work. Although Drivers Management suggests on appeal that Manchester was willfully negligent, it did not allege or prove that the accident was the result of willful negligence. Ordinary negligence is not a defense to a workers' compensation action, Neb. Rev. Stat. § 48-102 (Reissue 2004), and Manchester's entitlement to benefits was not meaningfully at issue.

Further, in *Guico*, we explained that

> "[t]he fact that an employer has terminated the employment of an employee, whose ability to perform the work for which he is fitted has been restricted due to an injury

> arising out of and in the course of his employment, does not destroy the right of the employee to compensation for the injury."

260 Neb. at 723, 619 N.W.2d at 479 (quoting *Aldrich v. ASARCO, Inc.*, 221 Neb. 126, 375 N.W.2d 150 (1985)). This was the law at the time of Manchester's accident. The law and the record in this case support the trial judge's determination that there was no reasonable controversy whether Manchester was entitled to temporary benefits. We therefore reverse the review panel's reversal of the trial judge's award of waiting-time penalties, interest, and attorney fees and reinstate the trial judge's award.

CONCLUSION

With respect to the cross-appeal, we conclude that the Social Security Administration's prior determination of total disability did not preclude Manchester from receiving workers' compensation benefits for her work-related injury. Further, there was sufficient evidence in the record to support the Workers' Compensation Court's decision that there was a causal link between Manchester's accident and her depression and agoraphobia. The award of TTD benefits for the period of January 8, 2006, through July 29, 2007, was not clearly wrong.

With respect to the appeal, we conclude that there was no reasonable controversy whether Manchester was entitled to benefits for the period of February 7 through August 18, 2006, and conclude that the review panel erred when it reversed the award of waiting-time penalties, interest, and attorney fees and we, therefore, reverse the review panel in this regard and order the reinstatement of the trial judge's award.

AFFIRMED IN PART, AND IN PART REVERSED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL J. GLOVER, APPELLANT.

774 N.W.2d 248

Filed October 30, 2009. No. S-09-156.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
3. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to 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.
4. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, 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 in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. In order 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. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
5. **Effectiveness of Counsel: Presumptions.** In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.
6. **Postconviction: Pleas: Waiver: Effectiveness of Counsel.** Normally, a voluntary guilty plea waives all defenses to a criminal charge, but in a postconviction action brought by a defendant convicted as a result of a guilty plea, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
7. **Convictions: Effectiveness of Counsel: Pleas: Proof.** When a conviction is based upon a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

Thomas J. Garvey for appellant.

Jon Bruning, Attorney General, James D. Smith, and Katie L. Benson, Special Assistant Attorney General, for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

Michael J. Glover appeals the denial of his motion for postconviction relief after an evidentiary hearing in the Douglas County District Court. This is the second appeal resulting from Glover's motion for postconviction relief. We affirm the decision of the district court.

BACKGROUND

In 2003, Glover was charged with first degree murder and use of a deadly weapon to commit a felony. Glover pled no contest to second degree murder, use of a deadly weapon to commit a felony, and robbery. Glover was sentenced to 40 years' to life imprisonment for the second degree murder conviction; 10 to 20 years' imprisonment for the use of a deadly weapon conviction, to run consecutively to his first sentence; and 15 to 20 years' imprisonment for the robbery conviction, to run concurrently with his first sentence. The trial court granted Glover credit for time served.

Glover had the same counsel for both his trial and direct appeal. Because he pled no contest, on direct appeal, Glover was limited to an excessive sentences claim. In case No. S-05-528, on August 31, 2005, we granted the State's motion for summary affirmance. Glover filed for postconviction relief. In that motion, Glover alleged that his trial counsel was ineffective for failing to obtain or investigate a recantation statement that his codefendant had made before Glover entered the no contest pleas. Glover's codefendant, Damien Watkins, pled guilty to second degree murder and agreed to testify against Glover. Shortly before Glover's trial was scheduled to take place, Watkins claimed in his recantation that he and Glover had taken credit for the robbery and murder for purposes of

notoriety, but had not actually committed the crimes. Glover claimed that his trial counsel did not properly investigate Watkins' recantation.

Glover also claimed trial counsel was ineffective in several other respects. Glover claimed that his trial counsel failed to investigate gunshot residue or blood spatter evidence which would prove Watkins was the shooter. Furthermore, Glover claimed that his trial counsel failed to advise him of the minimum penalties and that his trial counsel failed to withdraw Glover's no contest pleas.

In connection with the postconviction motion, the State deposed Glover's trial counsel. Trial counsel stated that he investigated Watkins' recantation, but that Glover had admitted to being at the scene of the murder and that no helpful fingerprint or DNA evidence existed. Trial counsel also stated that he had advised Glover of the minimum and maximum penalties for his offenses and that Glover had never asked to withdraw his no contest pleas. The trial court accepted the deposition of Glover's trial counsel into evidence, then denied Glover's motion for postconviction relief without an evidentiary hearing.

Glover appealed that denial, and we addressed his arguments in *State v. Glover*.[1] We found that the trial court erred when it accepted the deposition of the trial attorney without holding an evidentiary hearing. We then remanded the cause to the trial court for an evidentiary hearing. The evidentiary hearing was held January 7 and 12, 2009, after which the district court denied Glover's motion for postconviction relief. Glover now appeals that denial.

ASSIGNMENTS OF ERROR

Glover assigns, restated and consolidated, that (1) the district court erred in denying him an evidentiary hearing on his motion for postconviction relief and (2) his trial counsel was ineffective, causing his plea to not be knowingly, voluntarily, and intelligently entered.

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[1] *State v. Glover*, 276 Neb. 622, 756 N.W.2d 157 (2008).

STANDARD OF REVIEW

[1-3] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.[2] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[3] 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*,[4] an appellate court reviews such legal determinations independently of the lower court's decision.[5]

ANALYSIS

Glover's first assignment of error is without merit because he received an evidentiary hearing after we remanded his motion for postconviction relief back to the district court.[6] We therefore turn to Glover's assignment that his trial counsel was ineffective.

[4,5] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland*, 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 in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. In order 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. The two prongs of this test, deficient performance and prejudice, may

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[2] *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001).

[3] *State v. Hudson*, 277 Neb. 182, 761 N.W.2d 536 (2009).

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

[5] *State v. Hudson, supra* note 3.

[6] See *State v. Glover, supra* note 1.

be addressed in either order.[7] In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.[8]

[6,7] Normally, a voluntary guilty plea waives all defenses to a criminal charge, but in a postconviction action brought by a defendant convicted as a result of a guilty plea, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.[9] When a conviction is based upon a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.[10]

As noted, Glover alleges that his trial counsel was ineffective for failing to investigate Watkins' recantation as well as favorable gunshot residue or blood spatter evidence. Glover further argues that he suffered prejudice because proper investigation of such evidence and the recantation would have led to the withdrawal of his no contest pleas. Glover argues that the trial court, in denying his motion for postconviction relief, accepted the deposition testimony of his trial counsel and disregarded Glover's testimony entirely.

In its order, the district court found that Glover's counsel was not ineffective and that Glover did not suffer prejudice. The trial court found that trial counsel had properly investigated both Watkins' recantation as well as possible "powder residue and/or blood" evidence and that Glover had not suffered any prejudice. The trial court also accepted trial counsel's testimony that Glover had been properly advised of possible penalties and was aware of potential sentences. While Glover disputed this in his testimony, issues of credibility are for the trial court.[11]

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[7] *State v. Lopez*, 274 Neb. 756, 743 N.W.2d 351 (2008).

[8] *Id.*

[9] *State v. Barnes*, 272 Neb. 749, 724 N.W.2d 807 (2006).

[10] *Id.*

[11] See *State v. Poindexter*, 277 Neb. 936, 766 N.W.2d 391 (2009).

When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.[12] Glover cannot demonstrate that his attorney's actions were unreasonable, nor can he demonstrate any sort of prejudice. Glover's assignments of error are therefore without merit.

CONCLUSION

Glover has been unable to demonstrate that his counsel's performance was deficient or that he was prejudiced. For those reasons, we affirm the decision of the district court.

AFFIRMED.

[12] *State v. Rhodes*, 277 Neb. 316, 761 N.W.2d 907 (2009).

ELIZABETH A. WILKE AND MARK WILKE, HUSBAND AND WIFE, APPELLANTS, V. WOODHOUSE FORD, INC., A NEBRASKA CORPORATION, APPELLEE.

774 N.W.2d 370

Filed November 6, 2009. No. S-08-807.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted, and the court gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Legislature: Public Policy.** It is the function of the Legislature, through the enactment of statutes, to declare what is the law and public policy of this state.
4. **Uniform Commercial Code: Sales: Warranty.** Pursuant to Neb. U.C.C. § 2-316 (Reissue 2001), the implied warranty of merchantability may be disclaimed or excluded.
5. **Negligence: Words and Phrases.** Ordinary negligence is defined as the doing of something that a reasonably careful person would not do under similar circumstances, or the failing to do something that a reasonably careful person would do under similar circumstances.

6. **Negligence: Damages: Proximate Cause.** In order to prevail in a negligence action, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately caused by the failure to discharge that duty.
7. **Negligence: Words and Phrases.** In negligence cases, a duty may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.
8. **Negligence.** When determining whether a legal duty exists for actionable negligence, a court employs a risk-utility test concerning (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution.
9. **Negligence: Evidence: Tort-feasors.** The existence of a duty and the identification of the applicable standard of care are questions of law, but the ultimate determination of whether a party deviated from the standard of care and was therefore negligent is a question of fact. To resolve the issue, a finder of fact must determine what conduct the standard of care would require under the particular circumstances presented by the evidence and whether the conduct of the alleged tort-feasor conformed with the standard.
10. **Torts: Liability: Warranty.** Tort liability is not based upon representations or warranties. Rather, it is based upon a duty imposed by the law upon one who may foresee that his or her actions or failure to act may result in injury to others.
11. **Negligence: Proximate Cause: Trial.** Determination of causation is, ordinarily, a matter for the trier of fact.
12. **Negligence: Proximate Cause: Proof.** To establish proximate cause, the plaintiff must meet three basic requirements: (1) Without the negligent action, the injury would not have occurred, commonly known as the "but for" rule; (2) the injury was a natural and probable result of the negligence; and (3) there was no efficient intervening cause.
13. **Negligence: Proximate Cause.** Plaintiffs are contributorily negligent if (1) they fail to protect themselves from injury, (2) their conduct occurs and cooperates with the defendant's actionable negligence, and (3) their conduct contributes to their injuries as a proximate cause.
14. **Negligence: Proximate Cause: Words and Phrases.** An efficient intervening cause is new and independent conduct of a third person, which itself is a proximate cause of the injury in question and breaks the causal connection between the original conduct and the injury. The causal connection is severed when (1) the negligent actions of a third party intervene, (2) the third party had full control of the situation, (3) the third party's negligence could not have been anticipated by the defendant, and (4) the third party's negligence directly resulted in injury to the plaintiff.
15. **Negligence: Proximate Cause: Tort-feasors: Liability.** The doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable. But if a third party's negligence is reasonably foreseeable, then the third party's negligence is not an efficient intervening cause as a matter of law.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed in part, and in part reversed.

Melany S. Chesterman, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellants.

Brian D. Nolan, of Nolan, Olson, Hansen, Lautenbaugh & Buckley, L.L.P., for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

Elizabeth A. Wilke and her husband, Mark Wilke, purchased a van from Woodhouse Ford, Inc. (Woodhouse). That same day, Elizabeth was injured when their 3-year-old daughter allegedly pulled the gearshift out of park, allowing the van to roll over Elizabeth's foot and leg, causing her to fall and hit her head on a concrete driveway. The Wilkes testified that the key was out of the ignition at the time of the accident. The van was purchased that day from Woodhouse. Woodhouse sold the van to the Wilkes "as is" and disclaimed all implied warranties. The Wilkes brought suit against Woodhouse alleging two alternative theories: negligence and breach of implied warranty of merchantability. The district court entered summary judgment in favor of Woodhouse, and the Wilkes appealed. We moved the case to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

II. BACKGROUND

The Wilkes purchased a used 2002 Ford Econoline cargo van from Woodhouse on September 18, 2004. Mark is not a trained mechanic and has only a basic knowledge of mechanics. Before purchasing the van, Mark started the van's engine but did not test-drive the van. Mark felt that test-driving the

[1] Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

van or inspecting it further was unnecessary because he had purchased "good vehicles from Woodhouse before."

The purchase agreement stated that the van was used and purchased "AS IS" and "WITHOUT ANY WARRANTY" in bold type. The agreement further provided in a smaller font, "DEALER HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE . . . ." Both the Wilkes and the Woodhouse salesman signed the purchase agreement. There is no evidence that Woodhouse made any representations to the Wilkes regarding the condition or quality of the van.

Immediately after purchasing the van, the Wilkes drove directly to the home of their friend, approximately a 30- to 45-minute drive from the dealership. Elizabeth and her daughter drove in the family vehicle, and Mark followed in the new van. Upon arriving, Mark pulled the van into the driveway, which was slightly sloped, and parked. Mark did not apply the emergency brake after he parked the van. The Wilkes both remembered Mark taking the key out of the ignition and putting it in his pocket after parking the van. Mark testified that he had no doubt that he took the key out of the ignition. And Elizabeth testified in her deposition that she did not hear any chimes or buzzers indicating that the key had been left in the ignition.

After parking the van, the Wilkes and their daughter went inside for approximately 30 minutes. They then went back outside to show their friend the new van. Mark opened the driver's-side door and the two doors in the back of the van. Elizabeth testified that she was standing directly behind the van and that Mark was sitting at the end of the van with their daughter on his lap. At some point, the daughter got down from Mark's lap and stood beside Elizabeth. Elizabeth testified that she turned her head to talk to their friend for a moment and that when she was turning back to look at Mark, she saw her daughter climbing into the driver's seat. Elizabeth immediately screamed for her daughter to get down, and Elizabeth ran around to the driver's side of the van.

Elizabeth testified that as she approached the side of the van, she saw her daughter with her left hand on the steering wheel and her right hand on the gearshift. According to Elizabeth, her daughter's legs were tucked underneath her and she was on her knees. Before getting to the driver's side, Elizabeth heard a "clunk," and then the van started rolling backward. Elizabeth explained that her daughter grabbed the gearshift to pull herself up to come to Elizabeth, but that Elizabeth shoved her back into the van to make sure she would not fall out as the van rolled backward.

As the van rolled backward, Elizabeth was hit by the door and her right foot got caught under the van's tire. The force caused her to fall backward onto the pavement and hit her head. According to Elizabeth, the left front tire rolled over her right foot and thigh. The tire missed her shoulder, but her shirt was pinned under the tire.

Once the van started to roll, Mark turned and saw his daughter in the front seat. Mark entered the van through the open back doors, pushed open the separator cage, and "dove for the brake pedal with [his] hand." The van stopped rolling at that point. Mark testified that he noticed his daughter was in the front seat after he realized the van was moving and that she was on the seat either on her knees or standing. Mark also testified that he did not know which gear the van was in as it rolled over Elizabeth but that he knew the gearshift was not "aligned with the P." After stopping the van, Mark moved the van to release Elizabeth's shirt. Elizabeth was taken by ambulance to a hospital.

The deputy sheriff's report regarding the accident states: "VEHICLE 1 WAS DISCOVERED TO HAVE A DEFECTIVE SHIFT LEVER THAT WAS ABLE TO BE SHIFTED OUT OF PARK MODE WITHOUT DEPRESSING BRAKE PEDAL." The report does not explain or provide any details as to whether the key was in the ignition or how the defective gearshift was discovered.

Donald Jeffers, an automotive engineering consultant and the Wilkes' expert witness, conducted an investigation of the accident and prepared a report on his findings. In making his findings, Jeffers examined the State of Nebraska investigator's

motor vehicle accident report, color prints of photographs of the accident scene, transcripts of depositions and telephone interviews, Ford engineering drawings and shop manuals, the Federal Motor Vehicle Safety Standards, and Elizabeth's medical report.

In his report, Jeffers summarized parts of the telephone interview transcripts. According to Jeffers' report, the officer who responded to the call to the 911 emergency dispatch service testified in his telephone interview that "'[he] got in the driver's side and moved the shift lever, which shouldn't have moved, and it went into neutral and drive out of park without stepping on the brake pedal.'" According to the Federal Motor Vehicle Safety Standards relied upon by Jeffers, vehicles which have an automatic transmission with a "park" position must "'prevent removal of the key unless the transmission or transmission shift lever is locked in "park" as the direct result of removing the key.'" The purpose of this feature is "'to reduce the incidence of crashes resulting from the rollaway of parked vehicles with automatic transmissions as a result of children moving the shift mechanism out of the "park" position.'"

After the accident, Elizabeth's father took the van to Woodhouse for the first of two repairs. The record does not contain a repair order regarding the first repair. However, it appears as though Woodhouse adjusted the linkage on the gearshift because it was not going into park completely.

According to Mark, the transmission continued to shift out of park without the key in the ignition after the first Woodhouse repair. Mark explained that he and Elizabeth's father tested it by pulling the gearshift without his foot on the brake and that the gearshift would go into any gear that he put it into. Woodhouse came and picked up the van a second time for repairs.

Matthew Eschliman is a Woodhouse employee, and portions of his deposition testimony were included in the record. Eschliman's deposition testimony indicates that there was excessive play in the gearshift. Specifically, Eschliman stated, "You could move the lever up and down excessively but not actually physically get it out of gear." Eschliman testified that although there was free play in the gearshift, the transmission

would not shift from park to reverse without the key in the ignition. It is unclear from the record whether this observation was made before the first repair or the second repair.

The record suggests that Dustin Oppliger was the Woodhouse technician who actually repaired the van. Part of Oppliger's deposition was also included in the record. Oppliger testified that he checked the van before he made any repairs to see whether the gearshift would move. When asked if the gearshift had "free play from park to drive," Oppliger stated, "I wouldn't really call it free play. The shifter had free play, but not the actual linkage. You could feel the free play but you couldn't — there was no strength there." Oppliger also testified that he parked the van on a steep hill and tried to pull the gearshift out of park but was unable to get the gearshift to shift out of park. In other words, Oppliger was allegedly unable to duplicate the problem. Even though the Woodhouse employees reportedly could not shift the van out of park without the key in the ignition and the brake depressed, Oppliger replaced the bushings and adjusted the shifter cable.

The repair order concerning the second repair states: "Customer Reports: WHEN KEY IS OUT OF IGNITION THE TRANS WILL COME OUT OF GEAR ENOUGH TO ROLL FREELY. CHK AND ADVISE[.] Caused by ADJUSTED THE SHIFTER CABLE, R&I THE STEERING COLUMN & DISASSEMBLED THE SHIFT SHAFT, REPLACED THE BRGS. & RETEST[.]" The repair order also contains handwritten notes, which state: "Adjust shifter cable[.] R&R steering column[.] Disassemble found shift shaft [b]ushings worn out[.] Replaced them[.] Inspect shift lockout mechanism[.] Nothing worn on that[.] Reassemble and check[.] Works good."

After the second repair, a Woodhouse employee brought the van back to Mark, and Mark testified that when the van was brought back the second time, he could not get the gearshift to come out of park without the key in the ignition and the brake pedal depressed. In other words, according to Mark, the gearshift on the van worked properly after the second repair.

Based on his review and investigation, Jeffers concluded that "[t]hree separate failure modes caused and contributed"

to the accident. According to Jeffers' report, the brake shift interlock system failed, the transmission shift cable was misadjusted, and the key shift interlock failed or malfunctioned. Jeffers did not make any determinations regarding whether the defect in the gearshift could have been discovered by a reasonable inspection.

It is undisputed that the van was not inspected by Woodhouse employees prior to the Wilkes' purchase. Eschliman explained in his deposition testimony that because of the high volume of vehicles traded in, there are times when the service department does not inspect used vehicles before they are resold. Oppliger testified similarly. He explained that Woodhouse gets "too many vehicles in that we can't keep up on inspecting every one of them." There is no indication in the record that Woodhouse was aware prior to the accident that the gearshift on the van was defective.

The Wilkes filed a petition, which was later amended, against Ford Motor Company and Woodhouse seeking damages for Elizabeth's injuries. Ford Motor Company has been dismissed, without prejudice, and is not a party in this appeal. The petition contains three theories of recovery, only two of which involve Woodhouse. In count II of the petition, the Wilkes allege that Woodhouse knew or should have known that the defective condition of the van would pose an unreasonable and foreseeable danger to its customer or, alternatively, that Woodhouse knew or should have known that the van was defective when it was sold and that such negligence was the proximate cause of Elizabeth's injuries. In count III of the petition, the Wilkes allege that Woodhouse impliedly warranted, pursuant to Neb. U.C.C. § 2-314 (Reissue 2001), the van was merchantable and that Woodhouse breached that implied warranty. The district court granted Woodhouse's motion for summary judgment, and the Wilkes appeal.

III. ASSIGNMENTS OF ERROR

The Wilkes allege that the district court erred (1) as a matter of law in holding that no genuine issue of material fact exists and in granting summary judgment to Woodhouse and (2) in determining that used-car dealers can exclude through

"as is" clauses an implied warranty of safety that involves the vehicle's inherently dangerous defects, because such exclusions violate public policy.

IV. STANDARD OF REVIEW

[1,2] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted, and the court gives that party the benefit of all reasonable inferences deducible from the evidence.[3]

V. ANALYSIS

This case presents two issues: (1) whether a car dealer can exclude through the use of an "as is" clause the implied warranty of merchantability and (2) whether a car dealer has a duty to inspect used vehicles for safety defects prior to selling the vehicle.

1. Implied Warranty of Merchantability

The Wilkes' breach of warranty claim arises from the law of sales as codified in the Uniform Commercial Code (U.C.C.).[4] Historically, a warranty is an undertaking or assertion by the seller that the thing sold is as represented.[5] Under the U.C.C., warranties relating to goods sold can be either express or implied.[6] Under § 2-314:

> (1) Unless excluded or modified (section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind . . . .

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[2] *Jardine v. McVey*, 276 Neb. 1023, 759 N.W.2d 690 (2009).

[3] *Id.*

[4] See Neb. U.C.C. §§ 2-101 to 2-725 (Reissue 2001).

[5] See *Erskine v. Swanson*, 45 Neb. 767, 64 N.W. 216 (1895).

[6] See §§ 2-313 and 2-315.

> (2) Goods to be merchantable must be at least such as . . . .
>
> (c) are fit for the ordinary purposes for which such goods are used[.]

The Wilkes contend that Woodhouse breached this express warranty of merchantability with respect to the van it sold to them.

As noted in the statutory language defining an implied warranty of merchantability, it exists "unless excluded or modified."[7] Section 2-316(3)(a) provides: "[U]nless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is', 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." The purchase agreement evidencing the sale of the van from Woodhouse to the Wilkes included a conspicuous statement that it was sold "as is," "without any warranty either expressed or implied," and further stated that Woodhouse was disclaiming any implied warranty of merchantability. This language met the requirements of § 2-316(2) and (3)(a) for excluding an implied warranty of merchantability.

[3,4] The Wilkes argue, however, that exclusion of an implied warranty of merchantability with respect to a safety defect would violate public policy and therefore should not be enforced by a court. In support of their argument, the Wilkes cite to general propositions defining public policy as restrictions on the freedom to contract in order to prevent acts injurious to the public.[8] But we have also explained that it is the function of the Legislature, through the enactment of statutes, to declare what is the law and public policy of this state.[9] And our Legislature has provided, in § 2-316, that the implied warranty of merchantability may be disclaimed or excluded.

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[7] § 2-315.

[8] See *New Light Co. v. Wells Fargo Alarm Servs.*, 247 Neb. 57, 525 N.W.2d 25 (1994).

[9] *State v. Barranco, ante* p. 165, 769 N.W.2d 343 (2009).

The provisions of the U.C.C. which permit a seller to exclude warranties make no exception for warranties relating to the safety of the product. We conclude that the use of an "as is" clause to exclude the implied warranty of merchantability cannot be against the public policy of this state when it mirrors the statutory requirements specifically allowing for such exclusion.[10] Section 2-316 is the Legislature's clear expression of the public policy of this state. Therefore, the purchase agreement effectively disclaimed and excluded any implied or express warranties for the vehicle. As such, the district court properly entered summary judgment in favor of Woodhouse for the Wilkes' cause of action for breach of the implied warranty of merchantability.

2. Negligence

The Wilkes also alleged a theory of recovery based on negligence. While a breach of warranty claim is based upon a seller's express or implied statements regarding the product, a negligence claim focuses on the seller's conduct.[11] A common-law duty exists to use due care so as not to negligently injure another person.[12] Thus, the absence of implied warranties does not absolve Woodhouse from any potential liability resulting from its failure to exercise reasonable care.[13] In other words, nothing in the statutes dealing with exclusion of implied warranties allows for the exclusion of tort liability.

The Wilkes alleged that Woodhouse was negligent because it failed to reasonably inspect the van for safety defects prior to

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[10] See, *Continental Western Ins. Co. v. Conn*, 262 Neb. 147, 629 N.W.2d 494 (2001); *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 302 N.W.2d 655 (1981). See, also, *Peterson v. North American Plant Breeders*, 218 Neb. 258, 354 N.W.2d 625 (1984).

[11] See *Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 618 N.W.2d 827 (2000).

[12] *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994).

[13] See *Fleming v. Stoddard Wendle Motor Co.*, 70 Wash. 2d 465, 423 P.2d 926 (1967). See, also, *Kopischke v. First Continental Corp.*, 187 Mont. 471, 610 P.2d 668 (1980). See, generally, *Freeman v. Hoffman-La Roche, Inc., supra* note 11. But see *New Texas Auto v. Gomez De Hernandez*, 249 S.W.3d 400 (Tex. 2008).

its sale and that but for such negligence, Elizabeth would not have sustained her injuries by being run over by the van.

[5,6] Ordinary negligence is defined as the doing of something that a reasonably careful person would not do under similar circumstances, or the failing to do something that a reasonably careful person would do under similar circumstances.[14] In order to prevail in a negligence action, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately caused by the failure to discharge that duty.[15]

(a) Duty

[7,8] Woodhouse first maintains that it had no duty to inspect the van prior to its sale. In negligence cases, a duty may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.[16] When determining whether a legal duty exists, a court employs a risk-utility test concerning (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution.[17]

[9] The existence of a duty and the identification of the applicable standard of care are questions of law, but the ultimate determination of whether a party deviated from the standard of care and was therefore negligent is a question of fact.[18] To resolve the issue, a finder of fact must determine what conduct the standard of care would require under the particular circumstances presented by the evidence and

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[14] *Caguioa v. Fellman*, 275 Neb. 455, 747 N.W.2d 623 (2008); *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 574 N.W.2d 478 (1998).

[15] *Bargmann v. Soll Oil Co., supra* note 14.

[16] *Erickson v. U-Haul Internat.*, 274 Neb. 236, 738 N.W.2d 453 (2007).

[17] See, *Munstermann v. Alegent Health*, 271 Neb. 834, 716 N.W.2d 73 (2006); *Fuhrman v. State*, 265 Neb. 176, 655 N.W.2d 866 (2003).

[18] *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, 628 N.W.2d 697 (2001).

whether the conduct of the alleged tort-feasor conformed with the standard.[19]

We have never before addressed whether a used-car dealer has a duty to its customers to inspect vehicles for safety defects before they are sold. Most courts which have considered the issue have recognized a limited duty on the part of the dealer to inspect for patent safety defects existing at the time of sale. For example, Minnesota courts have held that the seller of a used vehicle intended for use upon the public highways has a duty to the public using such highways to exercise reasonable care in supplying the purchaser with a vehicle which will not constitute a menace or source of danger, so that liability attaches to the seller for injuries which are the result of patent defects in the vehicle, or defects which could have been discovered in the exercise of reasonable care.[20] Ohio courts have held that even when a dealer sells a used vehicle "as is," the dealer has a duty to exercise reasonable care in examining the vehicle to discover defects which would make the vehicle dangerous to users or those who might come in contact with them, and upon discovery, to correct those defects or at least give warning to the purchaser.[21] The Kentucky Court of Appeals has noted that used cars are more likely to be subject to mechanical defects than new vehicles and that the dealer is in a better position than the average consumer to "discover what defects might exist in any particular car to make it a menace to the public," holding that "[w]e are of the opinion it is not too harsh a rule to require these dealers to use reasonable care in inspecting used cars before resale to discover these defects, which the customer often cannot discover until too late."[22] In *Kopischke v. First Continental Corp.*,[23] the Montana Supreme Court held that a used-car

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[19] *Id.*

[20] *Crothers by Crothers v. Cohen*, 384 N.W.2d 562 (Minn. App. 1986); *Kothe v. Tysdale*, 233 Minn. 163, 46 N.W.2d 233 (1951).

[21] See, *Stamper v. Motor Sales*, 25 Ohio St. 2d 1, 265 N.E.2d 785 (1971); *Thrash v. U-Drive-It Co.*, 158 Ohio St. 465, 110 N.E.2d 419 (1953).

[22] *Gaidry Motors v. Brannon*, 268 S.W.2d 627, 629 (Ky. 1954).

[23] *Kopischke v. First Continental Corp., supra* note 13.

dealer had a duty to inspect a vehicle for safety defects prior to sale, notwithstanding the fact that the vehicle was sold "as is." The court reasoned:

> When the ordinary person purchases a car "as is," he expects to have to perform certain repairs to keep the car in good condition. He does not expect to purchase a death trap. Public policy requires a used car dealer to inspect the cars he sells and to make sure they are in safe, working condition. This duty cannot be waived by the use of a magic talisman in the form of an "as is" provision.[24]

But courts which have recognized a duty on the part of used-car dealers to inspect for safety defects prior to sale have also emphasized that the duty is limited. Courts have stated that used-car dealers are not insurers and therefore are not liable for latent defects in the vehicle.[25] Courts have limited the duty to inspect for patent defects[26] affecting the minimum essentials for safe operation of the vehicle.[27] Dealers are not required to disassemble the vehicle to inspect for latent defects,[28] and they are not responsible for the continuing safety of the vehicles they sell.[29]

Applying our risk-utility test for the existence of a legal duty to use reasonable care, we conclude that there is a relatively great magnitude of risk of injury in the circumstance where an unknowing buyer drives off the dealer's lot in a used vehicle which has a patent safety defect, such as defective brakes or steering. The dealer is better equipped than the purchaser to perceive such a defect before it causes harm. The nature of the risk is such that personal injury or death could result not only with respect to the purchaser of the defective vehicle, but to other members of the motoring public. The dealer has

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[24] *Id.* at 491-92, 610 P.2d at 679.

[25] *Stamper v. Motor Sales, supra* note 21; *Armour v. Haskins*, 275 S.W.2d 580 (Ky. 1955); *Thrash v. U-Drive-It Co., supra* note 21.

[26] *Rogers v. Hilger Chevrolet Co.*, 155 Mont. 1, 465 P.2d 834 (1970).

[27] *Foley v. Harrison Ave. Motor Co.*, 267 Mont. 200, 883 P.2d 100 (1994).

[28] *Crothers by Crothers v. Cohen, supra* note 20.

[29] *Armour v. Haskins, supra* note 25.

the earliest opportunity to discover and repair a patent safety defect in a used vehicle. An unknown safety defect existing at the time of sale poses foreseeable harm to the purchaser and the general public, and there exists a policy interest in requiring reasonable conduct on the part of the dealer to prevent such harm.

We, therefore, hold that a commercial dealer of used vehicles intended for use on public streets and highways has a duty to conduct a reasonable inspection of the vehicle prior to sale in order to determine whether there are any patent defects existing at the time of sale which would make the vehicle unsafe for ordinary operation and, upon discovery of such a defect, to either repair it or warn a prospective purchaser of its existence. The dealer has no duty to disassemble the vehicle to discover latent defects or to anticipate the future development of safety defects which do not exist at the time of sale. The tort duty we recognize today is not affected by a valid disclaimer or exclusion of U.C.C. warranties, because such contractual provisions do not absolve a seller from exercising reasonable care to prevent foreseeable harm.

[10] Tort liability is not based upon representations or warranties. Rather, it is based upon a duty imposed by the law upon one who may foresee that his or her actions or failure to act may result in injury to others.[30]

That being the case, whether or not the court properly entered summary judgment in favor of Woodhouse depends upon whether Woodhouse breached this duty. It is undisputed that Woodhouse did not inspect the van prior to selling it. However, that alone does not rise to the level of a breach of the applicable standard of care, because its duty extends only to patent, not to latent, defects. Thus, a breach of duty occurred if a reasonable inspection would have revealed the alleged defect in the gearshift. This is a question of fact that must be decided by the fact finder. A party moving for summary judgment has the burden to show that no genuine issue of material fact exists

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[30] *Gaidry Motors v. Brannon, supra* note 22. See, *Turner v. International Harvester Company*, 133 N.J. Super. 277, 336 A.2d 62 (1975); *Kothe v. Tysdale, supra* note 20.

and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted.[31] After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party.[32] The record presents conflicting testimony as to whether the gearshift malfunctioned occasionally or regularly. According to Mark, the gearshift malfunctioned regularly. Additionally, the officer who responded to the accident indicated that the gearshift came out of park without the key in the ignition. However, Woodhouse employees claim that they could not get the gearshift to malfunction. As such, there is a genuine issue of material fact whether a reasonable inspection of the van would have revealed any alleged defect.

(b) Causation

Woodhouse argues that even if there is a duty that was breached, there is no material issue of fact that Woodhouse was not the proximate cause of the accident. Rather, Woodhouse asserts that Mark and the child were the proximate cause of the accident.

[11,12] Determination of causation is, ordinarily, a matter for the trier of fact.[33] To establish proximate cause, the plaintiff must meet three basic requirements: (1) Without the negligent action, the injury would not have occurred, commonly known as the "but for" rule; (2) the injury was a natural and probable result of the negligence; and (3) there was no efficient intervening cause.[34]

[13] Assuming that Woodhouse breached its duty to reasonably inspect, Woodhouse proximately caused the vehicle to be placed into the hands of the Wilkes with a defect that could

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[31] See *Kline v. Farmers Ins. Exch.*, 277 Neb. 874, 766 N.W.2d 118 (2009).

[32] See *id.*

[33] *Dolberg v. Paltani*, 250 Neb. 297, 549 N.W.2d 635 (1996); *Merrick v. Thomas, supra* note 12.

[34] *Merrick v. Thomas, supra* note 12.

have been discovered by a reasonable inspection. This defect undoubtedly existed at the time of sale. And it is undisputed that the van was not altered in any way prior to the incident. But Woodhouse first argues that Mark's failure to set the parking brake was the proximate cause of the accident. In doing so, however, Woodhouse confuses the concepts of proximate causation and contributory negligence. Woodhouse is really arguing that Mark was contributorily negligent by not using the parking brake. Plaintiffs are contributorily negligent if (1) they fail to protect themselves from injury, (2) their conduct occurs and cooperates with the defendant's actionable negligence, and (3) their conduct contributes to their injuries as a proximate cause.[35] Whether or not the Wilkes were contributorily negligent to the point where recovery is precluded is a question for the trier of fact, and Woodhouse's allegations regarding Mark's failure to implement the parking brake are insufficient to warrant summary judgment in Woodhouse's favor.[36]

[14,15] Second, Woodhouse argues that the Wilkes' daughter was the proximate cause of the accident because she manipulated the gearshift, causing the accident. Essentially, Woodhouse is arguing that viewing the facts in the light most favorable to the Wilkes, the daughter's actions constituted an efficient intervening cause, warranting judgment as a matter of law in its favor. An efficient intervening cause is new and independent conduct of a third person, which itself is a proximate cause of the injury in question and breaks the causal connection between the original conduct and the injury.[37] The causal connection is severed when (1) the negligent actions of a third party intervene, (2) the third party had full control of the situation, (3) the third party's negligence could not have been anticipated by the defendant, and (4) the third party's negligence directly resulted in injury to the plaintiff.[38] The doctrine

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[35] *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007).

[36] See *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001).

[37] *Malolepszy v. State*, 273 Neb. 313, 729 N.W.2d 669 (2007).

[38] *Id.*

that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable.[39] But if a third party's negligence is reasonably foreseeable, then the third party's negligence is not an efficient intervening cause as a matter of law.[40] The record contains evidence that if the van had been operating properly, the gearshift should not have come out of park unless the key was in the ignition and the brake pedal was depressed. A jury could find that it is foreseeable that an accident could occur if a young child was able to take the vehicle out of park without the key in the ignition and the brake pedal depressed. Thus, we conclude that there is a genuine issue of material fact whether the alleged efficient intervening cause was foreseeable by Woodhouse, and therefore judgment as a matter of law is precluded.[41]

VI. CONCLUSION

We conclude that Woodhouse effectively disclaimed all implied warranties, including the warranty of merchantability. But we also conclude that commercial dealers of used vehicles have a duty to exercise reasonable care to discover any existing safety defects that are patent or discoverable in the exercise of reasonable care or through reasonable inspection. Because there are genuine issues of material fact as to whether Woodhouse breached its duty of care and, if so, whether Woodhouse's breach was the proximate cause of Elizabeth's injuries, we conclude that the district court incorrectly granted summary judgment in favor of Woodhouse on the Wilkes' negligence claim. We affirm the grant of summary judgment in favor of Woodhouse on count III and reverse the judgment of the district court granting summary judgment in favor of Woodhouse on count II.

AFFIRMED IN PART, AND IN PART REVERSED.

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[39] *Delaware v. Valls*, 226 Neb. 140, 409 N.W.2d 621 (1987).

[40] See *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992).

[41] See *Kozicki v. Dragon*, 255 Neb. 248, 583 N.W.2d 336 (1998).

STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. MARIO D. ALFORD, APPELLEE AND CROSS-APPELLANT.

774 N.W.2d 394

Filed November 6, 2009. No. S-08-1040.

1. **Sentences: Appeal and Error.** When the State appeals and claims that a sentence imposed on a defendant is excessively lenient, the standard of review is whether the sentencing court abused its discretion in the sentence imposed.
2. **Sentences.** Whether a defendant is entitled to credit for time served is a question of law.
3. **Jury Instructions.** Whether a jury instruction given by a trial court is correct is a question of law.
4. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
5. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
6. ____. 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.
7. **Sentences: Words and Phrases.** A sentence which is less than that demanded by law is, by definition, "excessively lenient."
8. **Pretrial Procedure: Appeal and Error.** Trial courts have broad discretion with respect to sanctions involving discovery procedures, and their rulings thereon will not be reversed in the absence of an abuse of discretion.
9. **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.
10. **Pretrial Procedure: Evidence: Prosecuting Attorneys.** Whether a prosecutor's late disclosure of evidence results in prejudice depends on whether the information sought is material to the preparation of the defense, meaning that there is a strong indication that such information will play an important role in uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony, or assisting impeachment or rebuttal.
11. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
12. ____: ____: ____. 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.
13. **Jury Instructions: Appeal and Error.** It is not error for the trial court to refuse to give a defendant's requested instruction where the substance of the requested instruction was covered in the instructions given.
14. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense are such

that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.

15. **Rules of Evidence: Rules of the Supreme Court: Hearsay.** Hearsay is not admissible except as provided by the rules of evidence or by other rules adopted by the statutes of the State of Nebraska or by the discovery rules of the Nebraska Supreme Court.
16. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
17. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In making this determination, the court should not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence, as these matters are for the finder of fact.
18. **Prior Convictions: Proof.** In a proceeding to enhance a punishment because of prior convictions, the State has the burden of proving such prior convictions by a preponderance of the evidence.
19. **Sentences: Prior Convictions: Right to Counsel: Waiver: Proof.** When using a prior conviction to enhance a sentence, the State must prove the defendant was represented by counsel at the time of conviction and sentencing, or had knowingly and voluntarily waived representation for those proceedings.
20. **Prior Convictions: Records: Proof.** The existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the oral testimony of the accused and duly authenticated records maintained by the courts or penal and custodial authorities.
21. **Prior Convictions: Proof.** There is no requirement—for purposes of enhancement—that a judge's signature appear on a judgment of conviction.
22. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
23. **Sentences: Probation and Parole.** 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 Sarpy County: DAVID K. ARTERBURN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Tricia Freeman, Chief Deputy Sarpy County Attorney, for appellant.

Thomas P. Strigenz, Sarpy County Public Defender, for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

Mario D. Alford was involved in a fight with fellow inmate Anthony Lukowski at the Sarpy County jail while awaiting trial for first degree murder. Alford was charged and convicted of assault by a confined person and with being a habitual criminal. In imposing Alford's sentence, the court gave Alford credit for the time served while simultaneously awaiting trial on both the first degree murder and the assault charges. Neb. Rev. Stat. § 28-932(2) (Reissue 2008) provides that a sentence for assault of a confined person "shall not include any credit for time spent in custody prior to sentencing unless the time in custody is solely related to the [assault charge]." Citing to this provision, as well as to Alford's criminal history, the State seeks reversal of this credit for time served as giving Alford an "excessively lenient" sentence under Neb. Rev. Stat. § 29-2320 (Reissue 2008). Alford also timely appeals.[1]

II. FACTS

1. EVIDENCE OF CONFINEMENT

In support of the charge of assault by a confined person, the prosecution offered certified copies of the trial docket for the first degree murder charge for which Alford was in custody at the time of the assault. The documents demonstrated that after an initial hearing on the complaint, Alford was held without bond. Several entries reference Alford's being in the custody of the "SCSO," which we understand to mean the Sarpy County sheriff's office. In particular, an entry dated December 13,

[1] See *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006).

2007, states, "[Alford] is remanded into the custody of the SCSO pending further hearing." The judge's minutes continue through May 30, 2008, without a final disposition of the felony charge. In the exhibit for the jury, the State redacted all references to the nature of the charge.

2. Testimony About Assault

Deputies Lloyd Schoolfield and David Weaver testified as witnesses to the assault. On the morning of February 10, 2008, Schoolfield was supervising the serving of the breakfast trays and the inmates of the Sarpy County jail were eating breakfast in their day areas. Alford and Lukowski were inmates in the same unit. Schoolfield had already served Alford's unit and was serving another unit nearby when he heard a noise. Schoolfield proceeded to where Alford and Lukowski were housed, and, through a window, he observed Alford and Lukowski locked in a fighting embrace.

Waiting for assistance to break up the fight, Schoolfield testified that he watched Alford free a hand and start "throwing punches to the head of Lukowski." When Weaver arrived to assist, the two deputies entered the unit and Schoolfield supervised the lockdown of the inmates not participating in the fight. By this time, Alford and Lukowski had fallen to the floor. Alford was underneath Lukowski with his arms around Lukowski's neck, holding Lukowski in a headlock to his chest. Weaver observed that Lukowski's arms were free, but that he did not hit Alford.

Alford continued to hold Lukowski in this manner even after Weaver approached and ordered him to let Lukowski go. Weaver repeated the order while applying the "mandibular angle pressure point." The first time Weaver did this, Alford winced, but did not let Lukowski go. After the second time, Alford released Lukowski.

When Alford and Lukowski got up, Schoolfield and Weaver observed that Lukowski had a bloody nose. Schoolfield testified that he had observed Lukowski's face when they had delivered the breakfast trays and that he had not observed any injuries before the fight occurred. Alford, in contrast, did not appear to be injured after the fight, and Alford told

Schoolfield that he was not injured. Lukowski was sent to the jail's nurse.

Only one of the inmates in Alford's unit agreed to describe for Schoolfield the events leading up to the fight. Schoolfield testified that the inmate was no longer in the Sarpy County jail. Defense counsel believed that the inmate's description of the fight was favorable to Alford's defense. But when defense counsel asked Schoolfield what the inmate had said, the court sustained the State's hearsay objection. Defense counsel made an offer of proof that Schoolfield would testify that Alford had accused Lukowski of cheating in a poker game the night before and that, in response, Lukowski attacked Alford and began hitting him.

At trial, Lukowski testified that he had begun the physical altercation with Alford. Lukowski testified that on the morning of February 10, 2008, Alford was "running his mouth," so Lukowski told Alford to "stand up and shut up or do something about it." Lukowski testified that Alford then came toward him and that he felt threatened, so he swung at Alford, but missed. Lukowski testified that Alford did not immediately respond and that Lukowski started choking Alford. Lukowski testified that when Schoolfield arrived, he and Alford were facing each other and that Lukowski had one arm around Alford's upper back and neck and the other arm around his waist. Alford had both his hands around Lukowski's back. After that, Alford "broke my hands loose from around his neck and hit me in the face a few times and threw me to the ground and put me in a headlock and [the fight] got broke up by Deputy Weaver."

On cross-examination, Lukowski elaborated that he had also "head-butt[ed]" Alford a couple of times in the course of the fight. Furthermore, Lukowski stated that while Alford had him in a headlock on the floor, Lukowski was "still trying to get at his throat . . . I was still trying to choke him out."

Lukowski testified that he received injuries, including a bloody nose and a black eye, as a result of being struck in the face by Alford. In a photograph taken of Lukowski after the fight, he appears to have a black eye and a bruised nose.

The court received, without objection, a statement made by Lukowski shortly after the incident. In that statement,

Lukowski did not mention choking Alford at all. Lukowski's statement described that Alford "rushed" toward him. In response, Lukowski swung at Alford, but missed. Lukowski stated that Alford "took advantage and I was hit in the eye, and nose and was taken to the floor and seconds later 2 officer's [sic] broke up the fight."

Referring to the statement, the prosecutor asked Lukowski when he had decided he had more to add. Lukowski answered that it was just 2 days prior to trial. The prosecutor also asked to whom Lukowski had given this additional information, and Lukowski answered that he had only told Alford's counsel. Upon further questioning, Lukowski confirmed that he had never shared this additional information with anyone at the jail.

3. Sentence

The jury found Alford guilty of assault by a confined person. The court found that Alford was a habitual criminal and sentenced Alford to a term of imprisonment from 10 to 36 years. The court granted Alford credit for the 223 days spent in incarceration awaiting disposition of the assault charge. This incarceration had taken place simultaneously to time spent awaiting trial for the first degree murder charge.

III. ASSIGNMENTS OF ERROR

The State asserts that the trial court erred by granting Alford credit for time served in pretrial and presentence incarceration.

Alford assigns that the trial court erred in (1) denying his motion in limine, (2) not giving his proposed jury instructions and giving jury instructions that were misleading and confusing, (3) entering judgment pursuant to a jury verdict that was based on insufficient evidence, (4) denying his motion for new trial, (5) finding he was a habitual criminal, and (6) ordering an excessive sentence.

IV. STANDARD OF REVIEW

[1] When the State appeals and claims that a sentence imposed on a defendant is excessively lenient, the standard of

review is whether the sentencing court abused its discretion in the sentence imposed.[2]

[2] Whether a defendant is entitled to credit for time served is a question of law.[3]

[3] Whether a jury instruction given by a trial court is correct is a question of law.[4]

[4] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.[5]

V. ANALYSIS

1. Credit for Time Served

[5,6] Because the jail time Alford served awaiting trial on a charge of assault by a confined person was simultaneous with jail time being served awaiting trial for first degree murder, the time was not "solely related" to the assault charge and the trial court lacked statutory authority under § 28-932(2) to give Alford credit for that time. Statutory language is to be given its plain and ordinary meaning.[6] 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.[7] And we find the language of § 28-932(2) to be clear.

Section 28-932(2) provides that a sentence for assault by a confined person "shall not include any credit for time spent in custody prior to sentencing unless the time in custody is solely related to the offense for which the sentence is being imposed [for assault of a confined person]." "[T]ime spent in custody," by its plain language, is broad and does not distinguish

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[2] *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990), *disapproved on other grounds, State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991).

[3] See *State v. Harker*, 8 Neb. App. 663, 600 N.W.2d 488 (1999).

[4] *State v. Brown*, 258 Neb. 346, 603 N.W.2d 456 (1999).

[5] *State v. Moore*, 277 Neb. 111, 759 N.W.2d 698 (2009).

[6] *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007).

[7] *State v. Stafford, ante* p. 109, 767 N.W.2d 507 (2009).

between time spent awaiting conviction for the nonrelated charge and time spent as part of the sentence after conviction of the other charge. In other words, it encompasses both "jail time" and "prison time."[8] Logically, if the time spent "in custody" awaiting trial on a charge of assault by a confined person is simultaneous to time spent awaiting trial on another charge, that time is not "solely related" to the charge of assault by a confined person. Without the charge for assault by a confined person, the defendant would still have been in custody.

In this case, no matter what the surrounding facts or circumstances that might justify lenity in his sentence for assault by a confined person, the judge's order granting Alford credit for time served was unauthorized. Section 28-932 employs the mandatory language that the sentence "shall not" include such a credit, and as a general rule, the use of the word "shall" is considered to indicate a mandatory directive, inconsistent with the idea of discretion.[9]

2. Jurisdiction

But we must consider whether such an unauthorized sentence falls under § 29-2320, which provides that we may reverse a sentence found to be "excessively lenient." The question arises because absent specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.[10] Section 29-2320 allows the State to appeal a sentence in a felony conviction when the prosecutor "reasonably believes, based on all of the facts and circumstances of the particular case, that the sentence is excessively lenient."

[7] As already discussed, the court violated § 28-932 by giving Alford credit for time served while awaiting separate trials on a first degree murder charge and on the unrelated assault by a confined person charge. In effect, the court imposed a sentence that was less than that demanded by law. We conclude

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[8] See *State v. Fisher*, 218 Neb. 479, 356 N.W.2d 880 (1984).

[9] *State v. Hense*, 276 Neb. 313, 753 N.W.2d 832 (2008); *Bazar v. Department of Motor Vehicles*, 17 Neb. App. 910, 774 N.W.2d 433 (2009).

[10] See *State v. Hense, supra* note 9.

that a sentence which is less than that demanded by law is, by definition, "excessively lenient."[11]

We note that in appeals brought under § 29-2320, it has always been a fundamental part of our abuse of discretion standard of review to ensure that the sentence was imposed in accordance with those laws that limit the trial court's sentencing discretion. When an appellate court is reviewing a sentence for its leniency, a sentence imposed by a district court *that is within the statutorily prescribed limits* will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion.[12] It is not only a proper, but a necessary, part of our review for excessive leniency that we first consider whether the sentence conforms to the mandates of the sentencing statutes.

Accordingly, in *State v. Hamik*,[13] in considering whether the defendant's sentence was excessively lenient, we first considered the State's argument that the defendant's sentence of probation for first degree sexual assault violated the mandatory minimum term provided by law. Only after we had concluded that the sentence was within the statutorily prescribed limits did we consider the State's argument that even if lawful, the circumstances of the case demanded a harsher punishment.

We observe that in a different context, we said that "[s]ection 29-2320 does not extend to the appeal of a sentence that is not in conformity with the law."[14] To the extent we suggested that § 29-2320 does not encompass appeals by a prosecutor who argues a sentence is excessively lenient because it falls below statutory sentencing parameters, we disapprove of this statement. We hold that for purposes of § 29-2320, a sentence that falls below the prescribed sentencing limits is simply an example of leniency. We find merit to the State's appeal, and in accordance with the authority granted by Neb. Rev. Stat.

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[11] See § 29-2320.

[12] *State v. Moore*, 274 Neb. 790, 743 N.W.2d 375 (2008).

[13] *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001).

[14] *Glantz v. Hopkins*, 261 Neb. 495, 500, 624 N.W.2d 9, 13 (2001).

§ 29-2322 (Reissue 2008), we remand the cause with directions to vacate the credit for time served.

3. Alford's Appeal

For the following reasons, we find no merit to Alford's appeal.

(a) Timeliness of Evidence of Confinement

Alford asserts that the trial court erred in allowing evidence relevant to Alford's confinement. The court overruled Alford's motion in limine, renewed during trial, alleging the documents were untimely provided during the discovery process and that they were more prejudicial than probative. Alford did not receive a copy of these documents until the morning of the hearing on the assault charge. However, the trial court ruled that there was no surprise to Alford because the documents were public records created in the separate first degree murder case involving Alford and the same defense counsel.

[8,9] Trial courts have broad discretion with respect to sanctions involving discovery procedures, and their rulings thereon will not be reversed in the absence of an abuse of discretion.[15] 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.[16] We find no abuse of discretion in this case.

We conclude that the trial court did not abuse its discretion in concluding that the late disclosure did not prejudice Alford, because he and his counsel already had knowledge that there was documentation of Alford's incarceration. Alford argues that the surprise was that the State would produce this documentation at trial. He then states, somewhat abstractly, that "[o]ne of those factors" defense counsel takes into account "when advising clients whether to settle or proceed to trial . . . is whether or not the State has the evidence to prove a necessary

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[15] *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007).

[16] *State v. Floyd*, 272 Neb. 898, 725 N.W.2d 817 (2007), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

element."[17] And Alford asserts broadly that the evidence was "prejudicial" because, without it, the State would not be able to obtain a conviction. This is not how we define prejudice in the context of late disclosure.

[10] Whether a prosecutor's late disclosure of evidence results in prejudice depends on whether the information sought is material to the preparation of the defense, meaning that there is a strong indication that such information will play an important role in *uncovering admissible evidence, aiding preparation of witnesses, corroborating testimony, or assisting impeachment or rebuttal*.[18] Alford does not argue that the evidence of his confinement was prejudicial in any of these ways. If evidence of an element of the offense is public record, then there is no unfair prejudice resulting from the State's failure to explicitly disclose that this evidence will be offered at trial. The defendant should expect that the State will attempt to prove its case, and the lack of such explicit notice neither surprises the defendant nor affects the defendant's ability to prepare witnesses, corroborate testimony, or assist impeachment or rebuttal.

(b) Jury Instructions

[11,12] Alford next argues that the court erred in giving instructions Nos. 3 and 4 and in failing to give his tendered instructions Nos. 1 through 6. In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.[19] 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.[20]

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[17] Brief for appellee on cross-appeal at 18.

[18] *State v. Gutierrez, supra* note 15.

[19] *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

[20] *Id.*

Instruction No. 3 stated:

> The material elements of the crime of assault by a confined person are:
>
> 1. The defendant intentionally, knowingly, or recklessly caused bodily injury to Anthony Lukowski;
>
> 2. The act took place on or about February 10, 2008;
>
> 3. At the time the act took place, the defendant was legally confined in a jail or correctional or penal institution;
>
> 4. The act took place in Sarpy County, Nebraska; and
>
> 5. The defendant did not act in self-defense.
>
> If you decide that the State proved each element beyond a reasonable doubt, then you must find the defendant guilty. Otherwise, you must find the defendant not guilty.

Instruction No. 4 stated:

> The defendant acted in self defense if:
>
> 1. Anthony Lukowski used or threatened force against the defendant; and
>
> 2. Under the circumstances as they existed at the time, the defendant reasonably believed that the force he used against Anthony Lukowski was immediately necessary to protect the defendant against any such force used or threatened by Anthony Lukowski.
>
> The fact that the defendant may have been wrong in estimating the danger does not matter so long as there was a reasonable basis for what he believed and he acted reasonably in response to that belief.

Alford's proposed instruction No. 1 was largely the same as the court's instruction No. 3, except for (1) the added introduction that "you must find each of the following elements beyond a reasonable doubt," (2) the addition of the element that the jury find "[t]hat Mario Alford's acts were not to avoid a greater harm," and (3) the fact that it used Alford's name rather than "the defendant." Alford's proposed instruction No. 2 was indiscernible from the court's instruction No. 4 above. Alford's proposed instruction No. 3 stated that "Mario Alford is not required to prove that he acted in self defense. It is up to the State to prove that he did not." Alford's proposed

instructions Nos. 6 through 8 sought to present to the jury the lesser offenses of third degree assault and third degree assault, mutual consent.

According to Alford, instruction No. 3 misstates the law by adding the element that he did not act in self-defense. And he claims that instruction No. 3, when read together with instruction No. 4, failed to instruct the jury that "if it found [Alford] acted in self-defense, the State must disprove that he acted in self-defense."[21] Further, Alford argues that "the instructions did not inform the jury that the State must disprove the theory of self-defense beyond a reasonable doubt."[22] We find no merit to these contentions.

Instruction No. 3 places the burden on the State to prove, "beyond a reasonable doubt," that Alford did not act in self-defense. It places this burden on the State without any prerequisite or limitation. It is true that the defendant carries the initial burden to raise the issue of self-defense as an affirmative defense,[23] but when the defendant has produced sufficient evidence to raise the defense, the issue is one which the State must disprove.[24] Not only was there no prejudice in this case by the instruction given, but it was proper to include the absence of self-defense as one of the elements the State had to prove.[25] We conclude that Alford's proposed instruction that "if it found [Alford] acted in self-defense, the State must disprove that he acted in self-defense"[26] would have simply confused the jury.

[13] Relatedly, we disagree that the jury could have been misled, by the combination of instructions Nos. 3 and 4, to believe that the burden of proving self-defense was placed on Alford. There is no meaningful distinction between given

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[21] Brief for appellee on cross-appeal at 20.

[22] *Id.*

[23] See, *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999); *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997).

[24] *Id.*

[25] See *State v. Warren*, 9 Neb. App. 60, 608 N.W.2d 617 (2000).

[26] Brief for appellee on cross-appeal at 20.

instruction No. 3, that the State was required to prove that Alford "did not act in self-defense," and Alford's proposed instructions, that the State was required to "disprove the theory of self-defense."[27] It is not error for the trial court to refuse to give a defendant's requested instruction where the substance of the requested instruction was covered in the instructions given.[28]

Furthermore, Alford's proposed instruction that he was "not required to prove that he acted in self defense" was simply not necessary when the lack of self-defense was presented to the jury as an element of the State's case in chief. It is understood that if the State is required to prove an element, then the defendant is *not* required to prove the same. There especially could have been no room for doubt in this particular case when the prosecutor explained to the jury during closing arguments that it was the State's burden to show "each and every one" of the elements in the jury instructions, including that Alford did not act in self-defense.

[14] Finally, Alford argues the court should have instructed the jury on the lesser-included offenses of third degree assault, as described in tendered instructions Nos. 6 through 8. A court must instruct on a lesser-included offense if (1) the elements of the lesser offense are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.[29] Alford argues there is a rational basis for acquitting him of assault of a confined person, while convicting him of simple assault, because the exhibits demonstrating his confinement should not have been received into evidence. Having already determined that those exhibits were properly admitted, we find no merit to the argument that there was a rational basis for finding that Alford was not confined at the time of the alleged assault. Therefore, there was no

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[27] *Id.*

[28] *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

[29] *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006).

basis upon which the jury could have acquitted Alford of the greater offense while convicting him of the lesser and there was no error in the court's refusal to give the jury Alford's proposed instructions.

(c) Failure to Allow Hearsay Statement

Alford next argues that the trial court erred in sustaining a hearsay objection to proposed testimony by Schoolfield as to what another inmate had told him about the fight. During cross-examination, Schoolfield stated that only one of the other inmates in the unit agreed to tell him what he had observed. Again, Schoolfield testified that the inmate was no longer in the Sarpy County jail. When defense counsel asked Schoolfield what the inmate had said about who started the fight, the court sustained the State's hearsay objection. Defense counsel made an offer of proof that Schoolfield would have testified that Alford accused Lukowski of cheating in a poker game the night before and that Lukowski charged Alford and began hitting Alford first.

The proposed statement was clearly hearsay because it was offered to prove the truth of the matter asserted, i.e., that Lukowski started the fight.[30] The trial court accordingly sustained the State's hearsay objection. When the trial court explained that the statement was hearsay, Alford's counsel did not argue to the trial court that it nevertheless fell under one of the recognized exceptions to the hearsay rule. On appeal, Alford now argues that the statement falls under the residual hearsay exception, Neb. Rev. Stat. § 27-804(2)(e) (Reissue 2008).

[15] Hearsay is not admissible except as provided by the rules of evidence or by other rules adopted by the statutes of the State of Nebraska or by the discovery rules of this court.[31] Therefore, the proponent of the hearsay evidence has the burden of identifying the appropriate exception and demonstrating

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[30] See, *State v. Clark*, 255 Neb. 1006, 588 N.W.2d 184 (1999); Neb. Rev. Stat. § 27-801(3) (Reissue 2008).

[31] See *State v. Hembertt*, 269 Neb. 840, 696 N.W.2d 473 (2005).

that the testimony falls within it.[32] And when the opposing party objects to evidence as hearsay and the trial court sustains the objection, the proponent is required to point out the possible hearsay exceptions in order to preserve the point for appeal.[33] Because defense counsel in this case failed to raise the issue of an exception to the hearsay exclusion, the facts relevant to determining whether a hearsay exception applied were never subjected to the factfinding and discretionary functions of the trial judge. We will not address these arguments for the first time on appeal.[34]

(d) Closing Arguments

Alford also argues that he was prejudiced when the trial court sustained an objection to his closing arguments. Defense counsel argued in closing that Alford acted in self-defense, because during the entirety of the fight, Lukowski was trying to choke Alford. Defense counsel explained that Lukowski did not mention these same details in his original statement to Schoolfield simply because he wanted to minimize his culpability. Defense counsel then said:

> Now, not only that but the State kind of went after me a little bit. They asked . . . Lukowski you only came up with this new information after you talked with [defense counsel]. Well, absolutely. I'm a lawyer. I'm going to go interview my witnesses, and I went over and talked to . . . Lukowski. And I wrote my opening —

The State objected that these facts were not in evidence, and the objection was sustained by the court.

According to Alford, defense counsel's statements in closing arguments were in response to the State's line of

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[32] See, *Odemns v. U.S.*, 901 A.2d 770 (D.C. 2006); *State v. Cagley*, 638 N.W.2d 678 (Iowa 2001). See, also, *Noel v. Com.*, 76 S.W.3d 923 (Ky. 2002); *Com. v. Smith*, 545 Pa. 487, 681 A.2d 1288 (1996); *Volkswagen of America, Inc. v. Ramirez*, 159 S.W.3d 897 (Tex. 2004); *Robinson v. Com.*, 258 Va. 3, 516 S.E.2d 475 (1999).

[33] See, *People v. Ramos*, 15 Cal. 4th 1133, 938 P.2d 950, 64 Cal. Rptr. 2d 892 (1997); *Odemns v. U.S., supra* note 32; *State v. Reed*, 282 S.W.3d 835 (Mo. 2009); *Johnson v. State*, 925 S.W.2d 745 (Tex. App. 1996).

[34] See *Weber v. Gas 'N Shop, ante* p. 49, 767 N.W.2d 746 (2009).

questioning which "inferred that Alford's attorney had persuaded Lukowski to add more details to his story about the altercation."[35] Therefore, Alford argues that the closing argument was proper and that by sustaining the State's objection, the court "left the inference to the jury that Alford's attorney could have possibly persuaded Lukowski to alter his story, thereby calling into question the credibility of Lukowski's testimony."[36]

An examination of the prosecutor's questioning of Lukowski during the case in chief reveals nothing improper. The prosecutor did not allege that defense counsel had persuaded Lukowski to alter his story. Instead, the questioning raised concerns about the veracity of Lukowski's testimony due to the fact that he waited 5 months to add important details to his version of events. Lukowski revealed that he had never shared this new information with the authorities that originally took his statement. And he was led to reveal that he had only shared this information with Alford's counsel. However, that fact was apparently the truth.

And even if improper questioning had occurred, the remedy was an objection at the time of questioning and rehabilitation during recross. The trial court was not obligated to allow defense counsel to address during closing arguments whatever slight occurred during the State's case in chief, real or imagined. We find no error in the trial court's sustaining the State's objection.

(e) Motion for New Trial

[16] Alford argues that the aggregate "irregularities" of the court's not allowing the inmate's hearsay statement into evidence and sustaining the prosecution's objection to the defense's closing arguments, as well as its alleged errors in the jury instructions, warranted a new trial. In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown,

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[35] Brief for appellee on cross-appeal at 31.

[36] *Id.*

the trial court's determination will not be disturbed.[37] As we have already addressed each of these arguments separately and found no error, we likewise find no merit to Alford's argument that the court should have granted his motion for new trial.

(f) Sufficiency of Evidence

[17] Alford further claims that the jury's verdict was unsupported by the evidence. In particular, Alford asserts the jury should have concluded that he acted in self-defense. He also alleges there was insufficient evidence demonstrating that Lukowski was injured by Alford. When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[38] In making this determination, the court should not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence, as these matters are for the finder of fact.[39]

Alford claims he acted in self-defense because Lukowski started the fight and only when Alford was unable to breathe did he retaliate. The extent to which Alford was responding to Lukowski's choking him, however, was a question for the trier of fact. In Lukowski's original statement, he did not mention that he choked Alford at all. Nor was the evidence undisputed that Lukowski was the first aggressor. Lukowski's original statement was that Alford physically attacked him first. And, regardless, while a determination of whether the victim was the first aggressor is an essential element of a self-defense claim,[40] it is not decisive. It does not follow that every time the victim is the first aggressor, the defendant's use of force is justified.

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[37] *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

[38] *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006).

[39] *Id.*

[40] See *State v. Lewchuk*, 4 Neb. App. 165, 539 N.W.2d 847 (1995).

We also note that regardless of who started the fight and whether Lukowski ever choked Alford, Neb. Rev. Stat. § 28-1409 (Reissue 2008), Nebraska's use-of-force statute, states that the use of force upon or toward another person is justifiable when the actor believes that such force is "immediately necessary" for the purpose of protecting himself. Such belief must be reasonable and in good faith.[41] There was evidence in this case from which the jury could have concluded that Alford attacked Lukowski even when Alford was not in immediate danger. In summary, there was sufficient evidence for the jury to conclude that Alford's actions were not justified by self-defense.

We also find the evidence sufficient to demonstrate that Lukowski was injured by the assault. Lukowski was observed with a bloody nose, and he had been observed prior to the fight without any injuries. Although Alford speculates that Lukowski caused his own injuries by head-butting Alford, again, this was a question for the jury.

(g) Admissibility of Prior Convictions

Alford argues that the trial court erred in finding that he was a habitual criminal.[42] Nebraska's habitual criminal statutes provide for enhanced mandatory minimum and maximum sentences for a convicted defendant who has been twice convicted of crimes for terms not less than 1 year.[43] The trial court found that Alford was previously convicted in Nebraska of possession of a controlled substance and convicted in federal court of possession of ammunition. He served a sentence of at least 1 year for each crime. It found, in addition, that Alford was represented by counsel at the time of those two convictions. But Alford asserts that the exhibits documenting these prior convictions lacked the necessary degree of trustworthiness and, as a matter of law, did not satisfy the State's burden of proof.

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[41] *State v. Cowan*, 204 Neb. 708, 285 N.W.2d 113 (1979).

[42] See Neb. Rev. Stat. § 29-2221 (Reissue 2008).

[43] *Id.*

[18,19] In a proceeding to enhance a punishment because of prior convictions, the State has the burden of proving such prior convictions by a preponderance of the evidence.[44] In addition, the State must prove the defendant was represented by counsel at the time of conviction and sentencing, or had knowingly and voluntarily waived representation for those proceedings.[45]

[20] Neb. Rev. Stat. § 29-2222 (Reissue 2008) states that "a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for any such crimes formerly committed by the party so charged, shall be competent and prima facie evidence of such former judgment and commitment." However, § 29-2222 does not confine the proof on the issue of the defendant's prior convictions to the documents therein mentioned.[46] The existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the oral testimony of the accused and duly authenticated records maintained by the courts or penal and custodial authorities.[47]

The possession of a controlled substance conviction was demonstrated by exhibits 8 and 9. Exhibit 8 is a stapled packet prepared by the district court clerk for Douglas County. The 10-page packet contains the information, a journal entry showing Alford was represented by counsel and pled no contest, a signed and stamped order by the trial judge sentencing Alford to probation, and a similar document sentencing Alford to 1 to 3 years' imprisonment after violating probation. The last page of the packet contains the seal of the court and a certification by the deputy clerk that the "above and foregoing is a true [a]nd correct copy as the same appears fully upon the Records and files of this Court now in my charge."

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[44] See, *State v. Robinson, supra* note 29; *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

[45] See *State v. Hall*, 270 Neb. 669, 708 N.W.2d 209 (2005).

[46] *State v. Coffman*, 227 Neb. 149, 416 N.W.2d 243 (1987).

[47] *State v. Thomas, supra* note 44.

Exhibit 9 is a "pen packet" providing the date Alford was sentenced on the possession charge, the date received, the date discharged, and the classification of the offense. It contains photographs and fingerprints identifying Alford as the subject of the commitment. The certificate of discharge shows that Alford was committed on September 24, 2002, and discharged on November 8, 2003. Exhibit 9 contains a signed letter stating that the information was kept in the normal course of business of the Department of Correctional Services. Attached also is a certification by the records custodian of the central records office, and further certified by the Secretary of State, that the copies were full, true, and correct reproductions of the originals on file.

The federal possession of ammunition charge was demonstrated by exhibits 10 and 11. Exhibit 10 contains 43 pages of various documents pertaining to Alford's agreement with the U.S. District Attorney to plead guilty to being a felon in possession of ammunition.[48] It includes the plea agreement, file stamped and certified by the deputy clerk as an accurate copy and signed by Alford and his counsel. The judge's minutes, certified by the deputy clerk as a copy of a document electronically filed, show Alford's guilty plea, with the appearance of defense counsel, and the court's acceptance of that plea. A judgment of guilt and sentence to 37 months' imprisonment is found in a six-page order "signed" with the judge's typed name and certified by the deputy clerk as a printed copy of an electronic filing. Another document in exhibit 10 shows that Alford was remanded to the custody of the U.S. Marshal for a prison term of 37 months. This document of imprisonment is signed by the warden and contains a file stamp of the district court and a certification by the deputy clerk.

Exhibit 11 is the "pen packet" for the felon in possession of ammunition charge, which is similar to the pen packet for the possession of a controlled substance conviction. The packet is preceded by a signed "Certificate of Record" by the "Custodian of Records" that "the following and attached records are true and correct copies of records of [the Federal

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[48] 18 U.S.C. § 922(g)(1) (2006).

Correctional Institution].” Underneath the signature of the “Custodian of Records” is the title of “Supervisory Inmate Systems Specialist.”

[21] Alford first argues that all of the above is insufficient proof of his prior convictions because there is no signature reflecting the court’s “‘[r]endition’” of the judgments.[49] While we have at times said that the evidence of a prior conviction must reflect a court’s “act of rendering judgment,”[50] we have not been referring to the requirements for a final, appealable order under Neb. Rev. Stat. § 25-1301 (Reissue 2008). Section 25-1301 does require a judge’s signature and the file stamp before the judgment is considered rendered and final. But in our reference to “rendering judgment,” we have referred instead to Neb. Rev. Stat. § 27-901 (Reissue 2008), which sets forth the requirement of authentication or identification.[51] In *State v. Thomas*, we indicated that there is no requirement—for purposes of enhancement—that a judge’s signature appear on a judgment of conviction.[52]

Alford also argues that the form of the authentication or identification of the prior convictions is lacking. Alford takes issue with the fact that there was no certification on the actual page of the judge’s minutes for the possession of a controlled substance charge. He complains that the federal certification “only attests to the fact that the document was filed in the U.S. District Court for the District of Nebraska.”[53] He also has several issues with the federal pen packet, arguing that “the inmate systems manager may not be the proper person to certify the authenticity of United States District Court records,”[54] that the signature is signed in a different-colored ink than the rest of the document, that the signature of acknowledgment of receipt

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[49] Brief for appellee on cross-appeal at 35.

[50] *State v. Linn*, 248 Neb. 809, 812, 539 N.W.2d 435, 438 (1995).

[51] See *id.*

[52] *State v. Thomas, supra* note 44. See, also, *State v. Gales, supra* note 28; *State v. Linn, supra* note 50; *State v. Fletcher*, 8 Neb. App. 498, 596 N.W.2d 717 (1999).

[53] Brief for appellee on cross-appeal at 37.

[54] *Id.* at 38.

is missing, and that the date and signature of the warden are missing. We find the documents sufficiently authenticated to serve as evidence demonstrating the prerequisite convictions by a preponderance of the evidence.

In reviewing criminal enhancement proceedings, a judicial record of this state, or of any federal court of the United States, may be proved by the production of the original or by a copy thereof, certified by the clerk or the person having the legal custody thereof, and authenticated by his or her seal of office, if he or she has one.[55] The seals and certifications purport to be by a person having legal custody of the documentation and serve as prima facie evidence that they are, absent evidence to the contrary. And nowhere is it required that the certification be on every single page of a document when it is clear that the certification refers to several pages. Finally, we find the attestation that the federal documents were filed in the U.S. District Court for the District of Nebraska to be sufficient.

(h) Excessive Sentence

Finally, Alford argues that his sentence was excessive. Alford argues that the Legislature has expressed a sentencing policy in favor of probation and, without any specific examples, asserts that his sentence was greater than sentences imposed on other defendants convicted of assault by a confined person. Assault by a confined person is punishable as a Class IIIA felony[56] with an authorized sentencing range from 0 to 5 years' imprisonment.[57] But a person found to be a habitual criminal under § 29-2221(1) must be sentenced to a minimum prison term of 10 years, with a maximum term of not more than 60 years. Alford was sentenced to 10 to 36 years' imprisonment. The court specifically found imprisonment was necessary for the protection of the public, because Alford would likely engage in additional criminal conduct if placed on probation and because a lesser sentence will depreciate the seriousness of the offense or promote disrespect for the law.

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[55] *State v. Thomas, supra* note 44.

[56] § 28-932(1).

[57] Neb. Rev. Stat. § 28-105(1) (Reissue 2008).

[22,23] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.[58] Whether probation or incarceration is ordered is likewise a choice within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion.[59] We conclude that the trial court did not abuse its discretion in sentencing Alford to 10 to 36 years' imprisonment.

VI. CONCLUSION

We remand the cause with directions to the trial court to vacate the credit for time served. In all other respects, we affirm the conviction and sentence.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., not participating.

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[58] *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007).

[59] *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001).

STATE OF NEBRASKA, APPELLEE, V.
LARRY WILLIAMS, APPELLANT.
774 N.W.2d 384

Filed November 6, 2009. No. S-08-1220.

1. **Double Jeopardy.** The Double Jeopardy Clauses of both the federal and the Nebraska Constitutions protect a defendant against a second prosecution for the same offense after an acquittal or conviction.
2. ____. A state may not put a defendant in jeopardy twice for the same offense.
3. **Double Jeopardy: Juries.** In a case tried to a jury, jeopardy attaches when the jury is impaneled and sworn.
4. **Double Jeopardy: Motions for Mistrial.** A mistrial does not automatically terminate jeopardy, because a trial can be discontinued when particular circumstances manifest a necessity for doing so, and when failure to discontinue would defeat the ends of justice.
5. ____: ____. Double jeopardy does not arise if the State can demonstrate manifest necessity for a mistrial declared over the objection of the defendant.

6. **Double Jeopardy.** A determination of a nonfrivolous double jeopardy claim affects the substantial right not to be tried twice for the same offense.
7. **Double Jeopardy: Motions for Mistrial.** A mistrial entered without manifest necessity is the equivalent of an acquittal for purposes of double jeopardy analysis in that each terminates jeopardy without a finding of guilt.
8. **Constitutional Law: Statutes.** It is the duty of a court to give a statute an interpretation that meets constitutional requirements if it can reasonably be done.
9. **Double Jeopardy: Pleadings.** A plea in bar pursuant to Neb. Rev. Stat. § 29-1817 (Reissue 2008) may be filed to assert any nonfrivolous double jeopardy claim arising from a prior prosecution, including a claim that jeopardy was terminated by entry of a mistrial without manifest necessity.
10. **Courts: Appeal and Error.** The Nebraska Supreme Court, upon granting further review which results in the reversal of a decision of the Nebraska Court of Appeals, may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach.
11. **Motions for Mistrial: Juries: Appeal and Error.** The classic basis for a proper mistrial is the trial judge's belief that the jury is unable to reach a verdict. The trial judge's decision to declare a mistrial when he or she considers the jury deadlocked is therefore accorded great deference by a reviewing court.
12. **Motions for Mistrial: Appeal and Error.** Reviewing courts have an obligation to satisfy themselves that the trial judge exercised sound discretion in declaring a mistrial.
13. **Double Jeopardy: Motions for Mistrial: Juries.** Because a deadlocked jury is not the equivalent of an acquittal, a trial court's determination of a mistrial due to a deadlocked jury does not terminate the original jeopardy to which the defendant was subjected and, thus, retrial is not automatically prohibited by the Double Jeopardy Clause.
14. **Motions for Mistrial: Juries: Appeal and Error.** Several factors are to be considered in determining whether a trial judge has properly exercised discretion in granting a mistrial, including (1) a timely objection by the defendant, (2) the jury's collective opinion that it cannot agree, (3) the length of the deliberations of the jury, (4) the length of the trial, (5) the complexity of the issues presented to the jury, (6) any proper communications which the judge has had with the jury, and (7) the effects of possible exhaustion and the impact which coercion of further deliberations might have on the verdict. The most critical factor is the jury's own statement that it was unable to reach a verdict.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and SIEVERS and MOORE, Judges, on appeal thereto from the District Court for Buffalo County, WILLIAM T. WRIGHT, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

John H. Marsh, Deputy Buffalo County Public Defender, of Knapp, Fangmeyer, Aschwege, Besse & Marsh, P.C., for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

STEPHAN, J.

In this criminal proceeding, the district court declared a mistrial after the jury reported that it was unable to reach a unanimous verdict. Larry Williams, the defendant, filed a plea in bar alleging that further prosecution would subject him to double jeopardy in violation of his constitutional rights. The district court overruled the plea in bar, and Williams appealed. The Nebraska Court of Appeals dismissed the appeal for lack of jurisdiction. We granted Williams' petition for further review in order to address apparent tension between our holdings in *State v. Jackson*[1] and *State v. Rubio*[2] with respect to (1) whether a nonfrivolous double jeopardy claim following the declaration of a mistrial may be raised by a plea in bar and (2) if so, whether an order overruling such a plea in bar is final and appealable.

I. BACKGROUND

In June 2007, Williams was charged by amended information with one count of sexual assault of a child and six counts of first degree sexual assault. A jury trial commenced on October 1. During the second day of deliberations, the jury reported that it was deadlocked and unable to reach a verdict. The judge who had presided over the trial was unavailable, so another judge met with the jury. Neither Williams, his counsel, nor the prosecutor was present when the following colloquy occurred:

> THE COURT: . . . Without telling me anything with regard to the division of how the jury is divided or the way that it is divided, if the Court were to ask you to continue deliberations, do you feel that there is a

[1] *State v. Jackson*, 274 Neb. 724, 742 N.W.2d 751 (2007).

[2] *State v. Rubio*, 261 Neb. 475, 623 N.W.2d 659 (2001).

reasonable probability that you might yet be able to arrive at a verdict?

PRESIDING JUROR: No.

THE COURT: Is there anything further the Court could do to assist the jury on arriving at a verdict in your opinion, for instance, reading further jury instructions, rereading testimony, anything like that?

PRESIDING JUROR: Maybe some rereading of some testimony might help. I don't know.

THE COURT: Do you specifically have any idea what testimony?

PRESIDING JUROR: It would be the testimony of the defendant — not the defendant, the victim, may help, but I don't know.

THE COURT: You can't be certain of that, that a rereading will help?

PRESIDING JUROR: No.

THE COURT: I'll tell you the rereading of testimony in these circumstances is unusual and typically is not something the Court often chooses to do. There's a desire not to reemphasi[ze] any of the testimony of a particular witness.

You have now been deliberating a period of approximately nine hours; is that correct?

PRESIDING JUROR: Seven and a half maybe. We started at 11:30 yesterday until 5, so five and a half and then two today — not quite two.

THE COURT: Under the circumstances, I'm going to have to declare a mistrial, release the jury. Thank you very much for your service.

On November 16, 2007, Williams filed a "Plea in Abatement," alleging there was "a defect in the record shown by facts extrinsic thereto" in that a mistrial was declared without the presence of him or his counsel. The plea requested that the prosecution thus be abated. The district court overruled the plea, and Williams appealed. On August 4, 2008, in case No. A-08-067, the Court of Appeals summarily dismissed, finding that the denial of a plea in abatement is not a final, appealable order.

After remand from the Court of Appeals, Williams filed a plea in bar in the district court. Williams' plea in bar stated that he had "been placed in jeopardy" by a trial, that a mistrial had been declared, and that because the "mistrial was in error and an abuse of discretion," a second prosecution was "barred" and the matter should be dismissed. The district court overruled the plea in bar, finding that the declaration of the mistrial was supported by manifest necessity.

Williams again appealed to the Court of Appeals, and, on January 20, 2009, the court summarily dismissed the appeal with the following minute entry:

> Appeal dismissed. See Neb. Ct. R. App. P. § 2-107(A)(2). Appellant's plea in bar does not meet requirements of Neb. Rev. Stat. § 29-1817 (Reissue 2008) and does not allege further prosecution barred by the double jeopardy clauses of the federal or state constitutions. See State v. Jackson, 274 Neb. 724, 742 N.W.2d 751 (2007).

We granted Williams' petition for further review.

II. ASSIGNMENTS OF ERROR

In his petition for further review, Williams assigns, restated and consolidated, that the Court of Appeals erred in finding that his plea in bar was not a final, appealable order. In the underlying appeal, Williams assigns, restated and consolidated, that the trial court erred in failing to find that a retrial was barred by the principles of double jeopardy.

III. STANDARD OF REVIEW

Issues regarding the grant or denial of a plea in bar are questions 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]

A trial court's determination that a jury is deadlocked and thus a manifest necessity exists for discharging the jury and declaring a mistrial is reviewed for an abuse of discretion.[5]

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[3] *State v. Jackson, supra* note 1.

[4] *Id.*

[5] See *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986).

IV. ANALYSIS

1. Appellate Jurisdiction

(a) Scope of Double Jeopardy Clause

[1,2] The Double Jeopardy Clauses of both the federal and the Nebraska Constitutions protect a defendant against a second prosecution for the same offense after an acquittal or conviction.[6] Stated another way, "[a] State may not put a defendant in jeopardy twice for the same offense."[7] In *Arizona v. Washington*,[8] the U.S. Supreme Court explained why the declaration of a mistrial in a criminal prosecution may trigger the constitutional protection afforded by the Double Jeopardy Clause:

> Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's "valued right to have his trial completed by a particular tribunal." The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.[9]

[3-5] In a case tried to a jury, jeopardy attaches when the jury is impaneled and sworn.[10] However, a mistrial does not automatically terminate jeopardy, because "'a trial can be

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[6] See *State v. Dragoo*, 277 Neb. 858, 765 N.W.2d 666 (2009).

[7] *Arizona v. Washington*, 434 U.S. 497, 503, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978); *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

[8] *Arizona v. Washington, supra* note 7.

[9] *Id.*, 434 U.S. at 503-05.

[10] See *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

discontinued when particular circumstances manifest a necessity for doing so, and when failure to discontinue would defeat the ends of justice.'"[11] Double jeopardy does not arise if the State can demonstrate manifest necessity for a mistrial declared over the objection of the defendant.[12]

(b) Remedy and Review

[6] Neb. Rev. Stat. § 29-1817 (Reissue 2008) provides: "The accused may . . . offer a plea in bar to the indictment that he has before had judgment of acquittal, or been convicted, or been pardoned for the same offense . . . ." In *State v. Milenkovich*,[13] we held that the denial of a plea in bar which asserted an acquittal as the bar to subsequent prosecution for the same offense was a final, appealable order. In reaching that conclusion, we relied upon the holding of the U.S. Supreme Court in *Abney v. United States*[14] that "rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." The *Abney* Court reasoned that the protections of the Double Jeopardy Clause would necessarily be lost if an accused were required to stand trial a second time before seeking appellate review of a claim that the second trial constituted double jeopardy. In the context of a final order as defined by Neb. Rev. Stat. § 25-1902 (Reissue 1989), we concluded in *State v. Milenkovich*[15] that based upon *Abney*, "there is no question that a determination of a nonfrivolous double jeopardy claim affects the substantial right not to be tried twice for the same offense." We then concluded that a ruling on a plea in bar is made in a "special

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[11] *State v. Jackson, supra* note 1, 274 Neb. at 728, 742 N.W.2d at 756, quoting *Wade v. Hunter*, 336 U.S. 684, 69 S. Ct. 834, 93 L. Ed. 974 (1949).

[12] *Arizona v. Washington, supra* note 7; *State v. Jackson, supra* note 1; *State v. Marshall, supra* note 10.

[13] *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990).

[14] *Abney v. United States*, 431 U.S. 651, 660, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977).

[15] *State v. Milenkovich, supra* note 13, 236 Neb. at 48, 458 N.W.2d at 751.

proceeding," because § 29-1817 "authorizes a defendant to bring a special application to a court to enforce the defendant's constitutional right to avoid double jeopardy."[16]

In *State v. Lynch*,[17] we applied the *Milenkovich* rationale to a prisoner's claim that his criminal prosecution for escape was barred by a prior administrative disciplinary proceeding in which the evidence was found insufficient to establish his involvement in the escape. Rejecting the State's argument that we lacked jurisdiction to review the denial of the plea in bar prior to conclusion of the criminal case, we reasoned that because the plea in bar raised a double jeopardy claim, it was final and appealable.

Two more recent decisions of this court further frame the jurisdictional issue in this case. In *State v. Rubio*,[18] a defendant charged with drug-related offenses in state court filed a plea in bar. He asserted that the State was precluded from prosecuting him because federal charges arising out of the same activity had been voluntarily dismissed after he successfully sought suppression of certain evidence in federal court. The district court denied the plea in bar, and the Nebraska Court of Appeals affirmed. On further review, we framed the issue as "whether a plea in bar is the proper procedural device with which to raise a challenge based on the Supremacy Clause of the U.S. Constitution."[19] We concluded that we lacked jurisdiction because the defendant had not filed a "true plea in bar,"[20] as defined by § 29-1817, in that he had not alleged that he was previously acquitted, convicted, or pardoned; therefore, the order denying the purported plea in bar could not be considered final and appealable under *Milenkovich*.

More recently, in *State v. Jackson*,[21] we considered the merits of the defendant's claim that a retrial following the

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[16] *Id.*

[17] *State v. Lynch*, 248 Neb. 234, 533 N.W.2d 905 (1995).

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

[19] *State v. Rubio, supra* note 2, 261 Neb. at 477, 623 N.W.2d at 661.

[20] *Id.*

[21] *State v. Jackson, supra* note 1.

declaration of a mistrial would constitute double jeopardy. Neither the parties nor this court raised a jurisdictional issue, and we concluded that retrial would violate the defendant's constitutional right not to be placed twice in jeopardy, because the record did not demonstrate the manifest necessity of the mistrial.

Rubio did not present a colorable double jeopardy claim, because jeopardy had never attached. As we noted in the opinion, the defendant in Rubio did not assert that he had previously been acquitted, convicted, or pardoned. And, in fact, he had been subjected only to a suppression hearing in federal court, not to a full trial on the criminal charges. *Jackson*, on the other hand, presented a true double jeopardy claim, because jeopardy had attached to the defendant prior to the declaration of the mistrial. However, the double jeopardy claim which we found to be meritorious in *Jackson* did not result from an acquittal, conviction, or pardon within the meaning of § 29-1817. Thus, there is tension between *Rubio* and *Jackson* as to whether a "true plea in bar" may include only double jeopardy claims arising from an acquittal, conviction, or pardon, or whether a plea in bar may also be used to raise a nonfrivolous double jeopardy claim arising from the declaration of a mistrial.

A literal reading of the language of § 29-1817 would lead to the first conclusion, and there is some case law which would support this interpretation.[22] But were we to adopt this literal interpretation, there would be no remedy whereby a claim of double jeopardy resulting from a mistrial could be resolved before the retrial actually occurs, thereby effectively depriving the defendant of his constitutional right even if the double jeopardy claim is eventually found to have merit. The need for such a remedy forms the underlying rationale of *Abney v. United States*,[23] in which the U.S. Supreme Court noted that

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[22] See *Melcher v. State*, 109 Neb. 865, 192 N.W. 502 (1923) (holding issues which are proper subject of plea in abatement cannot be raised by plea in bar).

[23] *Abney v. United States, supra* note 14, 431 U.S. at 662.

the essential guarantee of the Double Jeopardy Clause would be lost

> if the accused were forced to "run the gauntlet" a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit.

[7,8] In *Milenkovich*, we noted that state courts had reached differing conclusions as to whether *Abney* established a federal constitutional requirement of immediate review of double jeopardy claims. We did not reach the constitutional issue because we concluded that § 29-1817 "authorizes a defendant to bring a special application to a court to enforce the defendant's constitutional right to avoid double jeopardy"[24] and that the denial of such an application constituted a final, appealable order. A mistrial entered without manifest necessity is the equivalent of an acquittal for purposes of double jeopardy analysis in that each terminates jeopardy without a finding of guilt. Were we to narrowly interpret § 29-1817 as authorizing a special application to enforce some but not all colorable double jeopardy claims based upon a previous prosecution, a constitutional question could arise. State procedural and evidentiary rules construed and applied in an illogical manner have been held to violate a criminal defendant's federal constitutional rights.[25] It is the duty of a court to give a statute an interpretation that meets constitutional requirements if it can reasonably be done.[26]

[9] We therefore hold that a plea in bar pursuant to § 29-1817 may be filed to assert any nonfrivolous double jeopardy claim arising from a prior prosecution, including a claim that jeopardy was terminated by entry of a mistrial without manifest necessity. To the extent that language in *Rubio* is inconsistent

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[24] *State v. Milenkovich, supra* note 13, 236 Neb. at 48, 458 N.W.2d at 751.

[25] See, e.g., *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006); *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

[26] *State v. Arterburn*, 276 Neb. 47, 751 N.W.2d 157 (2008).

with this holding, it is disapproved. We construe Williams' plea in bar as asserting a nonfrivolous double jeopardy claim based upon the mistrial declared after jeopardy had attached, and we conclude that the order overruling the plea in bar was a final, appealable order which we have jurisdiction to review.

2. Merits

[10] This court, upon granting further review which results in the reversal of a decision of the Nebraska Court of Appeals, may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach.[27] In the interest of judicial economy, we address the substantive issues raised by Williams' double jeopardy claim which were not reached by the Court of Appeals due to its conclusion that it lacked jurisdiction to do so.

As we have noted, double jeopardy does not arise if the State can demonstrate manifest necessity for a mistrial declared over the objection of the defendant. While "'[t]he words "manifest necessity" appropriately characterize the magnitude of the prosecutor's burden,'" the words "'do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge.'"[28] There are "'degrees of necessity,'" and a "'"high degree"'" is required before a court can conclude that a mistrial is appropriate.[29]

[11-13] The "'classic basis'" for a proper mistrial is the trial judge's belief that the jury is unable to reach a verdict.[30] The trial judge's decision to declare a mistrial when he or she considers the jury deadlocked is therefore accorded great deference by a reviewing court.[31] Reviewing courts have an obligation to satisfy themselves that the trial judge exercised

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[27] *State v. Davlin*, 265 Neb. 386, 658 N.W.2d 1 (2003).

[28] *State v. Jackson, supra* note 1, 274 Neb. at 728-29, 742 N.W.2d at 756, quoting *Arizona v. Washington, supra* note 7.

[29] *Id.* at 729, 742 N.W.2d at 756, quoting *Arizona v. Washington, supra* note 7.

[30] *Id.*

[31] *Arizona v. Washington, supra* note 7.

sound discretion in declaring a mistrial.[32] But our narrow scope of review in this instance is tempered by significant policy considerations articulated by the U.S. Supreme Court in *Arizona v. Washington*:[33]

> If retrial of the defendant were barred whenever an appellate court views the "necessity" for a mistrial differently from the trial judge, there would be a danger that the latter, cognizant of the serious societal consequences of an erroneous ruling, would employ coercive means to break the apparent deadlock. Such a rule would frustrate the public interest in just judgments. The trial judge's decision to declare a mistrial when he considers the jury deadlocked is therefore accorded great deference by a reviewing court.

Because a deadlocked jury is not the equivalent of an acquittal, a trial court's determination of a mistrial due to a deadlocked jury does not terminate the original jeopardy to which the defendant was subjected and, thus, retrial is not automatically prohibited by the Double Jeopardy Clause.[34]

Williams argues that the trial judge's conversation concerning the deadlock with the jury foreman was an ex parte communication which bars his retrial under *Strasheim v. State*.[35] In that case, the trial judge conducted a colloquy with the jury about its reported inability to reach a verdict, during which the defendant and his counsel were not present. The judge made a statement to the jury regarding the importance of reaching a verdict which expanded upon the jury's role in the criminal justice system. The jury then resumed its deliberations and later returned a verdict of guilty. On appeal, the defendant argued that he had a right to be present when the judge addressed the jury about its deadlock. We agreed, found that prejudicial error had occurred, and reversed the

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[32] *State v. Jackson, supra* note 1.

[33] *Arizona v. Washington, supra* note 7, 434 U.S. at 509-10. See, also, *State v. Bostwick, supra* note 5.

[34] *Richardson v. United States*, 468 U.S. 317, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984); *State v. Bostwick, supra* note 5.

[35] *Strasheim v. State*, 138 Neb. 651, 294 N.W. 433 (1940).

conviction and remanded the cause for further proceedings. Because no mistrial was declared and no double jeopardy issue was presented, *Strasheim* is instructive but not determinative of this case.

Williams' primary argument is that because he and his counsel were not present when the jury reported that it was deadlocked and the judge declared a mistrial, he was deprived of his right to counsel at a critical stage of the proceeding and thus, there could be no manifest necessity for the mistrial. We note that unlike the Federal Rules of Criminal Procedure, Nebraska has no specific statute or rule requiring a trial court to involve the defendant and counsel in the decision of whether to declare a mistrial.[36] But *Strasheim* supports Williams' argument that he and his counsel should have been present when the trial judge addressed the jury about its reported deadlock and then declared a mistrial. We conclude that the trial judge erred in conducting the colloquy with the jury outside the presence of Williams, his counsel, and the prosecutor.

[14] The remaining question is whether this error automatically bars a retrial. We note that in *Strasheim*, the error resulted in a reversal of the conviction and a remand of the cause to the district court for further proceedings. There was no indication in our opinion that jeopardy had terminated and the defendant could not be retried. But Williams argues that a similar error should automatically preclude his retrial. We reject this bright-line approach. In *State v. Bostwick*,[37] we employed a test utilized by the Ninth Circuit Court of Appeals in *Arnold v. McCarthy*,[38] in which several factors are to be considered in determining whether a trial judge has properly exercised discretion in granting a mistrial, including

> "(1) a timely objection by defendant, (2) the jury's collective opinion that it cannot agree, (3) the length of the deliberations of the jury, (4) the length of the trial, (5) the complexity of the issues presented to the jury, (6) any

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[36] Fed. R. Crim. P. 26(3).

[37] *State v. Bostwick, supra* note 5.

[38] *Arnold v. McCarthy*, 566 F.2d 1377 (9th Cir. 1978).

> proper communications which the judge has had with the jury, and (7) the effects of possible exhaustion and the impact which coercion of further deliberations might have on the verdict."[39]

"'[T]he most critical factor is the jury's own statement that it was unable to reach a verdict.'"[40]

In this case, the jury, through its presiding juror, declared that it was deadlocked and unable to reach a verdict after deliberating for approximately 7½ hours. The judge's substantive inquiries to the presiding juror were proper and elicited a response that there was not a reasonable probability that the jury could arrive at a verdict. When the judge asked if there was anything the court could do to assist the jury in concluding its task, and the presiding juror suggested that rereading the testimony of the victim might be helpful, the judge properly indicated that this would not be permissible. Because Williams and his counsel were not present, Williams did not have an opportunity to object when the judge stated that he would declare a mistrial. But even if Williams, his counsel, and the prosecutor had been present and either counsel had objected, the record would support the declaration of a mistrial over such objection, because the judge's opinion that the jury was hopelessly deadlocked is supported by the record. Thus, taking into consideration the relevant factors, we conclude that although the judge erred in not having the parties and counsel present during his colloquy with the jury regarding its inability to reach a verdict, the court did not abuse its discretion in ordering the mistrial. Accordingly, jeopardy did not terminate and retrial is not barred by principles of double jeopardy.

V. CONCLUSION

For the reasons discussed, we reverse the judgment of the Court of Appeals and remand the cause to that court with directions to (1) affirm the order of the district court overruling

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[39] *State v. Bostwick, supra* note 5, 222 Neb. at 646, 385 N.W.2d at 916, quoting *Arnold v. McCarthy, supra* note 38.

[40] *Id.*

Williams' plea in bar and (2) remand the cause to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
TODD A. RUNG, APPELLANT.
774 N.W.2d 621

Filed November 13, 2009. No. S-08-878.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Constitutional Law: Statutes: Legislature: Intent.** All reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature.
4. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
5. **Constitutional Law: Equal Protection: Statutes: Presumptions: Proof.** Where a statute is challenged under the Equal Protection Clause, the general rule is that legislation is presumed to be valid, and the burden of establishing the unconstitutionality of the statute is on the one attacking its validity.
6. **Equal Protection.** The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike.
7. **Equal Protection: Proof.** The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action. Absent this threshold showing, one lacks a viable equal protection claim. In other words, the dissimilar treatment of dissimilarly situated persons does not violate equal protection rights.
8. **Equal Protection: Statutes.** In an equal protection challenge to a statute, the level of judicial scrutiny applied to a particular classification may be dispositive.
9. **Constitutional Law: Statutes.** Legislative classifications involving either a suspect class or a fundamental right are analyzed with strict scrutiny, and legislative classifications not involving a suspect class or fundamental right are analyzed using rational basis review.
10. ____: ____. Neb. Rev. Stat. § 28-320.02 (Reissue 2008) does not implicate speech regarding otherwise legal activity; it targets only speech used for the purpose of enticing a child to engage in illegal sexual conduct, and such speech is not protected by the First Amendment.

11. **Equal Protection: Statutes.** When a classification created by state action does not jeopardize the exercise of a fundamental right or categorize because of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.
12. **Constitutional Law: Statutes: Legislature: Intent.** Under rational basis review, an appellate court will uphold a classification created by the Legislature where it has a rational means of promoting a legitimate government interest or purpose. In other words, the difference in classification need only bear some relevance to the purpose for which the difference is made.
13. **Equal Protection: Proof.** Under the rational basis test, whether an equal protection claim challenges a statute or some other government act or decision, the burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification.
14. **Constitutional Law: Statutes: Appeal and Error.** As a general rule, in a challenge to the overbreadth and vagueness of a law, a court's first task is to analyze overbreadth.
15. **Constitutional Law: Statutes.** A statute is unconstitutionally overbroad and thus offends the First Amendment if, in addition to forbidding speech or conduct which is not constitutionally protected, it also prohibits the exercise of constitutionally protected speech.
16. ____: ____. A statute may be invalidated on its face only if its overbreadth is "substantial," i.e., when the statute is unconstitutional in a substantial portion of cases to which it applies.
17. ____: ____. In order to prevail upon a facial attack to the constitutionality of a statute, the challenger must show either that every application of the statute creates an impermissible risk of suppression of ideas or that the statute is "substantially" overbroad, which requires the court to find a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court.
18. **Constitutional Law: Criminal Law: Statutes.** The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.
19. **Constitutional Law: Statutes: Standing.** To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others.
20. ____: ____: ____. A court will not examine the vagueness of the law as it might apply to the conduct of persons not before the court.
21. ____: ____: ____. The test for standing to assert a vagueness challenge is the same whether the challenge asserted is facial or as applied.
22. **Sentences: Probation and Parole: Appeal and Error.** An order denying probation and imposing a sentence within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion.
23. **Judges: Words and Phrases.** The term "judicial abuse of discretion" means that 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.

24. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.
25. ____. In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
26. ____. 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.
27. **Sentences: Probation and Parole.** In considering a sentence of probation in lieu of incarceration, the court should not withhold incarceration if a lesser sentence would depreciate the seriousness of the offender's crime or promote disrespect for the law.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Shawn Elliott for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Todd A. Rung appeals his conviction for use of a computer to entice a child or a peace officer believed to be a child for sexual purposes, a violation of Neb. Rev. Stat. § 28-320.02 (Reissue 2008). Rung challenges the constitutionality of § 28-320.02 and asserts that his sentence is excessive. We reject Rung's constitutional challenges, and we affirm Rung's conviction and sentence.

STATEMENT OF FACTS

The State filed an information in the district court for Lancaster County charging Rung with a violation of § 28-320.02(1), which at that time provided:

> No person shall knowingly solicit, coax, entice, or lure (a) a child sixteen years of age or younger or (b) a peace officer who is believed by such person to be a child sixteen years of age or younger, by means of a computer . . . to engage in an act which would be in violation of section 28-319, 28-319.01, or 28-320.01 or subsection (1) or (2) of section 28-320.

Rung originally entered a plea of not guilty, but he moved for and was given permission to withdraw the plea so that he could file a motion to quash the information on the basis that § 28-320.02 was facially invalid.

In his motion to quash, Rung asserted that § 28-320.02 is unconstitutional on its face because it violates the Equal Protection Clauses of the U.S. and Nebraska Constitutions and because it is vague and overbroad, in violation of the 1st and 14th Amendments to the U.S. Constitution and article I, § 5, of the Nebraska Constitution. The district court overruled Rung's motion to quash.

With regard to the equal protection challenge, the court characterized Rung's equal protection argument as comparing persons who violate the enticement statute at issue, § 28-320.02, to persons who violate the sexual assault statutes, Neb. Rev. Stat. §§ 28-319, 28-319.01, and 28-320.01 (Reissue 2008). The court concluded that Rung did not meet the threshold showing required for an equal protection claim, because "persons addressed by § 28-320.02 are dissimilar from those persons addressed by § 28-319, § 28-319.01 or § 28-320.01. . . . [T]hey are not in all relevant aspects alike." With regard to the free speech challenge, the court concluded that § 28-320.02 "is narrowly tailored to achieve a legitimate governmental purpose (the protection of minors from adults seeking sexual relations)" and that "[t]here is no realistic danger that the enforcement of § 28-320.02 will significantly compromise recognized First Amendment protections of persons not currently before the court or will cause persons to refrain from exercising constitutionally protected expression for fear of criminal sanctions." The court further concluded that Rung did not have standing to raise a vagueness challenge to § 28-320.02, because the

conduct in which he was alleged to have been engaged was clearly proscribed by the statute.

After the court overruled his motion to quash, Rung waived his right to a jury trial. The case was tried to the bench on stipulated evidence which included police reports and a copy of the screen profile used online by the undercover police officer.

The police reports indicated that on the morning of October 10, 2007, Rung conversed in an online chat room with a police officer who was posing as a girl with the screen name "tendogurl." Rung, who was 37 years old at the time, asked "tendogurl" her age; she responded that she was 15 years old. He asked whether she had been with older men and whether she was willing to meet offline. Rung asked "tendogurl" for a picture of herself, and the police officer sent a picture of a female police officer that was taken when she was 15 years old. Rung sent "tendogurl" nude pictures of himself.

Rung arranged a meeting with "tendogurl" so that they could "get naked and fuck." Rung also asked about oral sex and whether he could take pictures during their encounter. Rung arranged to meet with "tendogurl" that afternoon. Police arrested Rung after he arrived at the designated park and approached an undercover female police officer. During an interview in which Rung waived his *Miranda* rights, Rung admitted that he believed he was conversing with a 15-year-old girl and that he planned to meet the girl in order to have sexual intercourse with her.

Rung renewed his motion to quash, and the court took the motion under advisement pending its review of the evidence. Following its review of the evidence, the court overruled Rung's renewed motion to quash and found him guilty of violating § 28-320.02(1)(b). The court sentenced Rung to imprisonment for 1 to 2 years and ordered him to be subject to the requirements of Nebraska's Sex Offender Registration Act.

Rung appeals his conviction and sentence.

ASSIGNMENTS OF ERROR

Rung asserts that the district court erred in failing to find § 28-320.02 facially invalid because (1) it violates the Equal

Protection Clauses of the U.S. and Nebraska Constitutions and (2) it is vague and overbroad, in violation of the 1st and 14th Amendments to the U.S. Constitution and article I, § 5, of the Nebraska Constitution. Rung also asserts that the court imposed an excessive sentence.

STANDARDS OF REVIEW

[1-3] Whether a statute is constitutional is a question of law; accordingly, we are obligated to reach a conclusion independent of the decision reached by the court below. *In re Interest of J.R.*, 277 Neb. 362, 762 N.W.2d 305 (2009). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Id.* All reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature. *Id.*

[4] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009).

ANALYSIS

Rung Misreads § 28-320.02.

Before addressing Rung's specific challenges to § 28-320.02, we note that his constitutional arguments are based in large part on an interpretation of the statute that we find to be erroneous. In sum, Rung argues that § 28-320.02 makes it a crime for a person to use a computer to entice a child 16 years of age or younger to engage in sexual conduct that may or may not be illegal if the person actually engaged in the sexual conduct with the child. We reject Rung's interpretation and find instead that § 28-320.02 criminalizes enticement only when the conduct in which the person seeks to engage would be illegal if the person actually engaged in the conduct.

Rung was charged under § 28-320.02(1), which at that time provided:

> No person shall knowingly solicit, coax, entice, or lure (a) a child sixteen years of age or younger or (b) a peace officer who is believed by such person to be a child sixteen

> years of age or younger, by means of a computer . . . to engage in an act which would be in violation of section 28-319, 28-319.01, or 28-320.01 or subsection (1) or (2) of section 28-320.

Relevant to Rung's arguments herein, we note that under § 28-319(1), "Any person who subjects another person to sexual penetration . . . when the actor is nineteen years of age or older and the victim is . . . *less than sixteen years of age* is guilty of sexual assault in the first degree" (emphasis supplied), and that under § 28-320.01(1), "A person commits sexual assault of a child in the second or third degree if he or she subjects another person *fourteen years of age or younger* to sexual contact and the actor is at least nineteen years of age or older" (emphasis supplied). The terms "sexual penetration" as used in § 28-319 and "sexual contact" as used in § 28-320.01 refer to specific types of sexual conduct as defined in Neb. Rev. Stat. § 28-318(5) and (6) (Reissue 2008).

Rung argues that § 28-320.02 criminalizes enticement of a child 16 years of age or younger to engage in any sort of sexual conduct, whether or not it would be illegal for the person to actually engage in such conduct with the child. As an example of the alleged scope of § 28-320.02, Rung asserts that a 19-year-old could be prosecuted under § 28-320.02 for using a computer to entice a 16-year-old to engage in "sexual penetration," even though under § 28-319, it would be illegal to engage in "sexual penetration" only if the child were less than 16 years of age. He also asserts by way of example that a 19-year-old could be prosecuted under § 28-320.02 for using a computer to entice a 15-year-old to engage in "sexual contact," even though under § 28-320.01, it would be illegal to engage in "sexual contact" only if the child were 14 years of age or younger.

Rung misreads § 28-320.02. By its terms, § 28-320.02 specifically refers to enticing a child "to engage in an act which would be in violation of section 28-319, 28-319.01, or 28-320.01 or subsection (1) or (2) of section 28-320." Therefore, one can violate § 28-320.02 only if the contemplated sexual conduct would be in violation of one of the specified statutes. If one uses a computer to entice a person 16 years

of age or younger to engage in an act that would not be in violation of any of the specified statutes, then that person has not violated § 28-320.02. We conclude that Rung's reading of the statute is erroneous, and we evaluate Rung's constitutional challenges with our proper understanding.

Rung Has Not Shown That § 28-320.02 Violates Equal Protection Standards.

Rung first asserts that the district court erred by failing to find that § 28-320.02 is facially invalid because it violates the Equal Protection Clauses of the U.S. and Nebraska Constitutions. He argues that the statute infringes on fundamental rights of free speech and sexual privacy. He also argues that the statute violates equal protection because it imposes on a person who entices a police officer believed to be a child the same punishment that other statutes impose on a person who actually engages in sexual contact with a real child. We reject Rung's arguments and conclude that the court did not err when it concluded that § 28-320.02 does not violate the Equal Protection Clauses of the U.S. and Nebraska Constitutions.

[5,6] Where a statute is challenged under the Equal Protection Clause, the general rule is that legislation is presumed to be valid, and the burden of establishing the unconstitutionality of the statute is on the one attacking its validity. *In re Interest of J.R.*, 277 Neb. 362, 762 N.W.2d 305 (2009). The Equal Protection Clause of the 14th Amendment, § 1, mandates that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike. See *In re Interest of J.R., supra*.

[7] The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action. Absent this threshold showing, one lacks a viable equal protection claim. *Id*. In other words, the dissimilar treatment of dissimilarly situated persons does not violate equal protection rights. *Id*.

[8,9] In an equal protection challenge to a statute, the level of judicial scrutiny applied to a particular classification may be dispositive. *Id.* Legislative classifications involving either a suspect class or a fundamental right are analyzed with strict scrutiny, and legislative classifications not involving a suspect class or fundamental right are analyzed using rational basis review. *Id.*

Rung argues that § 28-320.02 classifies and treats differently those who seek out sexual partners using a computer as compared to those who seek out sexual partners by "more readily accepted venues" such as "a school, a work place, a social club, a church, or a dating service." Brief for appellant at 19. Rung does not attempt to argue that such classification targets a suspect class. Instead, he argues that the classification should receive strict scrutiny because it jeopardizes the exercise of fundamental rights, namely the rights to free speech and sexual privacy.

Rung concedes that speech to promote criminal activity is not protected speech. In *U.S. v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000), the U.S. Court of Appeals for the Sixth Circuit stated that a defendant "simply does not have a First Amendment right to attempt to persuade minors to engage in illegal sex acts." In *U.S. v. Meek*, 366 F.3d 705, 721 (9th Cir. 2004), the U.S. Court of Appeals for the Ninth Circuit held that no otherwise legitimate speech was jeopardized by a statute criminalizing inducement of minors for illegal sexual activity because "speech is merely the vehicle through which a pedophile ensnares the victim." Various state courts considering statutes similar to § 28-320.02 have also rejected First Amendment challenges on the basis that speech to entice a minor to engage in illegal sexual activity is not speech protected by the First Amendment. See, *Podracky v. Com.*, 52 Va. App. 130, 662 S.E.2d 81 (2008); *State v. Colosimo*, 122 Nev. 950, 142 P.3d 352 (2006); *State v. Backlund*, 672 N.W.2d 431 (N.D. 2003). See, also, *People v. Foley*, 94 N.Y.2d 668, 731 N.E.2d 123, 709 N.Y.S.2d 467 (2000) (regarding statute criminalizing dissemination of indecent material to minors).

[10] Although Rung concedes this point, he asserts that § 28-320.02 restricts speech regarding activity that is not

criminal. He argues that § 28-320.02 is not narrowly drawn to prohibit speech using a computer to entice a child to engage in sexual acts legitimately prohibited by law. Rung's argument is based on his misreading of § 28-320.02. As we discussed above, one can violate § 28-320.02 only by enticing for purposes that, if achieved, would be in violation of one of the specified statutes. Therefore, § 28-320.02 does not implicate speech regarding otherwise legal activity; it targets only speech used for the purpose of enticing a child to engage in illegal sexual conduct, and we agree with the authorities cited above that such speech is not protected by the First Amendment.

Rung also argues that § 28-320.02 should receive strict scrutiny because it jeopardizes the exercise of a fundamental right to sexual privacy recognized by the U.S. Supreme Court in *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003). However, we have held that "when a law regulates sexual conduct involving a minor, *Lawrence* is inapplicable." *State v. Senters*, 270 Neb. 19, 24, 699 N.W.2d 810, 816 (2005). The statute in this case, § 28-320.02, is geared toward enticement of minors to engage in sexual conduct that would violate specified statutes, and as such, § 28-320.02 does not jeopardize the fundamental right recognized in *Lawrence*.

[11-13] Because Rung asserts no suspect classification and because the statute does not jeopardize a fundamental right, the classification in § 28-320.02 is subject to a rational basis review for equal protection purposes. When a classification created by state action does not jeopardize the exercise of a fundamental right or categorize because of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest. *Citizens for Eq. Ed. v. Lyons-Decatur Sch. Dist.*, 274 Neb. 278, 739 N.W.2d 742 (2007). Under rational basis review, we will uphold a classification created by the Legislature where it has a rational means of promoting a legitimate government interest or purpose. *In re Interest of J.R.*, 277 Neb. 362, 762 N.W.2d 305 (2009). In other words, the difference in classification need only bear some relevance to the purpose for which the difference is made. *Id*. Under the rational basis test,

whether an equal protection claim challenges a statute or some other government act or decision, the burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification. *Id.*

Rung argues that § 28-320.02 classifies based on the means by which one seeks out sexual partners and punishes those who use a computer but not those who use other means. We conclude that this classification rationally furthers a legitimate state interest. The State has a legitimate interest in preventing the sexual exploitation of children, and the Legislature rationally could have found that the use of a computer was a particularly effective method for those seeking to engage in prohibited sexual activities to find and entice children.

Rung also argues that § 28-320.02 violates equal protection because it imposes on a person who entices a police officer believed to be a child to engage in sexual contact the same punishment that other statutes impose on a person who actually engages in sexual contact with a real child. Whether or not the basis of this argument is correct, as noted above, the Equal Protection Clause "simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike." *In re Interest of J.R.*, 277 Neb. at 382, 762 N.W.2d at 322. Equal protection prevents a government from treating similarly situated persons differently, but it does not prevent government from treating differently situated persons similarly, nor does it prevent the State from imposing similar punishment for different crimes. Rung's argument in this respect does not state an equal protection claim, and we reject it.

We conclude that Rung has not met his burden to show that § 28-320.02 violates equal protection standards. The district court did not err in rejecting Rung's challenge to the statute.

Rung Has Not Shown That § 28-320.02 Is Vague and Overbroad.

Rung next asserts that the district court erred when it rejected his claim that § 28-320.02 is facially invalid because it is vague and overbroad in violation of the 1st and 14th Amendments to the U.S. Constitution and article I, § 5, of the Nebraska

Constitution. Rung claims that the statute is overbroad because it targets speech regarding acts that would not otherwise be illegal and that it is vague because it fails to define the crime with sufficient definiteness. We reject Rung's arguments and conclude that the court did not err when it concluded that § 28-320.02 is neither vague nor overbroad.

[14-17] As a general rule, in a challenge to the overbreadth and vagueness of a law, a court's first task is to analyze overbreadth. *State v. Hookstra*, 263 Neb. 116, 638 N.W.2d 829 (2002). A statute is unconstitutionally overbroad and thus offends the First Amendment if, in addition to forbidding speech or conduct which is not constitutionally protected, it also prohibits the exercise of constitutionally protected speech. *State v. Rabourn*, 269 Neb. 499, 693 N.W.2d 291 (2005). A statute may be invalidated on its face, however, only if its overbreadth is "substantial," i.e., when the statute is unconstitutional in a substantial portion of cases to which it applies. *Id*. Stated another way, in order to prevail upon a facial attack to the constitutionality of a statute, the challenger must show either that every application of the statute creates an impermissible risk of suppression of ideas or that the statute is "substantially" overbroad, which requires the court to find a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court. *Id*.

Rung argues that § 28-320.02 is overbroad because it targets speech regarding acts that would not otherwise be illegal. This argument, similar to other arguments by Rung, is based on his misreading of the statute. As we discussed above, § 28-320.02 criminalizes enticement only when the person entices a child to engage in an act that would be in violation of one of the specified statutes. Rung's argument is therefore without merit, and we reject his assertion that § 28-320.02 is unconstitutionally overbroad.

[18-21] The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *State v. Faber*, 264 Neb. 198, 647 N.W.2d

67 (2002). To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others. *Faber, supra*; *Hookstra, supra*. A court will not examine the vagueness of the law as it might apply to the conduct of persons not before the court. *Faber, supra.* The test for standing to assert a vagueness challenge is the same whether the challenge asserted is facial or as applied. *Id.*

We conclude that the district court in this case was correct to conclude that Rung did not have standing to challenge § 28-320.02 for vagueness, because the conduct with which Rung was charged is clearly prohibited by § 28-320.02. Rung was charged and convicted of using a computer to entice a police officer he believed to be a 15-year-old girl to engage in sexual penetration. Subjecting a girl under 16 years of age to sexual penetration is a violation of § 28-319. Enticing an officer believed to be a girl under 16 years of age to engage in sexual penetration clearly falls within the prohibition of § 28-320.02.

Although we conclude that Rung lacks standing to challenge § 28-320.02 for vagueness, we note for completeness that Rung again bases his argument on his assertion that the statute could be interpreted to apply to enticement to engage in conduct that would not be illegal. As noted above, Rung misreads § 28-320.02, and his argument is without merit.

Rung has not met his burden to show that § 28-320.02 is unconstitutionally vague or overbroad, and we therefore conclude that the district court did not err in rejecting his challenge.

The District Court Did Not Impose an Excessive Sentence on Rung.

Rung finally asserts that the district court imposed an excessive sentence. We conclude that Rung's sentence is within statutory limits and that the court did not abuse its discretion by imposing the sentence.

Rung was convicted of use of a computer to entice a child or a peace officer believed to be a child for sexual purposes, which

at the time was a Class IIIA felony under § 28-320.02(2). The maximum sentence of imprisonment for a Class IIIA felony is 5 years. Neb. Rev. Stat. § 28-105 (Reissue 2008). Therefore, Rung's sentence of imprisonment for 1 to 2 years is within statutory limits.

Rung argues that the district court abused its discretion by failing to sentence him to probation rather than imprisonment. He asserts that probation would have been a more appropriate punishment, because he had no prior criminal history of sex offenses or violent crimes and the offense for which he was convicted did not involve an actual victim because he corresponded with a police officer posing as a 15-year-old girl.

[22-27] An order denying probation and imposing a sentence within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion. *State v. Nelson*, 276 Neb. 997, 759 N.W.2d 260 (2009). The term "judicial abuse of discretion" means that 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. *Id.* When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime. *Id.* In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.* In considering a sentence of probation in lieu of incarceration, the court should not withhold incarceration if a lesser sentence would depreciate the seriousness of the offender's crime or promote disrespect for the law. *Id.*

In sentencing Rung, the district court indicated its concern that the sentence should not depreciate the seriousness of the offense. The court commented to the effect that the offense was serious because of the potential harm to children when

adults "go onto the computer and . . . try to entice children to engage in acts of sexual conduct." Rung argues that no child was harmed. However, the evidence indicates that Rung fully intended to subject a person he believed to be a 15-year-old girl to sexual penetration. Furthermore, although Rung had no prior history of sexual assaults, his criminal history included several other offenses over a period of almost 20 years. Considering these factors and considering that his sentence is at the lower end of the range of up to 5 years in prison that he could have received, we conclude that the district court did not abuse its discretion by sentencing Rung to imprisonment for 1 to 2 years.

CONCLUSION

We conclude that the district court did not err when it rejected Rung's constitutional challenges to § 28-320.02 on the basis that the statute is facially invalid either because it is a violation of the Equal Protection Clause or because it is vague or overbroad. We further conclude that the court did not abuse its discretion by sentencing Rung to imprisonment for 1 to 2 years. We therefore affirm Rung's conviction and sentence.

AFFIRMED.

McCORMACK, J., participating on briefs.

IN RE INTEREST OF HOPE L. ET AL.,
CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V.
BENJAMIN L., APPELLANT, AND JOANNA L.,
APPELLEE AND CROSS-APPELLANT.
775 N.W.2d 384

Filed November 13, 2009. No. S-08-949.

1. **Juvenile Courts: 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.
2. **Evidence: Appeal and Error.** 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. **Appeal and Error.** 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.
4. **Parental Rights: Evidence: Appeal and Error.** Improper admission of evidence in a parental rights proceeding does not, in and of itself, constitute reversible error, for, as long as the appellant properly objected, an appellate court will not consider any such evidence in its de novo review of the record.
5. **Parental Rights: Courts: Evidence.** A court is not prohibited from considering prior events when determining whether to terminate parental rights.
6. **Parental Rights: Juvenile Courts.** Reasonable efforts to reunify a family are required under the juvenile code only when termination of parental rights is sought under Neb. Rev. Stat. § 43-292(6) (Reissue 2008).
7. **Parental Rights: Proof.** Under Neb. Rev. Stat. § 43-292 (Reissue 2008), in order to terminate parental rights, the State must prove, by clear and convincing evidence, that one or more of the statutory grounds listed in this section have been satisfied and that termination is in the child's best interests.
8. **Constitutional Law: Parental Rights.** The proper starting point for legal analysis when the State involves itself in family relations is always the fundamental constitutional rights of a parent.
9. **Parental Rights: Proof.** Before the State attempts to force a breakup of a natural family, over the objections of the parents and their children, the State must prove parental unfitness.
10. ____: ____. A court may not properly deprive a parent of the custody of his or her minor child unless the State affirmatively establishes that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right.
11. ____: ____. It is always the State's burden to prove by clear and convincing evidence that the parent is unfit and that the child's best interests are served by his or her continued removal from parental custody.
12. **Parental Rights: Statutes: Words and Phrases.** The term "unfitness" is not expressly used in Neb. Rev. Stat. § 43-292 (Reissue 2008), but the concept is generally encompassed by the fault and neglect subsections of that statute, and also through a determination of the child's best interests.
13. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.

Appeal from the Separate Juvenile Court of Lancaster County: REGGIE L. RYDER, Judge. Affirmed.

Scott E. Sidwell, of Legal Aid of Nebraska, for appellant.

Stephanie R. Hupp, of McHenry, Haszard, Hansen, Roth & Hupp, P.C., L.L.O., for appellee Joanna L.

Gary Lacey, Lancaster County Attorney, Alicia B. Henderson, and Michelle Clarke, Senior Certified Law Student, for appellee State of Nebraska.

Dalton W. Tietjen, of Tietjen, Simon & Boyle, guardian ad litem.

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

HEAVICAN, C.J.

I. INTRODUCTION

The parental rights of Benjamin L. (Ben) and Joanna L. to their four minor children, Hope L., Samuel L. (Sam), Xavier L., and Gracie L., were terminated. Ben appeals and Joanna cross-appeals that termination. We affirm the juvenile court's termination of parental rights.

II. FACTS

Ben and Joanna are the parents of Hope, born in October 2003; Sam, born in April 2005; Xavier, born in October 2006; and Gracie, born in February 2008. Xavier was removed from Ben and Joanna's custody on March 29, 2007, as a result of their arrests for the repeated disconnection of Xavier's feeding tube while he was hospitalized at Children's Hospital (Children's) in Omaha, Nebraska. Hope and Sam were removed from Ben and Joanna's custody the next day, March 30. Gracie was removed from Ben and Joanna's custody on February 29, 2008, shortly after her birth.

1. XAVIER'S PREMATURE BIRTH AND SUBSEQUENT HOSPITALIZATIONS

Xavier was born at approximately 27 weeks' gestation. By all accounts, Joanna's pregnancy with Xavier was difficult. During the pregnancy, Joanna was treated several times for dehydration. Joanna's obstetrician, Dr. Sean Kenney, utilized both "NG tube" and "J tube" feedings in an attempt to help Joanna keep food down and gain appropriate weight. An NG tube delivers nourishment directly to the stomach; a J tube

bypasses the stomach and delivers nourishment directly to the intestines.

According to Kenney's testimony, about 2 weeks after beginning the J tube feedings, Joanna stopped the feedings because she reported the feedings made her feel nauseous. However, because such feedings bypass the stomach, usually no nausea is experienced. Joanna was directed to restart the feedings, but did not do so. Joanna subsequently requested the removal of the J tube, but Kenney declined to remove it. Kenney testified that he did not want to remove the tube because, given Joanna's inability to gain weight, the tube might still be needed.

During Kenney's treatment of Joanna, he expressed concern that Joanna was suffering from an eating disorder. Joanna had spent much of her youth in various forms of treatment for anorexia nervosa. Kenney recommended more aggressive care, but because both Ben and Joanna denied that Joanna was suffering from an eating disorder, such treatment was refused. Joanna was eventually hospitalized on September 24, 2006, and remained so until Xavier's birth in October. During her hospital stay, Joanna still did not gain weight as expected. No medical reason could be found for this failure. However, on two occasions, a nurse discovered that Joanna's feeding tube had been disconnected. Kenney also testified that during this hospital stay, Ben and Joanna repeatedly stopped and restarted the tube feedings.

Following Xavier's birth in October 2006, he spent 2 months in the neonatal intensive care unit at St. Elizabeth Regional Medical Center in Lincoln, Nebraska (St. Elizabeth). According to one of Xavier's physicians, his medical course was uncomplicated while in the neonatal intensive care unit and Xavier gained weight appropriately.

Upon Xavier's discharge on December 23, 2006, Ben and Joanna were informed that some of Xavier's feedings needed to be supplemented with human milk fortifier. Ben and Joanna were provided a can of human milk fortifier containing a 2- to 3-week supply and were instructed on its use. Just 3 days later, however, Ben and Joanna indicated to Xavier's physician, Dr. Alicia Cruce, that they were not feeding Xavier as ordered.

Once home from St. Elizabeth, Xavier failed to appropriately gain weight. He was again admitted to St. Elizabeth on January 10, 2007. Due to Xavier's lack of weight gain, Cruce increased the number of fortified milk feedings from two per day to three per day. During this hospitalization, Xavier gained weight well. Xavier was discharged from the hospital on January 17, but by this time, Joanna had been admitted to St. Elizabeth for a purported flareup of Crohn's disease. Throughout these events, and in the medical records from this case, Joanna asserted that she has Crohn's disease; however, testing has determined it is unlikely that she has the disease.

While hospitalized, Joanna was treated with morphine for pain. As a result, Joanna was informed by a nurse assigned to her that she should not breastfeed and that she should "pump and dump" any breast milk she produced during the time she was on the morphine. According to the nurse, 12 percent of a morphine dose would be transmitted via the breast milk, or about twice the dosage a child of Xavier's age should receive. However, the nurse testified that he observed Joanna breastfeeding Xavier. Another nurse testified that she also saw Joanna apparently breastfeeding at a time when she was on morphine.

Despite indicating her understanding of the instruction to "pump and dump" the breast milk, Joanna kept 6 to 10 cups of what appeared to be breast milk, marked with her name and the word "morphine," in a common refrigerator located at St. Elizabeth. The milk was disposed of only after one of Cruce's medical partners was contacted. That doctor spoke with Joanna, then instructed nursing staff to pour the morphine-tainted milk down the sink.

Ben and Joanna deny that either was initially informed of the dangers of Joanna's breastfeeding Xavier while she was on morphine. Joanna testified that once she was informed that she should not breastfeed, she stopped doing so. Joanna testified that there was no intention to save the breast milk pumped while Joanna was on morphine, but that she and Ben believed that breast milk, whether or not it contained morphine, was a biohazard that had to be properly disposed of. According to both Ben and Joanna, special steps had to be taken at Children's to

dispose of such milk. However, several nurses, including Ben's mother, who is a licensed practical nurse in the St. Elizabeth neonatal intensive care unit, testified that at St. Elizabeth, the milk could simply be poured down the sink or toilet.

Joanna was subsequently discharged. But on January 30, 2007, Xavier was readmitted to St. Elizabeth for poor weight gain. That day, Ben and Joanna informed yet another nurse that they were only breastfeeding Xavier. That nurse testified that she asked about the fortified milk and that the parents avoided answering her question, but reaffirmed that Xavier was getting breast milk. However, Ben and Joanna later insisted to Cruce that Xavier was, in fact, getting the prescribed three bottles of fortified milk.

The next day, January 31, 2007, Cruce contacted Child Protective Services. Cruce expressed concern that Ben and Joanna were not adequately feeding Xavier, because he would gain weight in the hospital but not at home. Cruce could find no medical explanation for Xavier's continued lack of weight gain. Child Protective Services met with Joanna at St. Elizabeth on February 2 and obtained Joanna's signature on a safety plan which indicated she would follow doctors' orders regarding Xavier's feedings. Ben signed that same safety plan on February 9.

On February 16, 2007, Xavier was brought to St. Elizabeth with parental reports of diarrhea and vomiting. Dr. Michelle Walsh, a medical partner to Cruce, admitted Xavier to the hospital due to his low glucose levels. However, Walsh questioned Ben and Joanna's reporting, because diarrhea or vomiting will cause a drop in carbon dioxide levels and Xavier's levels were normal.

In an attempt to raise his glucose levels, Xavier was given fluids intravenously and blood was drawn and tested every 2 hours. After several hours, Xavier's glucose levels were still not acceptable. It was then reported to Walsh that Xavier's intravenous line had been disconnected on two separate occasions. Walsh testified that Xavier could not have disconnected it himself; that in Walsh's 10 years of practice, she had never seen a disconnect in a patient Xavier's age; and that in both

instances, Joanna was the only person in Xavier's room around the time of the disconnects.

During this hospitalization at St. Elizabeth, it was determined that Xavier suffered from hydrocephalus, or extra fluid in his brain. Xavier was transferred to Children's for treatment of the hydrocephalus and placement of a shunt. During this hospitalization at Children's, parental reports of vomiting and fussiness were made, but never confirmed or observed by Children's staff. Xavier was discharged on February 23, 2007, but readmitted on February 27 and 28 for surgery to repair an inguinal hernia.

A few days later, on March 2, 2007, Xavier was yet again admitted to Children's due to his failure to appropriately gain weight. Various tests were performed in an attempt to determine why Xavier was not gaining weight, but no medical reason could be found to explain this failure. During the course of this testing, an NG tube was placed. Such a tube runs through the nasal passages, down the back of the throat, and into the stomach. According to Dr. Jay Snow, one of Xavier's treating physicians at Children's, Xavier's condition was progressing toward the need to perform a "fundoplication," a surgery in which the top part of the stomach is wrapped around the esophagus, as well as placement of a "gastrostomy button" (G-button), before it was determined that Xavier's feedings were being interrupted.

On March 19, 2007, a 2-week feeding trial using the formula Neocate was begun and Xavier was fed via an NG tube. At the end of the tube were two ports: a main port and a side port. The tube is capped when not in use; when in use, the tube is connected via the main port to a bag containing formula (or whatever is being fed to the patient). The side port is generally used for administering medicine. Even before the beginning of this feeding trial, several nurses reported that the NG tube was being manipulated and that formula was leaking out of the tube or that "burp rags" were wet with reported emesis, or "spit up." Tests conducted on March 22 concluded that Xavier was starving. At that time, a decision was made to have a nurse present in Xavier's room at all times to monitor whether

Ben or Joanna were manipulating the feedings. During this time, nurses reported several instances in which it appeared that Xavier's NG tube was being manipulated. After 2 days, Children's ceased such monitoring and contacted the Omaha Police Department (OPD).

Beginning on March 29, 2007, OPD began conducting a video surveillance of Xavier's room. During the approximately 7 hours when the room was under surveillance, a detective with OPD observed Joanna disconnect Xavier's feeding tube 25 times and tamper with the tube another 12 times. The detective ceased surveillance and transported Joanna to OPD headquarters for questioning. During that questioning, Joanna admitted that she typically would disconnect Xavier's tube about eight times per day and let the tube drain for 10 to 15 minutes each time. Joanna admitted, contrary to the video evidence, that she had disconnected the tube only twice on that day. Joanna was specifically asked if she or Ben were giving Xavier any breast milk; she replied that they were not and that she was "saving it all."

Ben, who was not present in Xavier's room at the time of the surveillance, was also interviewed. Ben first indicated that he or Joanna would pour formula from the refrigerator onto the "burp rags" as evidence of Xavier's continued emesis. But Ben eventually acknowledged that the couple had disconnected the tube and drained food from it. Ben stated that the tube would be drained for up to an hour at a time.

In contrast to their statements to OPD, Ben and Joanna both testified at the termination hearing that they were adding breast milk back into the feeding tube using a syringe. Joanna also testified that she occasionally would breastfeed Xavier. Joanna indicated that they hid these actions from hospital staff. Ben testified that he and Joanna would occasionally present formula-soaked "burp rags" to the hospital staff and represent that it was Xavier's natural emesis in an attempt to stop the Neocate trial. Ben explained that he and Joanna were concerned because the Neocate contained corn, to which Ben claims Xavier was allergic.

Ben and Joanna were arrested for child abuse. Both eventually pleaded no contest to felony child abuse. Meanwhile,

Xavier remained at Children's for several days following the arrests of Ben and Joanna. During that time, Xavier showed steady weight gain, first on Neocate, then later, on another formula. All NG tube feedings were ceased only days after Xavier was removed from Ben and Joanna's custody. Since his discharge from Children's in April 2007, Xavier has been hospitalized one time, for treatment of a relatively common respiratory virus. Xavier has gained or maintained his weight since that time, and has since switched to a regular diet including whole milk. In addition, Xavier has had tubes placed in his ears and his shunt has been replaced. The ambulance was called on one occasion because Xavier was crying, coughing, and possibly having a seizure. Otherwise Xavier's office visits to Cruce have been for routine well-child checks or for seasonal-type illnesses.

There was testimony from several physicians about the effect on Xavier of the disconnection of the feeding tube. Snow testified that Xavier was being starved and that he would have had hunger pains. Snow further testified that children who are starved have developmental delays. He also testified that cognitive functioning can be affected. According to Snow, a younger infant is at greater risk for these problems. A pediatric gastroenterologist, who is a feeding and growth specialist from Children's, testified that a child Xavier's age who is starved suffers problems with brain development and with the immune system. Another doctor, also from Children's, testified that such starvation can cause mild to significant developmental delays and an increased risk of infection and that the younger the age, the greater the effect the starvation will have on a child.

2. Hope's Eating Issues and Failure To Thrive

Hope was born at full term following an uncomplicated pregnancy. Hope apparently gained weight appropriately until she was about 18 months of age. But beginning in the summer of 2004, Hope began to lose weight, and in January 2005, she was diagnosed with failure to thrive. Hope was referred to Children's. During a period of hospital observation, Hope was diagnosed with rotavirus and was fed at night by an NG

tube. Hope was discharged with the NG tube still in place, and her parents were instructed to follow up with the feeding and growth clinic at Children's. The clinic told Ben and Joanna that if the tube fell (or was pulled) out, they should wait a few days to see if Hope would eat appropriately before attempting to have the tube replaced. Contrary to this advice, on one occasion, the tube fell out and Hope was brought to the emergency room (ER) within 30 minutes to have the tube replaced.

In addition to the purported eating issues, Cruce testified as to Hope's medical problems in the summer and fall of 2005. Ben and Joanna reported that Hope was often constipated but, despite testing, this could never be confirmed. Conversely, Hope was often brought in with complaints of diarrhea.

Hope also had tubes placed in her ears and had her adenoids removed. Though Hope had had relatively few ear infections, these surgeries were performed on the basis of parental reports that Hope was continually pulling at her ears.

Hope's medical history also reveals several office visits in which parental reports did not match Cruce's observations. In October 2005, Hope was reported to be fussy, but Cruce observed that Hope was playing and running in circles during the visit. And in November, parental reports indicated that Hope had been fussy and had refused to drink any fluids for the prior 24 hours; Cruce observed that Hope was playful and that she drank 3 ounces of fluid. Later in November, Hope was brought in for a dog bite which turned out to be only a scratch.

In addition, in the spring of 2005, Cruce began seeing Hope for asthma symptoms, particularly wheezing. Cruce testified that, in fact, she heard no wheezing when examining Hope, but indicated that such was not unusual as parents often mistake upper airway noise for wheezing. But Hope was continually seen for wheezing despite being put on different treatments. A few months later, for the first time, Joanna indicated that the wheezing became worse when Hope would run. Cruce testified that in the nine visits in which she saw Hope, at least in part for wheezing complaints, on only one of those occasions was Hope actually wheezing.

Similar to Cruce's testimony regarding the November 2005 visit, Snow testified that in January 2005, Hope had been

admitted to Children's based upon reports that she had stopped eating 24 hours earlier. But within a short time after admission, Hope was eating pizza, drinking water, and found to have a wet diaper.

In early 2006, due to Hope's continued and apparent refusal to eat, she was again fed by an NG tube and later had a G-button placed. When compared with an NG tube, which can be placed bedside, the placement of a G-button is a surgical procedure.

As will be discussed below, Hope has been diagnosed with posttraumatic stress disorder (PTSD) as a result of the various medical interventions experienced by herself and members of her family. As for medical care, since removal from Ben and Joanna's custody, Hope has had no hospitalizations or ER visits. Hope has been to the doctor for well-child checks, for allergy/cold symptoms, and to have her G-button removed.

3. Sam's Eating Issues and Fundoplication

Sam was also born full term following an uncomplicated pregnancy. He was breastfed, and Ben and Joanna reported that he suffered from reflux. Because of Sam's reflux, Joanna, who was breastfeeding, began excluding foods from her diet. Eventually, Sam was diagnosed with milk soy protein intolerance. Sam had many medical contacts for the alleged reflux and for other issues. The record largely indicates that parental reports received from Joanna were not consistent, either with each other or with the symptoms being observed by the medical professionals providing Sam's care.

For example, on May 28, 2005, Sam saw Walsh for an appointment. At this time, no mention was made that Sam was suffering from constipation. Later that same day, Sam was brought to the ER because of a scratch on his eyelid. Again, during that visit, no mention was made of constipation. But 2 days later, on May 30, Sam was brought to the ER with a report that he had been constipated for the prior 4 weeks and had not had a bowel movement in 4 days. Testing revealed no signs of constipation. The next day, May 31, Sam was brought to Cruce's office with parental reports of projectile vomiting and having not had a bowel movement for 5 days.

On June 30, 2005, Sam was admitted to Children's as a result of parental reports of continuing reflux issues, though testing continued to reveal nothing medically wrong. During the patient admission process, Joanna, with Ben present, indicated that Sam had blood in his stools and provided stool samples which tested positive for blood. In fact, stool samples had been ordered for Sam, but none tested positive for blood, a fact of which Joanna was aware. As a result of this claim, Sam had a flexible sigmoidoscopy, a scope of the rectum and lower colon. The risks of this procedure include bleeding and infection, as well as risks inherent with general anesthesia.

Joanna also informed doctors at Children's that Sam had previously undergone an upper gastrointestinal test which was positive for reflux. However, Sam's upper gastrointestinal test was not positive for reflux, a fact which 1 month earlier, Ben and Joanna had admitted to an ER doctor.

Finally, Joanna informed doctors at Children's that Sam had had several instances of apnea. While Sam's apnea monitor had alerted on several occasions, the alerts were not true apnea alarms. In reality, Sam had had no apnea episodes, a fact of which Joanna had been informed prior to Sam's admission to Children's.

On July 11, 2005, Joanna reported to Cruce that Sam had not improved. Sam was then admitted to St. Elizabeth. During the admission process, Joanna again informed medical staff that Sam had previously had blood in his stools. During this admission, a metabolic workup was done which showed Sam was in a starvation state and had not been receiving proper nutrition. Several days later, while still at St. Elizabeth, Joanna reported that Sam was fussy and continuing to reflux half-strength breast milk. But the nursing staff reported that Sam was not fussy. During this hospitalization, Sam lost weight. However, no medical reason could be found for his fussiness or weight loss.

Sam was transferred to Children's on July 18, 2005, due to parental reports of continued fussiness and reflux. According to parental reports, the situation had not improved by July 20; however, Children's staff observed no fussiness or reflux. Despite this, on July 26, based in part upon the above information

provided by Joanna, a fundoplication was performed on Sam. This is major surgery which can cause scarring and can occasionally result in death. In connection with this surgery, a G-button was placed so that Sam could be burped after feedings. Subsequent to this surgery, the site of Sam's G-button became infected. Because of the G-button, Sam also experienced less time spent lying on his stomach and needed physical therapy as a result.

In the months following the fundoplication, Sam continued to have visits with Cruce, though none were for reflux concerns. Parental reports included continued fussiness and multiple watery stools, but nothing was found to explain such stools. In each instance where fussiness was complained of, Cruce reported the opposite: that Sam was happy, alert, and smiling. In one particular instance on December 15, 2005, it was reported that Sam was lethargic, retching, and could not hold his head up. Cruce noted none of that in her notes; to the contrary, Cruce noted Sam was "happy, smiling, sitting well without help, and . . . had good head control." Later that day, Sam reported to the ER for the same symptoms; he was admitted to St. Elizabeth but released the next day.

In contrast, since his removal from the custody of Ben and Joanna, Sam has had no hospitalizations or ER visits. He has seen the doctor for well-child checks and for seasonal allergies and illness. And as will be discussed in more detail below, Sam has since been diagnosed with "Adjustment Disorder with Anxiety," primarily as a result of the anxiety associated with his removal from Ben and Joanna, and also with "Pervasive Developmental Disorder."

4. Gracie's Birth and Removal

Gracie was born in February 2008. By this time, Hope, Sam, and Xavier had all been removed from Ben and Joanna's custody and were living together in a foster home. According to Ben, Joanna, and Joanna's new obstetrician, Joanna suffered from hyperemesis during her pregnancy with Gracie, but the condition was more controlled than it was during her pregnancy with Xavier. Though Ben and Joanna arranged for family friends to act as Gracie's guardian, Gracie was removed

from Ben and Joanna's custody at the hospital and placed with Hope, Sam, and Xavier.

5. State's Testimony Regarding Best Interests

Several doctors testified that the best interests of Hope, Sam, Xavier, and Gracie would be served by terminating the parental rights of Ben and Joanna. First to testify on this point was Dr. Jeffrey DeMare, the medical director of the children's advocacy team at Children's. DeMare has extensive qualifications in the areas of child medical care and analysis, as well as the treatment of child abuse. DeMare examined the medical records of Hope, Sam, and Xavier, and also examined the surveillance video taken by OPD. Based upon that review, DeMare opined that Hope, Sam, and Xavier had all suffered from child abuse at the hands of Ben and Joanna. DeMare specifically diagnosed all three children with factitious disorder by proxy, also known as Munchausen syndrome by proxy. DeMare opined that to reunify the children with Ben and Joanna would put all the children at risk for further health issues, including death. DeMare was even more concerned for Hope and Sam than for Xavier based upon the "repeated and escalating nature of abuse." DeMare noted that he could not "conceive of a scenario by which these children, or any other children, would be safe from harm in these parents' care." Finally, DeMare indicated his concern that no doctor would be able to confidently treat the children given the risk that the parents would not provide correct information to the treating medical professionals.

Dr. Mannhan Pratap Pothuloori also testified regarding the best interests of the children. Pothuloori is the chief of the psychiatry division at BryanLGH Medical Center in Lincoln. Pothuloori also began treating Joanna for an eating disorder in 1996. Pothuloori testified that it was not safe for the children to be in the care of Joanna, nor was it likely to be safe in the future. This opinion was based upon a variety of factors, including Joanna's multiple mental health diagnoses. Those diagnoses included anorexia nervosa, purging and restricting type; major depressive disorder; possible PTSD; obsessive-compulsive symptoms; psychotic disorder, not otherwise specified; and

borderline personality disorder. Moreover, Pothuloori diagnosed Joanna with both factitious disorder and factitious disorder by proxy.

With respect to the diagnosis of factitious disorder by proxy, Pothuloori distinguished it from the pediatric definition with which the children were diagnosed. Specifically, the patient, in this case Joanna, performs improper acts regarding the children's medical conditions so that she can gain psychological benefit.

Pothuloori testified that even excluding the factitious disorder and factitious disorder by proxy diagnoses, her opinion regarding Joanna would still be "severely guarded." Pothuloori explained that her opinion was based upon the fact that Joanna had multiple hospitalizations, had not been very compliant, did not adhere to treatment, and had multiple relapses.

Dr. Judith Bothern, the children's therapist, also testified. Bothern is the clinical psychologist who had been treating Hope and Sam since their removal from Ben and Joanna's custody. In connection with her treatment of Hope and Sam, Bothern has also observed the foster family as well as Xavier and Gracie. In addition to her sessions with the various children and foster mother, Bothern also reviewed the children's medical histories, Joanna's medical and mental health records, visitation reports, and Child Protective Services' documentation. Bothern testified that she believed it was in the best interests of Hope, Sam, Xavier, and Gracie that the parental rights of Ben and Joanna be terminated.

Bothern indicated that she has watched the children struggle with problems caused by the behavior of Ben and Joanna. Bothern indicated that she had attempted to work with Ben and Joanna to make decisions which would not traumatize the children, in particular Hope. Bothern testified that Ben and Joanna still "try to avoid the help that was there [from DHHS] and to deceive people and [that she does not] know how we can protect these children any other way [besides terminating parental rights]." Bothern also indicated that she did not believe remedial efforts aimed at the parents would be successful, because such attempts had previously been tried and had been unsuccessful.

Bothern diagnosed Hope with PTSD as a result of the trauma related to her own medical procedures, as well as the disruptions caused by the medical procedures performed on Sam and Xavier. According to Bothern, Hope is ultrasensitized to medical-related issues and after exposure to such issues, Hope becomes upset, acts babyish, or cries and pretends to have "owies."

Also of concern to Bothern was the fact that while in therapy sessions, Hope was very "guarded" when the topic of her parents was raised, but she was not similarly guarded in any other areas. Bothern also relates that while in therapy, if Bothern raised the topic of Xavier's birth or Sam in his infancy, Hope would "disassociate" and it would be difficult to rouse her out of this state. Sometimes upon being brought back to reality, Hope would make some mention of "Xavier being sick." Bothern relates an incident from visitation in which Hope was not getting attention from her father; Hope began to simulate choking and gagging and attempted to throw up in order to gain that attention.

Bothern also testified to an incident at a visitation during Joanna's pregnancy with Gracie in which Joanna arrived with a medical device in a backpack. According to Bothern, the backpack beeped during visitation and Joanna left the room to deal with it. Hope and Sam "rushed her immediately when she came out which looked to me like insecurity and some fear related to that." On the topic of the backpack, at some point, Joanna was no longer wearing it and Hope reported to Bothern that "mom didn't need the backpack anymore because she wasn't sick and she had [the backpack] because she was sick." To Bothern's knowledge, no one had mentioned to Hope anything about the backpack or why Joanna needed it.

In addition to Hope's diagnosis, Bothern diagnosed Sam with an adjustment disorder with anxiety, due to both Sam's removal from Ben and Joanna and his concerns about Gracie's whereabouts. Bothern testified that after Gracie was placed in the foster home, both Hope and Sam were "constantly looking for where the baby was" and would continue to seek her until they found her. Sam continued this behavior even after Hope stopped. Sam was also diagnosed with pervasive developmental

disorder, which raises the concern that he might have a disorder on the autism spectrum.

Bothern made specific reference to Ben's involvement and whether his paternal rights should be terminated when arguably Joanna was the party making the bulk of the false reporting which had led to the allegedly unnecessary medical procedures. Bothern stated:

> Of additional concern is [Ben's] complicity on all levels from participating in unhooking [Joanna's] feeding tube while hospitalized and pregnant with Xavier (detrimental to mother and child), complicity in demands for more extensive and invasive treatment for his children, and his admitted participation in unhooking and draining nutrients from Xavier's feeding tube while hospitalized. In addition, [Ben] was inquiring about late term abortion with Xavier in September and again in October due to his wife's discomfort. While Xavier was in the hospital, [Ben] was keeping detailed records where he clearly tracked the weight that Xavier lost and/or failed to gain, yet continued to unhook the feeding tube with clear awareness that he was starving his own child. [Ben's] complicity indicates that he lacks the ability or desire to contradict his wife's wishes, his own denials regarding his wife's medical history after meeting and marrying her, his own focus on medical issues keeping significant weight records so that he was well aware of starving his son, his own willingness to harm both his wife and his children, and his inability to provide protection for any of them. For whatever reason [Ben] has engaged in this activity, it clearly indicates not only his complicity (both active and tacit) in the alleged abuse, but his unwillingness or inability to protect his children.

6. Parents' Testimony Regarding Best Interests

Ben and Joanna also presented the testimony of a psychologist, Dr. Audrey Wiener. Wiener was hired by Ben and Joanna to evaluate them in connection with the Douglas County criminal charges. In testifying and offering her opinion, Wiener reviewed some documentation regarding the family.

She reviewed a summary of the medical records for the entire family. Wiener also interviewed Ben and Joanna but did not evaluate the children.

Wiener testified she believed that with adequate support, Ben and Joanna could both parent. Wiener recommended that the family be provided with intensive family preservation services. Wiener indicated in her testimony that her opinion was formed before receiving the opinions of DeMare and Bothern, but that those opinions did not affect her recommendation. In addition, Wiener indicated that she was suspect of Cruce's opinion because she believed it to be formed in hindsight. Wiener did acknowledge, though, that she did not speak with Cruce, see her testify, know the content of Cruce's testimony, or review the actual medical records. Wiener also indicated that her review of the underlying medical records was not sufficient for her to conclude what impact Snow's opinion that Sam's fundoplication was unnecessary might have on her own opinion. Wiener did acknowledge that credible medical evidence that the children were not given proper medical treatment might change her opinion.

Wiener also indicated that she did not consider the safety plan Ben and Joanna signed, in which the couple agreed to follow all medical advice, and that Ben and Joanna's failure to follow through with the plan did not change her opinion. In addition to Wiener's less than complete review of applicable medical records, as noted, Wiener was retained in connection with the criminal case, not the termination case. As such, Wiener did not interview Ben and Joanna as to Hope and Sam, but only as to Xavier.

7. Removal of Guardian Ad Litem

During the termination hearing, Ben and Joanna asked to have the guardian ad litem (GAL) removed. Ben and Joanna argued that the GAL had shown he was not neutral by "inserting" himself as a witness in Ben's and Joanna's criminal cases, improperly attempting to influence their sentences. During that sentencing, the GAL provided information to the probation officer preparing presentence reports for Ben and Joanna. The juvenile court denied the motions.

8. Termination of Parental Rights

In its fourth amended petition, the State alleged that Ben's and Joanna's parental rights should be terminated because such termination was in the best interests of all four children. In addition, the State alleged the conditions as set forth in Neb. Rev. Stat. § 43-292 (Reissue 2008), specifically, subsections (2) (neglect) and (4) (unfit by reason of debauchery), existed for all four children. The same allegations were made with regard to Hope, Sam, and Xavier, as well as subsections (8) (causing serious bodily injury), (9) (subjected to aggravated circumstances), and (10)(d) (felony resulting in serious bodily injury). The State also alleged that under Neb. Rev. Stat. § 43-283.01 (Reissue 2008), it did not need to make attempts to reunify the family.

The juvenile court concluded that reunification attempts were not necessary and that termination was in the best interests of the children. The juvenile court also found statutory grounds to support termination as to Gracie under § 43-292(2), and as to Hope, Sam, and Xavier under § 43-292(2), (8), (9), and (10)(d). The court dismissed the allegation of § 43-292(4) for failure of proof.

III. ASSIGNMENTS OF ERROR

On appeal, Benjamin assigns, restated and renumbered, that the juvenile court erred by (1) admitting evidence of Joanna's mental health history which predated the birth of her children, (2) concluding that reasonable efforts to preserve and reunify the family were unnecessary, and (3) terminating his parental rights.

On cross-appeal, Joanna assigns, restated and renumbered, that the juvenile court erred by (1) admitting evidence of her mental health and criminal history, (2) concluding that reasonable efforts to preserve and reunify the family were unnecessary, (3) terminating her parental rights, and (4) not removing the guardian ad litem.

IV. STANDARD OF REVIEW

[1,2] 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.[1] 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.[2]

V. ANALYSIS

1. Admissibility of Mental Health and Criminal Histories

[3] In their first assignments of error, Ben and Joanna both assign that it was error for the juvenile court to admit Joanna's mental health and medical history predating the birth of the children. Ben does not actually address this assignment of error in his brief. In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error; therefore, we decline to address Ben's assignment.[3] But Joanna does assign and argue this issue, and accordingly, we address her arguments. In addition to arguing that her mental health and medical histories were inadmissible, Joanna argues that it was error to admit her criminal history.

We turn first to Joanna's criminal history. There is no mention made of Joanna's criminal history in the juvenile court's order. Nor does Joanna argue in her brief precisely what evidence should have been excluded. But the record shows that Joanna once made false accusations of rape against at least one man that she worked with. According to the record, Joanna felt pressured to have sex with the man and did so, but then felt guilty afterward.

[4] Given our review of this record, even assuming that the admission of this evidence was in error, it was harmless. Our review is de novo on the record; any error is cured so long as this court does not rely on the challenged evidence. Improper admission of evidence in a parental rights proceeding does not, in and of itself, constitute reversible error, for, as long as the

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[1] *In re Interest of Angelica L. & Daniel L.*, 277 Neb. 984, 767 N.W.2d 74 (2009).

[2] *Id.*

[3] See *Hauptman, O'Brien v. Turco*, 277 Neb. 604, 764 N.W.2d 393 (2009).

appellant properly objected, an appellate court will not consider any such evidence in its de novo review of the record.[4] Because, as explained in more detail below, there is sufficient evidence to support the termination of Joanna's parental rights, her argument with respect to her criminal history is without merit.

Turning next to Joanna's mental health and medical histories and diagnoses, Joanna argues that any history predating the birth of the children is too remote to be probative, that the diagnoses in question were provided by doctors other than her treating physicians, that there was no causal connection shown between the histories and the alleged parenting problems, and that the history was unduly prejudicial. Joanna contends there is no indication that any of her alleged diagnoses affect her ability to parent or would be sufficient to support the termination of her parental rights and that it was inappropriate for the juvenile court to rely on this past medical history as a basis for the termination of her parental rights.

To the extent Joanna argues that the juvenile court terminated her parental rights because she has a mental illness, such is not borne out in the juvenile court's decision. Rather, the juvenile court considered Joanna's illnesses within the framework of whether Joanna could be rehabilitated and whether it was in the children's best interests to have Joanna's rights terminated.

[5] We conclude that the juvenile court did not err in admitting evidence of Joanna's mental health and medical issues experienced prior to the birth of the children, and we reject Joanna's argument to the contrary. This court has stated that a court is not prohibited from considering prior events when determining whether to terminate parental rights.[5] The challenged evidence is relevant to what happened to Hope, Sam, and Xavier. First, the evidence shows a pattern of medical intervention sought by Joanna for herself, which is relevant when considered in light of what was alleged to have occurred to her children. But even more importantly, the evidence shows

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[4] *In re Interest of Kassara M.*, 258 Neb. 90, 601 N.W.2d 917 (1999).

[5] *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003).

the depth of Joanna's mental health issues and the multiple attempts at treatment that Joanna, for the most part unsuccessfully, underwent. Whether Joanna recognizes her mental health issues and whether she responds to treatment are both highly relevant to whether it is in the best interests of Hope, Sam, Xavier, and Gracie that Joanna's parental rights be terminated.

Joanna's first assignment of error is without merit.

2. Necessity of Reasonable Efforts to Reunify Family

Both Ben and Joanna next assign that the juvenile court erred by concluding that it was not necessary for the State to make reasonable efforts to reunify the family. At issue is § 43-283.01(4), which provides in relevant part that

> [r]easonable efforts to preserve and reunify the family are not required if a court of competent jurisdiction has determined that:
>
> (a) The parent of the juvenile has subjected the juvenile to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse;
>
> (b) The parent of the juvenile has (i) committed first or second degree murder to another child of the parent, (ii) committed voluntary manslaughter to another child of the parent, (iii) aided or abetted, attempted, conspired, or solicited to commit murder, or aided or abetted voluntary manslaughter of the juvenile or another child of the parent, or (iv) committed a felony assault which results in serious bodily injury to the juvenile or another minor child of the parent; or
>
> (c) The parental rights of the parent to a sibling of the juvenile have been terminated involuntarily.

We discussed § 43-283.01 in some detail in *In re Interest of DeWayne G. & Devon G.*[6] We began by considering § 43-283.01 in light of the entire juvenile code. We then noted that with regard to

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[6] *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002).

the termination of parental rights pursuant to § 43-292, the Legislature incorporated § 43-283.01 into only § 43-292(6). Subsection (6) now states that parental rights can be terminated when, "Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts to preserve and reunify the family if required under section 43-283.01, under the direction of the court, have failed to correct the conditions leading to the determination." Section 43-283.01 is not incorporated into any of the other grounds for seeking termination of parental rights.

We additionally note that the plain language of §§ 43-284, 43-254, 43-1315, and 43-292(6), as amended by the Legislature in 1998, recognizes that determinations regarding reasonable efforts are necessary only "if required" under § 43-283.01. Section 43-283.01 limits situations in which the State is required to provide reasonable efforts to preserve and reunify, by completely eliminating any such requirement in those situations contemplated under § 43-283.01(4)(a), (b), and (c).

Construing this statutory framework in pari materia, we determine that the issue of reasonable efforts if required under § 43-283.01 must be reviewed by the juvenile court (1) when removing from the home a juvenile adjudged to be under subsections (3) or (4) of § 43-247 pursuant to § 43-284, (2) when the court continues a juvenile's out-of-home placement pending adjudication pursuant to § 43-254, (3) when the court reviews a juvenile's status and permanency planning pursuant to § 43-1315, and (4) when termination of parental rights to a juvenile is sought by the State under § 43-292(6).[7]

[6] In *In re Interest of DeWayne G. & Devon G.*, we clearly indicated that reasonable efforts to reunify a family are required under the juvenile code only when termination is sought under § 43-292(6); we reaffirm that holding today. In this case, termination was not sought under § 43-292(6); it was sought under

[7] *Id.* at 53-54, 638 N.W.2d at 519.

§ 43-292(2), (4), (8), (9), and (10)(d). It was not necessary for the State to make reasonable efforts to reunify this family, and Ben's and Joanna's assignments of error to the contrary are without merit.

3. Termination of Parental Rights

[7,8] We now turn to the question of whether the juvenile court properly terminated Ben's and Joanna's parental rights. It is axiomatic that under § 43-292, in order to terminate parental rights, the State must prove, by clear and convincing evidence, that one or more of the statutory grounds listed in this section have been satisfied and that termination is in the child's best interests.[8] And the proper starting point for legal analysis when the State involves itself in family relations is always the fundamental constitutional rights of a parent.[9]

(a) Finding of Statutory Grounds

[9-12] We have explained that the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the U.S. Supreme Court. Accordingly, before the State attempts to force a breakup of a natural family, over the objections of the parents and their children, the State must prove parental unfitness.[10] A court may not properly deprive a parent of the custody of his or her minor child unless the State affirmatively establishes that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right.[11] It is always the State's burden to prove by clear and convincing evidence that the parent is unfit and that the child's best interests are served by his or her continued removal from parental custody.[12] We have noted that the term "unfitness" is not expressly used in § 43-292, but the concept is generally encompassed by the

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[8] *In re Interest of Angelica L. & Daniel L., supra* note 1.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] See *id.*

fault and neglect subsections of that statute, and also through a determination of the child's best interests.[13]

In this case, the juvenile court found that the State had met its burden of showing statutory ground § 43-292(2) as to Gracie and statutory grounds § 43-292(2), (8), (9), and (10)(d) as to Hope, Sam, and Xavier. Ben and Joanna appeal these findings. In relevant part, § 43-292 states:

> The court may terminate all parental rights between the parents or the mother of a juvenile born out of wedlock and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> . . . .
>
> (2) The parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection;
>
> . . . .
>
> (8) The parent has inflicted upon the juvenile, by other than accidental means, serious bodily injury;
>
> (9) The parent of the juvenile has subjected the juvenile to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse; or
>
> (10) The parent has . . . (d) committed a felony assault that resulted in serious bodily injury to the juvenile or another minor child of the parent.

A review of the record demonstrates that Ben and Joanna repeatedly sought unnecessary medical attention for their children. The couple reported false symptoms and test results to medical staff, resulting in the performance of unnecessary procedures and surgeries, most particularly Sam's fundoplication surgery. In many cases, it is clear that the symptoms were false because the same behavior was not observed by medical staff and was not confirmed by testing. In addition, Ben and Joanna

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[13] See *In re Interest of Xavier H.*, 274 Neb. 331, 740 N.W.2d 13 (2007).

were convicted of felony child abuse for withholding food from Xavier's feeding tube to the point that he entered a starvation state. Joanna was videotaped repeatedly disconnecting the NG tube; in addition, both Ben and Joanna admitted to the disconnection of the feeding tube. The record shows that Sam was also in a starvation state at one point. And a G-button was placed because of parental reports that Hope did not eat.

The parents argue that medical professionals performed the now-questioned procedures and that, therefore, a medical basis to do so must have existed. But parental reports were the driving force behind most of these procedures; several medical professionals testified that in order to effectively practice medicine, one must be able to take parental reports at face value. As a result of all of these medical interventions, Hope has been diagnosed with PTSD. And though Xavier appears to be doing well, the starvation he experienced as a young, premature infant might well affect him developmentally.

We conclude, based upon our de novo review of the record, that under § 43-292(2), Ben and Joanna "substantially and continuously or repeatedly neglected and refused to give . . . necessary parental care and protection" to Hope, Sam, and Xavier. Moreover, under § 43-292(2), if this condition is met as to the three older children, it is also met as to their sibling, Gracie.

In addition to § 43-292(2), the record also supports the conclusion that Ben and Joanna subjected Hope, Sam, and Xavier to aggravated circumstances, specifically chronic abuse, under § 43-292(9). The record is replete with instances of unnecessary medical treatment undergone by Hope and Sam, as well as the repeated disconnection of Xavier's feeding tube and Ben and Joanna's failure to comply with medical advice and orders relating to Xavier's treatment, even after signing a safety plan indicating that they would do so.

The evidence supports these findings under § 43-292(2) and (9) with respect to both Ben and Joanna. Joanna was responsible for many of the false reports, but the record indicates that Ben was also involved. It is not plausible that Ben was unaware of Joanna's actions. And indeed, the record reveals that Ben was present with Joanna on many relevant occasions. Notably,

Ben was present at St. Elizabeth and Children's during the admission processes leading to Sam's fundoplication, times when Joanna made several false reports to medical staff. And Ben has admitted that he was as involved with the disconnection of Xavier's feeding tube as Joanna was.

Because we have concluded that Ben and Joanna are unfit under § 43-292(2) and (9), we decline to address whether the medical abuse suffered by the children was sufficient to render Ben and Joanna unfit under any other subsection of § 43-292.

(b) Best Interests

Having concluded that the State met its burden to show the requisite statutory grounds under § 43-292, we next move to the question of whether the termination of Ben's and Joanna's parental rights is in the best interests of Hope, Sam, Xavier, and Gracie. And again, upon our de novo review of the record, we conclude that termination of those rights is in the best interests of the children.

As we have already discussed, the record in this case shows an extensive history of unnecessary medical treatment. As a result of this unnecessary treatment, the three older children are victims of factitious disorder by proxy, or Munchausen syndrome by proxy. Joanna has been diagnosed with factitious disorder, or Munchausen syndrome, as well as factitious disorder by proxy. Munchausen syndrome by proxy is the name given to factitious disorders in children produced by their parents or caregivers.[14] The American Psychiatric Association defines factitious disorder by proxy as "the deliberate production or feigning of physical or psychological signs or symptoms in another person who is under the individual's care," motivated by the perpetrator's need to assume the sick role by proxy.[15] Munchausen syndrome is distinguished from

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[14] See *In re Interest of Shelby L.*, 270 Neb. 150, 699 N.W.2d 392 (2005), citing 2 Gale Encyclopedia of Medicine 1147 (Donna Olendorf et al. eds., 1999).

[15] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 781 (4th rev. ed. 2000).

Munchausen syndrome by proxy in that the medical attention is sought for oneself.

In addition to her factitious disorder and factitious disorder by proxy diagnoses, Joanna has also been diagnosed with a host of other mental illnesses. Joanna has been in treatment for various disorders, including anorexia nervosa, since she was a teenager, and she has repeatedly undergone treatment. Ben and Joanna maintain that Joanna does not currently suffer from an eating disorder, but medical testimony suggests otherwise.

Moreover, Joanna has a history of being treated, claiming to feel fine, and then returning for more treatment only a few days later. Joanna's treating physicians have indicated that she plays the sick role, as evidenced by her factitious disorder and factitious disorder by proxy diagnoses. Physicians also testified that Joanna lacked insight into her issues and illnesses.

And Ben is complicit in Joanna's actions. He denies that Joanna has any problems, notably any eating disorder, and seems resistant to treatment in any case. There is evidence that Ben, too, lacks insight into Joanna's problems, as well as into his own problems.

There was evidence from multiple medical professionals that it was in the best interests of the children that Ben's and Joanna's parental rights be terminated. Most experts believed that Ben and Joanna refused to acknowledge any problems and therefore would be resistant to any attempts to rectify their behavior. And Joanna's history of unsuccessful treatment is also an indication that further treatment would not be effective. Just one expert testified that the family could be reunited; the juvenile court found that this expert "was not very compelling in her testimony nor was she very credible." This court may consider and give weight to that conclusion.[16]

Ben and Joanna suggest that this case is controlled by this court's decision in *In re Interest of Shelby L.*[17] On petition for further review in that case, we reversed the termination of the mother's parental rights based upon allegations that the mother

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[16] See *In re Interest of Angelica L. & Daniel L., supra* note 1.

[17] *In re Interest of Shelby L., supra* note 14.

had too much contact with medical professionals. But *In re Interest of Shelby L.* is distinguishable. In that case, there had been no diagnosis of factitious disorder or factitious disorder by proxy and even the child's doctor testified that there were medical reasons for continued medical intervention. Moreover, we concluded that the inaccurate reporting of symptoms was exaggerated and that the child's improvement in foster care was not as significant as the State, the juvenile court, and the Court of Appeals made it appear. But in this case, both Joanna and the three older children have been diagnosed with factitious disorder by proxy. The children's treating physicians were unable to find medical reasons for most of Hope's, Sam's, and Xavier's various medical issues. Finally, the conclusion that Ben and Joanna were inaccurately reporting symptoms is supported by the record. The record also supports the conclusion that the children have improved since being placed in foster care, having fewer medical visits and interventions and suffering mostly from seasonal-type illnesses and allergies.

Ben and Joanna also take issue with a portion of DeMare's opinion in which he suggests that Hope suffered from traumatic brain injury at 7 months of age and with his opinion's being based only on a record review. We have considered these contentions and find them to be without merit.

Based upon our de novo review of the record, we conclude that Ben and Joanna are unfit, and it is in the best interests of the children that Ben's and Joanna's parental rights be terminated. Accordingly, we conclude that Ben's and Joanna's third assignments of error are without merit.

4. Removal of GAL

In her final assignment of error, Joanna assigns that the GAL should have been removed because he "submitted a sentencing request to the criminal court urging a maximum sentence be issued"[18] in Joanna's criminal case. Joanna complains that by asking for the maximum term of 5 years' imprisonment, the GAL's recommendation would have had the effect of terminating parental rights, because Joanna would not have had the

[18] Brief for appellee on cross-appeal at 41.

ability to comply with a dispositional plan. Joanna cites no authority in support of this contention.

We reject Joanna's argument. There is no evidence in this record regarding the content of the GAL's alleged statements in the criminal case. During the hearing on the motion to disqualify the GAL, neither Joanna nor Ben attempted to offer the content of that statement, or any evidence at all, in support of the request to have the GAL removed, save a request that the court take judicial notice of the argument made at an earlier hearing held on June 17, 2008. And the record includes neither a bill of exceptions nor a request for a bill of exceptions for that hearing.

[13] It is incumbent upon the appellant (or in this case, cross-appellant) to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.[19] This court cannot conclude that the GAL should be removed based solely upon Joanna's assertions without any evidentiary support for such assertions. Because Joanna has failed to present any evidence as to the content of any information that might have been given to the Douglas County District Court, the record is inadequate for us to further examine Joanna's assignment of error.

We accordingly conclude that Joanna's final assignment of error is without merit.

VI. CONCLUSION

For the reasons stated, we conclude that the decision of the juvenile court terminating Ben's and Joanna's parental rights should be affirmed.

AFFIRMED.

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[19] *Parker v. State ex rel. Bruning*, 276 Neb. 359, 753 N.W.2d 843 (2008).

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. BRYAN E. SMITH, JR., RESPONDENT.

775 N.W.2d 192

Filed November 13, 2009. No. S-08-1333.

1. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
2. ____. Each case justifying discipline of an attorney must be evaluated individually under the particular facts and circumstances of that case.
3. ____. In imposing the appropriate discipline, the Nebraska Supreme Court considers any aggravating or mitigating factors. It considers prior reprimands as aggravators. It also considers the attorney's acts both underlying the events of the case and throughout the proceeding.
4. ____. The Nebraska Supreme Court considers an attorney's failure to respond to inquiries and requests for information from the Counsel for Discipline as an important matter and as a threat to the credibility of attorney disciplinary proceedings.

Original action. Judgment of suspension.

John W. Steele, Assistant Counsel for Discipline, for relator.

No appearance for respondent.

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

PER CURIAM.

Relator, the Counsel for Discipline, filed formal charges against respondent, Bryan E. Smith, Jr. Smith was admitted to the practice of law in Nebraska on April 23, 2001. After Smith failed to file an answer to the formal charges, we sustained the Counsel for Discipline's motion for judgment on the pleadings and now determine the appropriate sanction.

FACTS

In December 2007, Smith met with Henry Johnson regarding Johnson's desire to modify a child custody order entered in

Ida County, Iowa. At that meeting, Johnson and Smith signed a fee agreement that provided Johnson was to pay Smith a $500 retainer and then $200 per month starting in February 2008 until $1,500 was paid. Johnson paid Smith the $500 retainer at the meeting. Though not contained in the fee agreement, Johnson understood that Smith would commence working on the case immediately. Smith claims that he advised Johnson that he normally does not start work on a case until at least one-half of the fee was paid. Johnson disagrees. At the meeting, Smith also explained that he would first have to register the Iowa custody order in Nebraska before a court could modify it.

According to Smith, he did not commence working on Johnson's case until January 3, 2008, because of the intervening holidays, but he did start before one-half of the fee was paid. Smith stated that he ordered a copy of the custody order he sought to have registered in Nebraska. He also claims to have drafted the "'modification documents and prepared them to file'" while he was awaiting receipt of the order from the Iowa court. But, the documents Smith provided to the Counsel for Discipline do not conform to the requirements of the Uniform Child Custody Jurisdiction and Enforcement Act.

In late January 2008, Johnson called Smith about the case. Smith explained that he had some difficulties in obtaining the order from the Iowa court. This was the last time Johnson spoke to Smith. On February 7, Smith sent a letter to Johnson furnishing him with a copy of the fee agreement. In the letter, he reminded Johnson that the $200 monthly payments were to begin on February 1. Sometime in February, Johnson paid an additional $200.

Smith received a copy of the Iowa order on February 11, 2008, but he never registered it with a Nebraska court, nor did he file an application to modify the decree in Nebraska. Johnson made periodic attempts to contact Smith but was never able to speak with him. Concerned with the apparent lack of progress and his inability to get any information from Smith, Johnson wrote to Smith on April 23, expressing his concern. Smith did not answer. Because of Smith's lack of communication, Johnson terminated Smith's representation on May 6, and requested a refund. Smith has offered to repay the fees

requested, but has not yet refunded any of the fees. The above facts were taken from the formal charges.

Johnson filed a grievance with the Counsel for Discipline. The Counsel for Discipline forwarded the grievance to Smith along with a letter advising him that he was required to file an appropriate written response within 15 business days. After two reminder letters, Smith filed a written response. In September 2008, after obtaining additional information from Johnson, the Counsel for Discipline sent a complaint to the Committee on Inquiry of the Third Disciplinary District. The committee determined that there were reasonable grounds for discipline and that the public interest would be served by filing formal charges.

Counsel for Discipline filed formal charges on December 29, 2008. The formal charges allege that Smith's behavior in representing Johnson violated the following provisions of the Nebraska Rules of Professional Conduct: Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (duty to provide competent representation), 3-501.3 (duty to act with reasonable diligence), 3-501.4 (duty to properly communicate with client), and 3-501.16 (duty to protect client's interests when terminating representation), and his oath of office as an attorney under Neb. Rev. Stat. § 7-104 (Reissue 2007). The Counsel for Discipline sent a copy of the formal charges and a summons to Smith at his last-known office address. The envelope was returned to the Counsel for Discipline unclaimed. The Counsel for Discipline then re-sent the information to Smith at his last-known home address. The return receipt appears to have been signed by Smith.

As of March 10, 2009, Smith had not filed an answer or responded to the formal charges. Accordingly, the Counsel for Discipline filed a motion for judgment on the pleadings. We sustained that motion on April 10. The sole issue before us is the appropriate sanction.

ANALYSIS

[1,2] To determine whether and to what extent discipline should be imposed in Smith's discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the

reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of Smith generally, and (6) Smith's present or future fitness to continue in the practice of law.[1] Each case justifying discipline of an attorney must be evaluated individually under the particular facts and circumstances of that case.[2]

[3,4] In imposing the appropriate discipline, we consider any aggravating or mitigating factors.[3] We have considered prior reprimands as aggravators.[4] We also consider the attorney's acts both underlying the events of the case and throughout the proceeding.[5] We consider an attorney's failure to respond to inquiries and requests for information from the Counsel for Discipline as an important matter and as a threat to the credibility of attorney disciplinary proceedings.[6]

Because Smith neither responded to the Counsel for Discipline regarding Johnson's grievance nor filed a pleading, we have no basis for considering any factors that mitigate in Smith's favor. Furthermore, this behavior indicates disrespect for our disciplinary jurisdiction and a lack of concern for the protection of the public, the profession, and the administration of justice.[7] Considering that Smith has previously been privately reprimanded for similar neglect and that he has failed to communicate with the Counsel for Discipline in a timely or meaningful fashion, we conclude that a 6-month suspension from the practice of law is necessary to protect the public and maintain the reputation of the bar. We also order Smith to return any fees collected from Johnson.

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[1] See *State ex rel. Counsel for Dis. v. Bouda, ante* p. 380, 770 N.W.2d 648 (2009).

[2] See *id.*

[3] See *id.* See, also, *State ex rel. Counsel for Dis. v. Wickenkamp*, 272 Neb. 889, 725 N.W.2d 811 (2007).

[4] *Wickenkamp, supra* note 3.

[5] See *Bouda, supra* note 1.

[6] See *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000).

[7] See *id.*

CONCLUSION

It is the judgment of this court that Smith should be suspended from the practice of law for 6 months, effective immediately, after which period he may apply for reinstatement to the bar, provided that he has returned all fees to Johnson. Smith shall comply with Neb. Ct. R. § 3-316, and upon failure to do so, he shall be subject to punishment for contempt of this court. Smith is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323(B) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF SUSPENSION.

STATE OF NEBRASKA, APPELLEE, V.
JACOB J. DALY, APPELLANT.
775 N.W.2d 47

Filed November 20, 2009. No. S-08-192.

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. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
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. **Courts: Expert Witnesses.** Under the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), jurisprudence, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This gatekeeping function entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue.
5. ____: ____. In determining the admissibility of an expert's testimony, a trial judge may consider several more specific factors that might bear on a judge's gatekeeping determination. These factors include whether a theory or technique can be (and has been) tested; whether it has been subjected to peer review and

publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community. These factors are, however, neither exclusive nor binding; different factors may prove more significant in different cases, and additional factors may prove relevant under particular circumstances.

6. ____: ____. A court performing a *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), inquiry should not require absolute certainty. Instead, a trial court should admit expert testimony if there are good grounds for the expert's conclusion, even if there could possibly be better grounds for some alternative conclusion.
7. **Police Officers and Sheriffs: Expert Witnesses.** A law enforcement officer with the training and experience offered by "drug recognition expert" certification is sufficiently qualified to testify, based on his or her evaluation, that a suspect was under the influence of drugs.
8. **Drunk Driving: Words and Phrases.** As used in Neb. Rev. Stat. § 60-6,196 (Reissue 2004), the phrase "under the influence of alcoholic liquor or of any drug" requires the ingestion of alcohol or drugs in an amount sufficient to impair to any appreciable degree the driver's ability to operate a motor vehicle in a prudent and cautious manner.
9. **Convictions: Drunk Driving: Police Officers and Sheriffs: Evidence.** Whether impairment is caused by alcohol or drugs, a conviction for driving under the influence may be sustained by either a law enforcement officer's observations of a defendant's intoxicated behavior or the defendant's poor performance on field sobriety tests.
10. **Trial: Expert Witnesses: Appeal and Error.** There is no exact standard for fixing the qualifications of an expert witness, and a trial court is allowed discretion in determining whether a witness is qualified to testify as an expert. Unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal.
11. **Trial: Expert Witnesses.** Experts or skilled witnesses will be considered qualified if they possess special skill or knowledge respecting the subject matter involved superior to that of persons in general, so as to make the expert's formation of a judgment a fact of probative value.
12. **Trial: Rules of Evidence: Expert Witnesses.** A witness may qualify as an expert by virtue of either formal training or actual practical experience in the field.
13. **Rules of Evidence.** The fact that evidence is prejudicial is not enough to require exclusion under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party; it is only the evidence which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under rule 403.
14. **Trial: Courts.** A trial court has broad discretion in determining how to perform its gatekeeper function.
15. **Judgments: Evidence: Presumptions: Appeal and Error.** An appellate court presumes in the absence of anything to the contrary that a trial court considered only competent and relevant evidence in rendering a decision.

16. **Constitutional Law: Pretrial Procedure.** Confrontation Clause rights are trial rights that do not extend to pretrial hearings in state proceedings.
17. **Trial: Evidence: Testimony: Proof.** Demonstrative exhibits are admissible if they supplement a witness' spoken description of the transpired event, clarify some issue in the case, and are more probative than prejudicial.
18. ____: ____: ____: ____. Demonstrative exhibits are inadmissible when they do not illustrate or make clearer some issue in the case; that is, where they are irrelevant or where the exhibit's character is such that its probative value is substantially outweighed by the danger of unfair prejudice.
19. **Trial: Evidence: Judgments: Appeal and Error.** A judgment will not be reversed on account of the admission or rejection of demonstrative evidence unless there has been a clear abuse of discretion.
20. **Records: Appeal and Error.** The presentation of an adequate record for appellate review is primarily the responsibility of the parties.
21. **Trial: Waiver.** A party who fails to insist upon a ruling to a proffered objection waives that objection.
22. **Trial: Evidence: Waiver.** If, when inadmissible evidence is offered, the party against whom such evidence is offered consents to its introduction, or fails to object or to insist upon a ruling on an objection to the introduction of the evidence, and otherwise fails to raise the question as to its admissibility, he is considered to have waived whatever objection he may have had thereto, and the evidence is in the record for consideration the same as other evidence.
23. **Trial: Expert Witnesses: Records: Appeal and Error.** A trial court's gatekeeping duty requires it to adequately demonstrate by specific findings on the record that it has performed that duty, because the losing party is entitled to know that the trial court has engaged in the heavy cognitive burden of determining whether the challenged testimony was relevant and reliable and to a record that allows for meaningful appellate review.
24. **Expert Witnesses: Appeal and Error.** Meaningful appellate review requires the court to explain its choices so that the appellate court has an adequate basis to determine whether the analytical path taken by the trial court was within the range of reasonable methods for distinguishing reliable expert testimony from false expertise.
25. **Trial: Rules of Evidence: Expert Witnesses.** A trial court adequately demonstrates that it has performed its gatekeeping duty when the record shows (1) the court's conclusion whether the expert's opinion is admissible and (2) the reasoning the court used to reach that conclusion, specifically noting the factors bearing on reliability that the court relied on in reaching its determination.
26. **Jurors: Appeal and Error.** The erroneous overruling of a challenge for cause will not warrant reversal unless it is shown on appeal that an objectionable juror was forced upon the challenging party and sat upon the jury after the party exhausted his or her peremptory challenges.
27. ____: ____. An appellate court will not reverse a conviction based on a challenge to a potential juror if that person was not ultimately included on the jury, even if the defendant was required to use a peremptory challenge to remove the person.
28. **Juror Qualifications.** The true object of challenges, either peremptory or for cause, is to enable the parties to avoid disqualified persons and secure an

impartial jury. When that end is accomplished, there can be no just ground for complaint against the rulings of the court as to the competency of the jurors.

29. **Criminal Law: Motions for Mistrial: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.
30. **Trial: Motions for Mistrial: Juries.** A mistrial is not necessarily required if the resulting prejudice can be cured by an admonition to the jury.
31. **Motions for Mistrial: Motions to Strike: Appeal and Error.** Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material.
32. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial will not be disturbed on appeal in the absence of an abuse of discretion.
33. **Verdicts: Juries: Jury Instructions: Presumptions.** Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.
34. **Motions for Mistrial: Motions to Strike: Proof.** A defendant faces a higher threshold than merely showing a possibility of prejudice when attempting to prove error predicated on the failure to grant a mistrial, especially when an objection or motion to strike the allegedly improper material was sustained and the jury was admonished to disregard such material.

Appeal from the District Court for Lancaster County, STEVEN D. BURNS, Judge, on appeal thereto from the County Court for Lancaster County, LAURIE YARDLEY, Judge. Judgment of District Court affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and John C. Jorgensen for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

GERRARD, J.

Jacob J. Daly was convicted at a jury trial of, among other things, operating a motor vehicle while under the influence of marijuana.[1] The primary issue presented in this appeal is the

[1] See Neb. Rev. Stat. § 60-6,196 (Reissue 2004).

admissibility of a police officer's opinion that Daly was under the influence of drugs while operating his vehicle. We conclude that the officer's opinion was properly admitted, and we affirm Daly's convictions and sentences.

I. BACKGROUND

The vehicle Daly was driving was stopped after Lincoln police officer Christopher Monico observed Daly's car operating without a headlight. Monico smelled burnt marijuana, and he observed that Daly's eyelids were drooping and that his eyes were watery and bloodshot. Daly admitted to having smoked marijuana earlier that day and gave Monico permission to search the vehicle. Monico found, among other things, plastic bags that contained rolling paper, a small scale, and trace amounts of marijuana.

Monico summoned Officer Jesse Hilger, who had completed instruction as a "drug recognition expert" (DRE). After Hilger arrived, Monico conducted field sobriety tests. Daly's results were mixed, and Monico concluded that Daly was unable to safely operate a motor vehicle. Daly was arrested, and Hilger conducted further drug tests pursuant to standardized DRE protocol. A chemical breath test gave no indication that Daly was under the influence of alcohol, but evidence of marijuana use was found in Daly's urine.

Daly was charged by complaint with one count of driving under the influence (DUI), one count of possession of 1 ounce or less of marijuana, and one count of possession of drug paraphernalia. Daly filed a pretrial *Daubert*/*Schafersman*[2] motion to determine the admissibility of the State's opinion that Daly had been under the influence of a drug. After an extensive hearing, the county court overruled Daly's motion, and the matter proceeded to a jury trial. Hilger testified at trial to his opinion, based upon Daly's poor coordination and matrix of physical symptoms, that Daly's marijuana usage had impaired him to the point that he was unable to operate a motor vehicle

[2] See, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

safely. Daly was convicted on all charges and appealed his DUI conviction to the district court, which affirmed the county court's judgment.

II. ASSIGNMENTS OF ERROR

Daly assigns, consolidated and restated, that the trial court erred in the following respects:

(1) Overruling his motion in limine and objection to the admissibility of Hilger's DRE testimony.

(2) Allowing, at the pretrial *Daubert*/*Schafersman* hearing, expert testimony from several witnesses who testified regarding the DRE protocol. Generally, Daly argues that these witnesses were not qualified to offer the testimony that the trial court accepted for purposes of the *Daubert*/*Schafersman* hearing.

(3) Allowing, at the pretrial *Daubert*/*Schafersman* hearing, several exhibits that were supporting materials for the testimony of the witnesses to whom Daly also objected.

(4) Refusing Daly's offer of the resume of Gregory Cody, and refusing to receive cross-examination testimony of Cody and Darrell Fisher, at the pretrial *Daubert*/*Schafersman* hearing. The trial court held a consolidated hearing relating to several DUI cases. Because the State proffered Cody's and Fisher's testimony in another case, not Daly's, the court rejected Daly's proffer of evidence relating to their testimony.

(5) Taking the State's offer of two particular exhibits under advisement, but never ruling on the offer or Daly's objections to the exhibits.

(6) Overruling Daly's motion for further "findings of fact" in association with the overruling of his motion in limine.

(7) Overruling Daly's motion to strike a juror for cause because the juror, a parole officer, was an employee of the State of Nebraska.

(8) Initially overruling his Neb. Evid. R. 404[3] objection to the admission of the scale found in Daly's car and then, after reconsidering the objection and excluding the evidence, denying his motion for mistrial.

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[3] Neb. Rev. Stat. § 27-404 (Reissue 2008).

(9) Overruling a motion for mistrial that Daly claims he made during closing argument.

(10) Overruling Daly's motion for new trial and committing cumulative error.

III. 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.[4] The standard for reviewing the admissibility of expert testimony is abuse of discretion.[5] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[6]

IV. ANALYSIS

1. *Daubert*/*Schafersman* Reliability of Hilger's DRE Testimony

Daly's principal contention on appeal is that the court erred in permitting Hilger to testify that in his opinion, Daly was impaired by the use of marijuana. This contention primarily rests on two general contentions—first, that the DRE protocol is unreliable, and second, that Hilger's training and experience with the DRE protocol did not provide sufficient foundation for him to render an expert opinion. And Daly makes several other arguments about the conduct of the *Daubert*/*Schafersman* hearing. We address Daly's arguments in turn.

(a) DRE Protocol

The DRE program is a nationally standardized protocol for identifying drug intoxication based upon a program first designed by the Los Angeles Police Department. The protocol is designed to identify seven different categories of drugs and the physical symptoms associated with each category. For

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[4] *State v. Edwards, ante* p. 55, 767 N.W.2d 784 (2009).

[5] *Id.*

[6] *Id.*

example, the behavioral symptoms associated with marijuana intoxication are

> impaired attention, impaired attention spans, forgetting to do things, forgetting [things] in mid-sentence . . . ; inappropriate euphoria, such as laughing or smiling during an incident that's fairly serious; an impaired ability to divide attention, to do more than one thing at the same time, maybe concentrating on colors or lights rather than the overall environment.

Symptoms also include bloodshot eyes; an elevated heart rate; and sometimes, body tremors. Under the DRE protocol, officers are trained in a step-by-step procedure to examine various clinical or physiological indicators to determine what drugs a suspect might have used.

A field DRE examination generally involves making three determinations: first, that a person is impaired and that the impairment is not consistent with alcohol intoxication; second, the ruling in or out of medical conditions that could be responsible for the signs and symptoms; and third, what type of drug is responsible for the impairment. The process is systematic and standardized. A DRE officer uses a "face sheet" to record his or her observations—a standardized form with prepared entries for the various tests and observations the officer must perform.

The process begins with a breath alcohol test; then, if the DRE officer is not the arresting officer, the DRE officer interviews the arresting officer about the circumstances of the arrest and the suspect's behavior. The DRE officer then conducts the preliminary examination. The DRE officer checks the suspect's pulse, does an initial check of the nystagmus (involuntary jerking movements) of the eyes, and checks the suspect's pupil size. And a series of medical questions is typically asked.

Assuming that the suspect appears to be under the influence of drugs and no medical condition is present, the DRE officer proceeds to conduct an eye examination. The officer administers horizontal and vertical gaze nystagmus tests in each eye, and checks for a lack of convergence, or the eye's ability to converge on an object approaching the face. The next step is

to conduct the "divided attention" tests, composed of four different tests that are similar to familiar field sobriety tests. The suspect is asked to estimate a period of time while balancing in a particular way, perform a "walk-and-turn" or "walk-the-line" test, perform a one-leg stand test, and perform a "finger-to-nose" test.

The DRE officer then conducts a vital signs examination. The officer rechecks the suspect's pulse and measures the suspect's body temperature and blood pressure. Then the officer conducts a "dark room examination," during which the suspect's pupils are examined under different light conditions. After that, the officer uses a penlight to examine the suspect's mouth and nose for debris, drugs, or physiological changes that can take place with repeated drug use. The next step is a check for muscle tone—the officer evaluates the suspect's voluntary muscles to see if they are abnormally rigid or flaccid. The officer then checks for injection sites and takes the suspect's pulse again. Finally, the examination concludes with an interview of the suspect.

When the examination is concluded, the DRE officer forms an opinion based on his or her observations. Then, the final step in the process is the use of toxicology to analyze samples taken from the suspect for the presence of drugs.

In other words, the underlying principles of the DRE protocol are basic and familiar: Gather information from the suspect and measure fundamental physical symptoms and then derive a conclusion about drug or alcohol intoxication from that data. Dr. Zenon Zuk testified for the State that the DRE protocol is based on the well-established concept that drugs cause observable signs and symptoms, affecting vital signs and changing the physiology of the body.

A 1984 study, conducted by the Johns Hopkins University School of Medicine in conjunction with the National Highway Traffic Safety Administration, concluded that under laboratory conditions, the DRE protocol

> showed a high degree of accuracy in correctly identifying the drug classes which had been administered to those subjects judged to be intoxicated. Of subjects judged to be intoxicated the correct drug class was identified on 91.7%

> of occasions. Overall, in 98.7% of instances of judged intoxication the subject had received some active drug. On 7% of occasions of judged intoxication the incorrect drug class was identified, and on 1.3% of occasions the subject had received no active drug . . . .

A field study conducted by the Los Angeles Police Department and the National Highway Traffic Safety Administration found that when DRE's claimed drugs other than alcohol were present, they were detected in blood tests 94 percent of the time. A study performed by the State of Minnesota from 1991 to 1993 found that at least one DRE-predicted drug category was present in 84.5 percent of cases and that the protocol for detecting cannabis intoxication was the most reliable, corroborated by toxicology in 91.8 percent of cases. And a 1994 study performed by the State of Arizona found that DRE decisions were "highly accurate" and that the DRE program, supported by the toxicology laboratory, was "a valid method for detecting and classifying drug-impaired individuals."

[4] Based largely on that data, every court to have considered the issue has concluded that testimony based upon the DRE protocol is admissible into evidence.[7] In Nebraska, our analysis of the issue is governed by the principles announced by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, and adopted by this court in *Schafersman v. Agland Coop*.[8] Under our *Daubert*/*Schafersman* jurisprudence, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion. This gatekeeping function entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether

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[7] See, *U.S. v. Everett*, 972 F. Supp. 1313 (D. Nev. 1997); *State v. Baity*, 140 Wash. 2d 1, 991 P.2d 1151 (2000); *Mace v. State*, 328 Ark. 536, 944 S.W.2d 830 (1997); *State v. Klawitter*, 518 N.W.2d 577 (Minn. 1994); *Wooten v. State*, 267 S.W.3d 289 (Tex. App. 2008); *State v. Aleman*, 145 N.M. 79, 194 P.3d 110 (N.M. App. 2008), *cert. denied* 145 N.M. 255, 195 P.3d 1267; *State v. Kanamu*, 107 Haw. 268, 112 P.3d 754 (Haw. App. 2005); *State v. Sampson*, 167 Or. App. 489, 6 P.3d 543 (2000); *Williams v. State*, 710 So. 2d 24 (Fla. App. 1998).

[8] See, *Daubert, supra* note 2; *Schafersman, supra* note 2.

that reasoning or methodology properly can be applied to the facts in issue.[9]

[5] In determining the admissibility of an expert's testimony, a trial judge may consider several more specific factors that might bear on a judge's gatekeeping determination. These factors include whether a theory or technique can be (and has been) tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community. These factors are, however, neither exclusive nor binding; different factors may prove more significant in different cases, and additional factors may prove relevant under particular circumstances.[10]

(i) Persuasiveness of Supporting Studies/Risk of Error

Daly makes several arguments with respect to the reliability of the DRE protocol. His primary argument seems to be that the studies mentioned above were not peer reviewed and were methodologically flawed. Daly contends that other studies, suggesting that the DRE protocol is less reliable, were peer reviewed and used more sound methodology.

[6] To begin with, we note that although Daly attacks the credibility of the literature supporting the reliability of the DRE protocol, he cannot contest its existence.[11] And we have observed that a court performing a *Daubert*/*Schafersman* inquiry should not require absolute certainty.[12] Instead, a trial court should admit expert testimony if there are good grounds for the expert's conclusion, even if there could possibly be

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[9] *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006).

[10] *State v. Fernando-Granados*, 268 Neb. 290, 682 N.W.2d 266 (2004). See, also, *King v. Burlington Northern Santa Fe Ry. Co.*, 277 Neb. 203, 762 N.W.2d 24 (2009).

[11] See *Sampson, supra* note 7.

[12] *King, supra* note 10.

better grounds for some alternative conclusion.[13] And as other courts have noted, the research validating the DRE protocol has been carefully scrutinized at scientific conferences, conventions, workshops, and other forums for the exchange of ideas among those interested in the physiological consequences of drug use.[14] The reason that peer-reviewed publication is valuable is that it places research in the public domain and permits evaluation and criticism. Although not always published in a peer-reviewed journal per se, DRE research has been the subject of considerable scientific scrutiny.[15] As the court in *U.S. v. Everett*[16] observed, "These writings began in the late 1970's and have continued to the present. The use of the protocol and its various elements has certainly not been kept a secret nor is there evidence that its proponents have attempted to avoid the limelight."

Nor are the studies that Daly depends upon as dispositive as he asserts. The feature of those studies upon which he relies—their blind design—has been criticized by others as a fundamental flaw in their methodology.[17] Daly refers us primarily to studies conducted by Stephen J. Heishman and his colleagues from 1996 to 1998.[18] Daly suggests that the Heishman studies indicated at best a 51-percent success rate for DRE accuracy and indicated a success rate of only 44 percent when alcohol-only decisions were excluded.[19]

But in order to make those studies "blind," the DRE protocol was used incompletely. The DRE examiners did not question

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[13] See *id.*

[14] See, *Everett, supra* note 7; *Aleman, supra* note 7.

[15] See *Aleman, supra* note 7.

[16] *Everett, supra* note 7, 972 F. Supp. at 1324.

[17] See, *id.*; *Sampson, supra* note 7; *Williams, supra* note 7.

[18] See, Stephen J. Heishman et al., *Laboratory Validation Study of Drug Evaluation and Classification Program: Alprazolam,* d-*Amphetamine, Codeine, and Marijuana*, 22 J. Analytical Toxicology 503 (1998); Stephen J. Heishman et al., *Laboratory Validation Study of Drug Evaluation and Classification Program: Ethanol, Cocaine, and Marijuana*, 20 J. Analytical Toxicology 468 (1996).

[19] See *id.*

subjects about recent drug use, nor did they interrogate the subjects to solicit admissions about drug use. Nor was evidence from the arrest available. This means that the blind studies could not realistically predict the scientific reliability of the DRE program in the field because they examined an abbreviated evaluation that is different from the standardized protocol that is actually used.[20]

As the *Everett* court observed, this "defies the centuries old practice of physicians to take a history of patients in connection with a physical examination."[21] To remove that aspect of the protocol does not provide an accurate test of the protocol itself. Simply put, the fact that suspects may admit to using drugs or may have drug paraphernalia on their persons does not make a protocol that includes those facts *less* reliable as a diagnostic tool. And more to the point, when the issue is the reliability of the complete DRE protocol as a diagnostic tool for law enforcement officers in the field, the county court did not abuse its discretion in being more persuaded by studies that actually measured the reliability of the complete protocol under field conditions.

We also note that even the 1998 Heishman study concluded that the DRE protocol "is a valid test to identify recent drug use."[22] That study also found that when DRE evaluations were inconsistent with toxicological testing, false negatives were substantially more likely than false positives, including with respect to marijuana use.[23] And even using an incomplete protocol, "DREs are able to detect drug-induced impairment in general," even when they have difficulty discriminating between various drugs.[24]

In other words, to the extent the Heishman studies indicate a higher rate of error than the studies relied upon by the State, that risk is mitigated by the fact that an erroneous DRE

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[20] See *Williams, supra* note 7. See, also, *Everett, supra* note 7.

[21] *Everett, supra* note 7, 972 F. Supp. at 1322.

[22] Heishman et al., *supra* note 18 at 513.

[23] See *id.*

[24] See *id.*

evaluation will probably err on the side of the suspect.[25] The risk of a false *positive* is low. Any risk is mitigated further by the fact that identifying the specific drug that caused a driver's impairment is inessential—the DUI statute only requires proof that the defendant was under the influence of "any drug" and does not require the drug to be identified by the arresting officer.[26] And finally, we note that the final step in the DRE protocol is the use of chemical testing to confirm the officer's evaluation. In the end, it was not an abuse of discretion to conclude that the available scientific literature supported the admission of DRE-based testimony.

(ii) General Acceptance in Scientific Community

Daly also argues that the DRE protocol is not generally accepted in the scientific community. To support this argument, Daly contends that because the DRE protocol is a technique based upon the human body's reaction to drugs, "the relevant scientific community must include Pharmacologists, Neurologists, Toxicologists, Behavioral Research Psychologists, Forensic Specialists, and Medical Doctors concerned with the recognition of alcohol and drug intoxication."[27] And Daly suggests that the DRE protocol as a whole is the single "theory or technique" that must be generally accepted.

But the DRE protocol, while based in scientific principles, is a program designed to meet the specific needs of law enforcement. The medical community would rely on toxicological testing, because medical diagnosis and treatment require neither evaluation of a patient's impairment at a particular time nor probable cause to perform a chemical test. And scientists interested in the effects of drugs on the human body would test those effects under controlled conditions, rather than collecting research subjects out of motor vehicles. In other words, the DRE program as a whole cannot be evaluated based on

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[25] See, *Everett, supra* note 7; *Sampson, supra* note 7; *Williams, supra* note 7. Cf. *Aleman, supra* note 7.

[26] See, § 60-6,196; *State v. Falcon*, 260 Neb. 119, 615 N.W.2d 436 (2000).

[27] Brief for appellant at 35.

whether it is used in the scientific community, because it is uniquely tailored to the exigencies of law enforcement.

Instead, the relevant question is whether the tests that make up the protocol are generally accepted. In that regard, Zuk testified that each step in the DRE protocol reflected techniques that were accepted in the medical community for diagnostic purposes and were either consistent with the medical community's method of performing those examinations or based on a sound understanding of the central nervous system. And as previously noted, the entire protocol is based on the generally accepted principle that drugs affect vital signs and change the physiology of the body.

Nonetheless, Daly takes issue with several of the particular components of the DRE protocol. He argues, for instance, that nystagmus testing is an unreliable gauge of a suspect's impairment. He argues that several of the physical sobriety tests have not been proved reliable. And he takes particular issue with the examination of a suspect's mouth and nose for evidence of drug use.

We have, however, previously held that nystagmus testing is generally accepted in the relevant scientific community as an indicator of impairment, although that result standing alone is insufficient to support a conviction for DUI.[28] It is also within the expertise of a veteran police officer to have observed that repeated drug use can have physical manifestations such as scarring or discoloration around the mouth. And the variables that could account for anomalous results on any one aspect of the DRE examination are precisely why the protocol exists—to promote a systematic approach that considers a number of different factors.[29] The issue is not whether any single observation is reliable enough to be dispositive—instead, it is whether an opinion based upon all of the relevant observations is reliable enough to be admissible. And, as discussed above, the scientific literature supports the conclusion that it is.

In sum, we conclude that the county court did not abuse its discretion in concluding that the DRE protocol was a

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[28] See *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000).

[29] See, *Everett, supra* note 7; *Klawitter, supra* note 7.

sufficiently valid methodology to support Hilger's opinion testimony.

(b) Expert Witness Testimony

Daly makes several arguments with respect to the testimony of the State's various expert witnesses. Primarily, of course, he focuses on Hilger's opinion testimony. So we begin by examining the standards for training a DRE.

(i) Hilger's DRE Training and Opinion Testimony

The first step in training a DRE officer is a 2-day preliminary training program, called "preschool," which prepares students for the more rigorous training to follow. DRE school itself involves 7 days of classroom instruction, including lectures on physiology and toxicology, specific training on the effects of particular drugs, hands-on exercises in implementing the DRE procedure and interpreting the results, and oral and written examinations. Finally, the certification phase of the training requires students to apply the training in real-world settings on actual suspects under the supervision of a DRE instructor. For a student to be certified, a minimum of 12 evaluations must be completed, involving at least three different categories of drug, and verified by toxicology in at least 75 percent of the cases. At least two different DRE instructors must approve and recommend the student for certification. Certification requires the student to pass a comprehensive, 3- to 4-hour final examination. And continuing education is required to maintain certification.

The record establishes that Hilger had been trained in accordance with national standards. And Hilger testified that he performed the DRE protocol as he had been trained to do. Daly does not argue on appeal that Hilger performed the protocol deficiently. Instead, Daly simply asserts that a police officer is not qualified to opine on drug intoxication, because a police officer is not a medical doctor or other expert in "drugs, the eyes, vital signs, psychomotor capabilities, symptomology of drugs, [or] human physiology."[30]

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[30] Brief for appellant at 30.

But in this case, Hilger was not asked to opine as to why or how Daly's use of marijuana caused symptoms of intoxication. It is well established, for instance, in the context of alcohol intoxication, that sufficient foundation may be laid for a police officer to testify to his or her opinion that a driver was under the influence of alcohol.[31] In that context, acceptable foundation includes training to detect the physical and mental effects of alcohol, experience in doing so, and the officer's account of the procedures undertaken to evaluate the driver's intoxicated condition.[32] This is because a police officer need neither explain nor know why consumption of alcohol causes certain symptoms in order to be able to identify those symptoms and reach a conclusion based upon them.

[7] Daly offers us no persuasive basis to distinguish drug intoxication, other than taking issue with the substance of the officer's training and procedures. But we conclude that a law enforcement officer with the training and experience offered by DRE certification is sufficiently qualified to testify, based on his or her evaluation, that a suspect was under the influence of drugs. Hilger had successfully completed DRE training, and his opinion was admissible.

[8,9] In a related contention, Daly claims that there is a difference between intoxication and impairment and that Hilger should not have been permitted, based on a DRE examination, to testify that Daly's ability to drive was impaired. We have said that as used in § 60-6,196, the phrase "under the influence of alcoholic liquor or of any drug" requires the ingestion of alcohol or drugs in an amount sufficient to impair to any appreciable degree the driver's ability to operate a motor vehicle in a prudent and cautious manner.[33] And we have held that whether impairment is caused by alcohol or drugs, a conviction for DUI may be sustained by either a law enforcement officer's observations of a defendant's intoxicated behavior or the defendant's

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[31] See, *State v. Howard*, 253 Neb. 523, 571 N.W.2d 308 (1997); *State v. Dail*, 228 Neb. 653, 424 N.W.2d 99 (1988).

[32] See *id.*

[33] See, *Falcon, supra* note 26; *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991).

poor performance on field sobriety tests.[34] The court did not err in permitting Hilger to testify, based upon his observation of Daly and his law enforcement experience, that Daly's ability to drive was impaired.

Daly also contends that the DRE protocol is flawed because it depends on police officers, who he argues are inadequately trained to implement the protocol. And Daly argues that there is no data to show "inter-rater reliability,"[35] which we understand to refer to the ability of different DRE's to successfully apply the protocol. But the qualifications of the officers applying the protocol do not bear on the validity of the protocol itself. Instead, the question is simply whether Hilger, the DRE officer who actually tested Daly and testified at trial, was qualified to render his opinion about Daly. In that regard, Daly contends that the DRE training program offers insufficient training in the DRE protocol.

[10-12] But there is no exact standard for fixing the qualifications of an expert witness, and a trial court is allowed discretion in determining whether a witness is qualified to testify as an expert.[36] Unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal.[37] Experts or skilled witnesses will be considered qualified if they possess special skill or knowledge respecting the subject matter involved superior to that of persons in general, so as to make the expert's formation of a judgment a fact of probative value.[38] And a witness may qualify as an expert by virtue of either formal training or actual practical experience in the field.[39] We find no clear error in the trial court's conclusion that by virtue of his DRE training and experience, Hilger was qualified as an expert in the recognition of drug intoxication.

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[34] See *id.*

[35] Brief for appellant at 40.

[36] See *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000).

[37] *Id.*

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

[39] *Crawford v. Department of Motor Vehicles*, 246 Neb. 319, 518 N.W.2d 148 (1994).

Daly asserts, in passing, that foundation for Hilger's opinion was lacking because there was no video recording showing that Hilger's evaluation was performed correctly. But Hilger testified about his evaluation of Daly and was available for cross-examination about whether the evaluation was performed adequately. Such matters as whether vital signs were measured accurately are appropriate subjects for cross-examination. A video recording of the evaluation was not necessary for Hilger's testimony to be admissible.

Daly also argues briefly that "[t]he State has asserted a definition of 'drug' as generally being a chemical substance taken into the human body that impairs the ability to operate a motor vehicle safely" and that "[t]his definition is too broad."[40] This is apparently a reference to Hilger's testimony, during which he described the range of substances that the DRE protocol is designed to detect. But Daly did not object to that testimony at trial. And whatever a "drug" might be for purposes of the DRE protocol, it is not disputed that the only drug at issue here was marijuana, which is clearly a drug within the meaning of both the DRE protocol and the DUI statute.[41]

[13] Finally, Daly argues that Hilger's testimony should have been excluded under Neb. Evid. R. 403,[42] which provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." The fact that evidence is prejudicial is not enough to require exclusion under rule 403, because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party; it is only the evidence which has a tendency to suggest a decision on an improper basis that is *unfairly* prejudicial under rule 403.[43] Hilger's testimony was relevant to whether Daly was operating his vehicle under the influence of marijuana, and his opinion suggested a decision on that basis.

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[40] Brief for appellant at 47.

[41] See, Neb. Rev. Stat. § 28-405 (Reissue 2008); § 60-6,196; *Falcon, supra* note 26.

[42] Neb. Rev. Stat. § 27-403 (Reissue 2008).

[43] See *Robinson, supra* note 9.

It was not unfairly prejudicial, and the court did not abuse its discretion in admitting it.

(ii) Expert Witnesses at Daubert*/*Schafersman *Hearing*

Daly also argues that the State's other experts should not have been permitted to testify at the *Daubert*/*Schafersman* hearing. His arguments present something of a moving target: He seems to be contending that the police officer who helped develop the DRE protocol should not have been permitted to testify because he was not a medical expert; an optometrist should not have been permitted to testify because he was not a medical doctor; Zuk, a medical doctor, should not have been permitted to testify because he was not a specialist; and a toxicologist should not have been permitted to testify because she was not an expert on impaired driving.

But each witness testified to relevant issues that were within their competence. Thomas Page, the police officer who helped develop the DRE protocol, testified about how the protocol was developed, the steps involved, and the literature that supports its validity. Karl Citek, an optometrist and associate professor, has a degree in physics from Columbia University and a doctor of optometry degree and a master of science and Ph.D. in vision science from the State University of New York College of Optometry. Citek coauthored two journal articles about the use of nystagmus testing to detect impairment in drivers,[44] and he testified about nystagmus observation and its use in detecting impairment. Michelle Spirk, a forensic toxicologist, testified about the physiological effects of marijuana intoxication, specifically on the ability to operate a motor vehicle. And as described above, Zuk testified as a medical doctor about the medical validity of the steps in the DRE protocol.

[14,15] The witnesses' testimony was sufficiently related to their research and experience. Furthermore, a trial court has broad discretion in determining how to perform its gatekeeper

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[44] See, Karl Citek et al., *Nystagmus Testing in Intoxicated Individuals*, 74 Optometry 695 (2003); Edward M. Kosnoski et al., *The Drug Evaluation Classification Program: Using Ocular and Other Signs to Detect Drug Intoxication*, 69 J. Amer. Optometric Assn. 211 (1998).

function,[45] and we presume in the absence of anything to the contrary that a trial court considered only competent and relevant evidence in rendering a decision.[46] Given the nature and scope of the pretrial hearings, we cannot find that the trial court abused its discretion in permitting the witnesses to testify. The trial court was certainly capable of determining the effect the witnesses' qualifications should have on the weight to be afforded their testimony, and we find no abuse of discretion in the court's conclusions.

Daly also argues that Thomas Schwarten, a DRE instructor with the Nebraska State Patrol, should not have been permitted to testify about Hilger's DRE certification and proficiency. But the ultimate issue to be determined at the *Daubert*/*Schafersman* hearing was whether Hilger's DRE training qualified him to testify that Daly was under the influence of drugs. Schwarten was qualified to testify as an expert in DRE instruction, and his testimony about Hilger's training, and successful completion of that training, was relevant.

(c) Evidentiary Issues at *Daubert*/*Schafersman* Hearing

(i) Field Sobriety Test Studies

Daly also objected to several exhibits that were entered into evidence at the *Daubert*/*Schafersman* hearing. First, Daly complains about "Exhibits 20 through 26," which he describes as "validation studies in regards to standardized field sobriety tests."[47] (Exhibit 20 does not fit this description; we assume that its inclusion in this argument is merely a typographical error in Daly's brief.) Daly argues that

> [w]ith the question being the admissibility of the DRE program protocols and/or testimony derived therefrom due to the qualities of proffering a medical diagnosis on the basis of vital sign examination, pupillary examinations, and or toxicology—the basis upon which there may have

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[45] See *State v. Aguilar*, 268 Neb. 411, 683 N.W.2d 349 (2004).

[46] See, e.g., *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007).

[47] Brief for appellant at 51.

> been research in regards to Horizontal Gaze Nystagmus, the Walk and Turn, the One Leg Stand, is irrelevant.[48]

[16] This argument is not entirely clear to us. Because standard field sobriety tests are included in the DRE protocol, scientific examination of those tests would be relevant. And Page referred to the studies as part of the basis for his testimony regarding the DRE protocol. We find no merit to Daly's assertion that the evidence was irrelevant. Daly also argues that the evidence was hearsay. But the evidence was used as foundation for Page's testimony and was admissible to show the basis for his opinion.[49] Finally, Daly argues that the evidence violated his rights under the Confrontation Clause.[50] He waived this ground for his objection by not raising it in the trial court.[51] And in any event, it is well established that Confrontation Clause rights are trial rights that do not extend to pretrial hearings in state proceedings.[52]

(ii) Demonstrative Exhibits

Daly objected to the admission at the *Daubert*/*Schafersman* hearing of exhibit 30, a PowerPoint presentation that was used as a demonstrative exhibit during Citek's testimony. Citek generally testified about the effect of drugs on movement of the eyes. Exhibit 30 included several diagrams, photographs, and

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[48] *Id.*

[49] See, Neb. Evid. R. 703, Neb. Rev. Stat. § 27-703 (Reissue 2008); *Koehler v. Farmers Alliance Mut. Ins. Co.*, 252 Neb. 712, 566 N.W.2d 750 (1997); *State v. Simants*, 248 Neb. 581, 537 N.W.2d 346 (1995).

[50] See U.S. Const. amend. VI.

[51] See *Robinson, supra* note 9.

[52] See, *Kentucky v. Stincer*, 482 U.S. 730, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987); *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987); *United States v. Matlock*, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974). See, e.g., *State v. Timmerman*, 218 P.3d 590 (Utah 2009); *State v. Rivera*, 144 N.M. 836, 192 P.3d 1213 (2008); *Gresham v. Edwards*, 281 Ga. 881, 644 S.E.2d 122 (2007); *State v. Woinarowicz*, 720 N.W.2d 635 (N.D. 2006); *Sheriff v. Witzenburg*, 122 Nev. 1056, 145 P.3d 1002 (2006); *Whitman v. Superior Court (People)*, 54 Cal. 3d 1063, 820 P.2d 262, 2 Cal. Rptr. 2d 160 (1991); *State v. Sherry*, 233 Kan. 920, 667 P.2d 367 (1983); *Mitchell v. State*, 84 Wis. 2d 325, 267 N.W.2d 349 (1978).

videos illustrating some of the terms and concepts described during Citek's testimony, and Citek relied on exhibit 30 for illustration throughout his testimony.

[17-19] Daly argues on appeal that the exhibit was not relevant and that it was hearsay. But we conclude that it was admissible as a demonstrative exhibit. Demonstrative exhibits are admissible if they supplement a witness' spoken description of the transpired event, clarify some issue in the case, and are more probative than prejudicial.[53] Demonstrative exhibits are inadmissible when they do not illustrate or make clearer some issue in the case; that is, where they are irrelevant or where the exhibit's character is such that its probative value is substantially outweighed by the danger of unfair prejudice.[54] And a judgment will not be reversed on account of the admission or rejection of demonstrative evidence unless there has been a clear abuse of discretion.[55]

In this case, exhibit 30 provided helpful illustration of Citek's detailed medical testimony. No unfair prejudice is apparent from the record. And the exhibit was not hearsay because it was not 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.[56] Rather, it was simply illustrative of Citek's testimony at the hearing—about which he was cross-examined—and Daly does not contend that the exhibit did not accurately represent and aid Citek's testimony. Thus, we conclude that exhibit 30 was an appropriate illustration of Citek's testimony and that the county court did not abuse its discretion by admitting it for purposes of the *Daubert*/*Schafersman* hearing.

Daly makes similar arguments with respect to exhibits 41 and 42, which were charts prepared by Spirk listing various drugs and their physiological effects. For similar reasons, we also find those arguments to be without merit.

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[53] *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007).

[54] *Id.*

[55] See *id.*

[56] See Neb. Evid. R. 801, Neb. Rev. Stat. § 27-801 (Reissue 2008).

(iii) Letter From American Optometric Association

Daly also makes relevance, hearsay, and Confrontation Clause arguments with respect to exhibit 32, a letter containing a resolution of the American Optometric Association supporting horizontal gaze nystagmus as a field sobriety test. But the only objection made at the *Daubert/Schafersman* hearing was that "[t]here's been no showing that [Citek] was present when this was made . . . ." Citek testified that he was a member of the organization, recognized the resolution, and agreed with it. The court did not abuse its discretion in overruling Daly's nonspecific objection, and even if it had, the error would have been harmless.

(iv) Evidence Relating to Cody and Fisher

The *Daubert/Schafersman* hearing in this case was also applicable to several other pending cases. Because similar issues were pending in other cases on the county court's docket, the parties stipulated to a consolidated *Daubert/Schafersman* hearing. As a result, some evidence was accepted at the pretrial hearing for some cases, but not for others.

Cody and Fisher were DRE instructors for, respectively, the city of Lincoln and the Nebraska State Patrol. Cody's testimony was offered by the State solely with respect to another case, not Daly's case. Nonetheless, the defense offered Cody's resume into evidence in all the consolidated cases, including Daly's. And the defense argued that Cody's cross-examination testimony was relevant in Daly's case as well. Similarly, Fisher was called as a witness solely with respect to yet another case. The county court sustained the State's objections to Daly's proffered evidence.

On appeal, Daly argues that the county court erred in permitting Cody and Fisher to testify as expert witnesses. But because neither witness' testimony was admitted in Daly's case, Daly was not aggrieved by the court's rulings and does not have standing to object to them on appeal.[57]

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[57] See, *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006); *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004).

Daly also argues that the court erred in sustaining the State's relevance objection to Cody's resume. Specifically, Cody's resume included his "rolling log" of DRE examinations. Daly argues that the rolling log was relevant, because it "could be utilized in challenging any assertions of margin of error and/or reliability."[58] But Daly has not explained *how* it could be utilized to do that. And more to the point, the issue at the *Daubert*/*Schafersman* hearing was the general reliability of the DRE protocol as a basis for Hilger's testimony, not the specific proficiency of another officer who did not even examine Daly. The county court did not abuse its discretion in sustaining the State's objection.

Daly's final argument with respect to Cody's and Fisher's testimony is that the court erred in overruling his proffer of their cross-examination testimony. To begin with, it is not clear from the record that Fisher's testimony was offered. Daly's specific offer of proof referenced the docket number of the case in which Cody testified, not the case in which Fisher testified. But regardless, the county court did not abuse its discretion in excluding the testimony as irrelevant. Daly repeats his assertion that the evidence could be "utilized in challenging any assertions of margin of error, inter-rater and intra-rater reliability."[59] He does not explain how the evidence would support such a challenge, nor does he explain how such a challenge would be relevant to the issue presented in Daly's case at the *Daubert*/*Schafersman* hearing.

In short, the county court did not abuse its discretion in refusing to consider any evidence relating to Cody or Fisher in Daly's case. Daly's arguments in that regard are without merit.

(v) Failure to Rule on Exhibits 17 and 18

At the conclusion of the *Daubert*/*Schafersman* hearing, the State offered into evidence exhibits 17 and 18—respectively, a position statement on DRE's of the Committee on Alcohol and Other Drugs of the National Safety Council and a statement

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[58] Brief for appellant at 58.

[59] *Id.* at 59.

supporting DRE's from the American Bar Association. Daly objected on several grounds. After some argument, the court stated that it would "take them under advisement" and "take a look at what's already been offered." But no ruling on the exhibits appears in the record. Daly argues that the court erred in taking the State's offer under advisement but never ruling on the offer or his objections. Daly complains that the county court's failure to rule on the offer and objections hampers his ability to claim error on appeal.

[20-22] But the presentation of an adequate record for appellate review is primarily the responsibility of the parties.[60] It is well established that a party who fails to insist upon a ruling to a proffered objection waives that objection.[61] We have explained that

> "[i]f when inadmissible evidence is offered the party against whom such evidence is offered consents to its introduction, or fails to object, or to insist upon a ruling on an objection to the introduction of the evidence, and otherwise fails to raise the question as to its admissibility, he is considered to have waived whatever objection he may have had thereto, and the evidence is in the record for consideration the same as other evidence."[62]

Daly was entitled to rulings on his objections. But because no request was made for the rulings, Daly waived his objections. His argument on appeal is without merit.

(d) Daly's "Motion for Findings of Fact"

After the county court filed its written ruling that Hilger's opinion was admissible, Daly filed a "Motion for Findings of Fact" asking the court for specific rulings on a number of particular questions. The court denied the motion, and Daly claims on appeal that this was error.

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[60] *R.W. v. Schrein*, 264 Neb. 818, 652 N.W.2d 574 (2002).

[61] See, *State v. Dean*, 270 Neb. 972, 708 N.W.2d 640 (2006); *Schrein, supra* note 60.

[62] *State v. Nowicki*, 239 Neb. 130, 134, 474 N.W.2d 478, 483 (1991) (emphasis omitted). Accord *Schrein, supra* note 60.

[23-25] A trial court's gatekeeping duty requires it to adequately demonstrate by specific findings on the record that it has performed that duty, because the losing party is entitled to know that the trial court has engaged in the heavy cognitive burden of determining whether the challenged testimony was relevant and reliable and to a record that allows for meaningful appellate review.[63] And meaningful appellate review requires the court to "'explain its choices' so that the appellate court has an adequate basis to determine whether the analytical path taken by the trial court was within the range of reasonable methods for distinguishing reliable expert testimony from false expertise."[64] So, we explained in *Zimmerman v. Powell*[65] that

> [a] trial court adequately demonstrates that it has performed its gatekeeping duty when the record shows (1) the court's conclusion whether the expert's opinion is admissible and (2) the reasoning the court used to reach that conclusion, specifically noting the factors bearing on reliability that the court relied on in reaching its determination.

The county court held several pretrial hearings in this case regarding the DRE protocol and eventually entered an 11-page order that summarized the history of the DRE protocol, the process of DRE examination, the evidence presented, and the court's findings regarding the reliability of the protocol and the admissibility of Hilger's opinion testimony. The county court's order satisfies the requirements articulated in *Zimmerman*, demonstrating that the court considered the issues carefully and conscientiously performed its gatekeeping duty.

Daly's appellate argument consists of repeating the assertions he made in his motion, that certain findings were "necessary,"[66] without explaining why they were necessary for the

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[63] See *Zimmerman v. Powell*, 268 Neb. 422, 684 N.W.2d 1 (2004).

[64] *Id.* at 430, 684 N.W.2d at 9.

[65] *Id.* at 430-31, 684 N.W.2d at 9.

[66] Brief for appellant at 62.

court to perform its gatekeeping function. For instance, Daly claims that "it was necessary to clarify the appropriate definition of 'drug,'" "it was necessary to clarify whether any or all of the various 12-step protocols and its varied components collectively and/or individually may be presented regarding intoxication, impairment, or exposure to a particular class of drug or alcohol," and "[i]t was necessary to clarify whether the DRE protocol(s) are deemed as being subject to a specific margin of error, and specifically what the Court determined that margin of error to be."[67]

But those findings were not necessary to resolve the issues presented at the *Daubert/Schafersman* hearing, nor are they essential to our appellate review. While Daly was entitled to ask the court for clarification on issues he thought were important, he has identified no prejudicial error in the court's failure to answer his questions. The court's findings were more than sufficient to satisfy its gatekeeping duty. We find no merit to Daly's argument to the contrary.

2. Trial Issues

(a) Overruling of Motion to Strike Juror for Cause

One of the members of the venire was a parole officer employed by the State of Nebraska Department of Correctional Services. Daly moved to strike the parole officer for cause, taking the position that because he was employed by the State of Nebraska, he was an employee of a party to the case. The county court overruled the motion, and Daly exercised a peremptory strike to prevent the parole officer from serving on the jury.

Daly argues that the potential juror should have been stricken for cause, relying on the Court of Appeals' holding in *Kusek v. Burlington Northern RR. Co.*[68] that employees of a party are ineligible to serve on a jury in a case involving their employer.

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[67] *Id.* at 62-63 (emphasis omitted).

[68] *Kusek v. Burlington Northern RR. Co.*, 4 Neb. App. 924, 552 N.W.2d 778 (1996).

We question whether the principle stated in *Kusek* extends to this situation, in which the parole officer was employed by the State's Department of Correctional Services, while Daly was prosecuted by the office of the Lancaster County Attorney. But more importantly, Daly has failed to show that he was prejudiced by the court's denial of his motion.

[26,27] It is well settled that even the erroneous overruling of a challenge for cause will not warrant reversal unless it is shown on appeal that an objectionable juror was forced upon the challenging party and sat upon the jury after the party exhausted his or her peremptory challenges.[69] We will not reverse a conviction based on a challenge to a potential juror if that person was not ultimately included on the jury, even if the defendant was required to use a peremptory challenge to remove the person.[70]

[28] Here, Daly argues only that the parole officer should have been stricken for cause. The parole officer did not sit on the jury, and Daly does not argue that any juror who actually sat on the panel was objectionable. In other words, Daly does not argue that the jury was not impartial. The true object of challenges, either peremptory or for cause, is to enable the parties to avoid disqualified persons and secure an impartial jury. When that end is accomplished, there can be no just ground for complaint against the rulings of the court as to the competency of the jurors.[71] Daly's complaint in this case is, therefore, without merit.

(b) Rule 404 Objection to Scale Found in Daly's Car

Before trial, Daly moved to exclude the scale found in Daly's car, based on rule 404. Daly argued that the scale was not relevant to the DUI charge, but would suggest Daly was a

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[69] See *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007). See, also, *Rivera v. Illinois*, 556 U.S. 148, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009).

[70] *Hessler, supra* note 69.

[71] *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001); *State v. Rife*, 215 Neb. 132, 337 N.W.2d 724 (1983).

repeat drug user. The county court overruled the motion, reasoning that the scale was evidence of the use of marijuana in the car. And at trial, Monico was initially permitted to testify about the presence of the scale in Daly's car.

But after Monico's testimony, the court reconsidered and sustained Daly's objection to the scale. Daly moved for a mistrial, but the court did not declare a mistrial, and instead instructed the jury that

> [p]reviously there was some evidence that a scale had been received, was received into evidence. At this point the Court is going to sustain the objection to evidence regarding that scale and I'm going, at this time, [to] tell you to disregard that. It is not considered evidence and you must not consider it.

Daly's first argument on appeal is that the court erred in admitting the scale into evidence. But the court did not admit the scale into evidence. Therefore, the issue is whether the court should have declared a mistrial or whether the court's admonition to the jury was sufficient to cure any prejudice resulting from the mention of the scale.

[29-32] A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.[72] But a mistrial is not necessarily required if the resulting prejudice can be cured by an admonition to the jury.[73] Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material.[74] And the decision whether to grant a motion for mistrial will not be disturbed on appeal in the absence of an abuse of discretion.[75]

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[72] *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006).

[73] *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002).

[74] See *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

[75] See *State v. Floyd*, 277 Neb. 502, 763 N.W.2d 91 (2009).

[33,34] Here, the jury was instructed to disregard the scale. And even though it is hard to "unring the bell" in certain instances, absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.[76] We find nothing in the record in this case to suggest that the jury could not and did not abide by the court's admonition in a matter such as this. A defendant faces a higher threshold than merely showing a possibility of prejudice when attempting to prove error predicated on the failure to grant a mistrial, especially when, as in this case, an objection or motion to strike the allegedly improper material was sustained and the jury was admonished to disregard such material.[77] Daly must prove the alleged error actually prejudiced him, rather than creating only the possibility of prejudice.[78] He has not done so, and under these circumstances, the court did not abuse its discretion in refusing to declare a mistrial.

(c) Alleged Misconduct During Closing Argument

During closing argument, the prosecutor argued that the DRE protocol was used by a number of government agencies around the world. Daly made an objection, and a discussion was held at the bench. Closing argument continued, and another objection and sidebar followed. No ruling on the objections is indicated in the record, and no record was made of either discussion at the bench.

Daly now assigns that the court erred in "overruling [his] Motion for Mistrial regarding the remarks made by the prosecutor in closing argument." But no corresponding motion for mistrial appears in the record. Nor was a motion for mistrial made at the conclusion of the argument.[79] Nor does the record reflect the basis upon which Daly's objections were made.[80]

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[76] See *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

[77] *Robinson, supra* note 74.

[78] See *id.*

[79] See, *Robinson, supra* note 9; *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998).

[80] See *State v. Hall*, 270 Neb. 669, 708 N.W.2d 209 (2005).

As we explained, under comparable circumstances, in *State v. Harris*[81]:

> It is incumbent upon an appellant to supply a record which supports his or her appeal. . . . In this instance, neither the basis for the objection nor any ruling on the objection appears in the record. This court has held that a party who fails to insist upon a ruling to a proffered objection waives that objection. . . . As the record before us shows neither the basis for [the defendant's] objection nor any ruling on the objection, we conclude that [the defendant] has waived any error in this regard.

Similarly, the record in this case reflects neither the basis for Daly's objection nor a ruling on the objection. Nor does the record show that a motion for mistrial was made or the basis for such a motion. Under these circumstances, we conclude that Daly has waived any error in this regard.

(d) Motion for New Trial and Cumulative Error

Finally, Daly argues that the county court erred in overruling his motion for new trial and that he was denied a fair trial by cumulative error. Daly's argument in this regard is dependent upon the arguments we have already rejected with respect to his other assignments of error. Therefore, we also find his final assignments of error to be without merit.

V. CONCLUSION

The county court did not abuse its discretion in permitting Hilger's opinion testimony or prejudicially err in any other regard. The district court did not err in affirming Daly's conviction and sentence for DUI. The judgment of the district court is affirmed.

AFFIRMED.

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[81] *State v. Harris*, 263 Neb. 331, 340, 640 N.W.2d 24, 34 (2002) (citations omitted).

STATE OF NEBRASKA, APPELLEE, V. DWIGHT L. TUCKER, APPELLANT.

774 N.W.2d 753

Filed November 20, 2009. No. S-08-623.

1. **Judgments: Appeal and Error.** On a question of law, an appellate court reaches a conclusion independent of the court below.
2. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
3. **Criminal Law: Weapons: Intent.** A person cannot use a weapon for the purpose of unintentionally committing another crime.
4. **Criminal Law: Trial: Judges: Presumptions.** A trial judge is presumed in a jury-waived criminal trial to be familiar with and apply the proper rules of law, unless it clearly appears otherwise.
5. **Criminal Law: Assault.** The crime of first degree assault can only be committed intentionally.

Petition for further review from the Court of Appeals, IRWIN, CARLSON, and CASSEL, Judges, on appeal thereto from the District Court for Douglas County, MARLON A. POLK, Judge. Judgment of Court of Appeals affirmed.

Thomas C. Riley, Douglas County Public Defender, and Timothy P. Burns for appellant.

Dwight L. Tucker, pro se.

Jon Bruning, Attorney General, and George R. Love for appellee.

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

MCCORMACK, J.

NATURE OF CASE

In a case where the only injury to the victim was a single gunshot wound that caused his death, we address whether it is irreconcilable for a judge in a bench trial to find the defendant guilty of unintentional manslaughter while also finding him guilty of the intentional use of a weapon to commit the felony

of either terroristic threats, first degree assault, or second degree assault.

BACKGROUND

SHOOTING

Dwight L. Tucker testified that at around 12:30 a.m. on June 2, 2007, his cousin, Jerry Valentine, called and asked Tucker to assist in "a run" to sell drugs. Tucker agreed. Valentine picked Tucker up, and the two drove from North Omaha, Nebraska, to a gas station on 13th and Vinton Streets. The gas station was closed, but the exterior of the convenience store and the pumps were well lit and monitored by three surveillance cameras. There was light street traffic in front of the station, and the pumps and convenience store were in plain view of the street.

Silent footage from the cameras showed that at approximately 1:15 a.m., Valentine's vehicle pulled up askew to the gas pumps, which were in front of the convenience store. Almost immediately thereafter, Daniel Everbeck pulled up in front of a pay telephone located on the wall outside the front entrance of the convenience store. Tucker testified that when they pulled up, he saw Everbeck and assumed he was the person Valentine would be selling drugs to.

Everbeck opened his door, but did not immediately exit. Instead, the two vehicles stood in plain sight of one another, until Valentine's vehicle backed up out of view from the cameras. Tucker explained at trial that after backing up, they parked on a side street.

Tucker testified that he and Valentine exited Valentine's vehicle. Before doing so, Valentine put a gun on Tucker's lap and told him to watch his back in case somebody tried to rob him. Tucker testified that he did not know the gun was loaded.

Everbeck exited his vehicle and walked around the front and toward the pay telephone. He then disappeared from view of the camera because the pay telephone and the immediate vicinity of the pay telephone are not captured. Approximately 30 seconds later, Everbeck returned to retrieve something from the vehicle and walked back to the pay telephone.

One minute after Everbeck walked to the telephone, Valentine appeared strolling through the area of the gas pumps, looking in the direction of the pay telephone, before leaving the camera's coverage area. Tucker explained at trial that Everbeck was on the telephone and that Valentine was walking around "to make sure it wasn't a setup" and that everything was "cool." Tucker waited by the side of the building.

Everbeck's girlfriend, a bartender at a bar across the street from the gas station, testified that Everbeck called her on her cellular telephone at 1:17 a.m. The conversation lasted approximately 2 minutes, and she noted nothing out of the ordinary. They made arrangements to meet after she was finished closing the bar. She did not know where Everbeck was calling from.

A little over 2 minutes after Valentine had strolled through the gas pump area, Valentine and Tucker approached Everbeck from the side of the convenience store. The three were in view of the cameras only briefly. During this time, Everbeck stood with his back to his vehicle and facing Tucker, whose back was facing the convenience store. Valentine stood slightly to the side, with his back at an angle between the convenience store and the side lot from which they came.

Everbeck soon appeared to become agitated with Tucker, gesticulating in an animated fashion toward him and apparently talking. Tucker stood, apparently silent, with his arms straight at his sides, but looking at Everbeck. Tucker explained at trial that he was holding the gun aimed at the ground.

Everbeck then appeared to shove Tucker in the direction of the pay telephone, and Tucker and Everbeck disappeared from view of the cameras. At approximately the same time, another camera showed Valentine calmly walking away in the direction from which they came and looking back in the direction of the pay telephone. Then, Valentine started to run and Tucker appeared in the camera's view, running away behind him. The actual shooting was not recorded by the cameras. Everbeck's girlfriend testified that she heard a bang outside the bar approximately 30 seconds after her conversation with Everbeck had ended.

Tucker explained at trial that when they approached Everbeck, Valentine greeted him, saying, "[W]hat's up." Everbeck ignored Valentine and angrily turned his attention to Tucker instead, asking, "What you got a gun for? What, you going to shoot me?" Tucker stated he did not respond. According to Tucker, Everbeck then pushed him and started coming toward him, backing him into the wall where the pay telephone was located. Tucker testified that Everbeck tried to reach for his gun and tried to hit him. As Tucker pulled his arm back to keep the gun out of Everbeck's reach, it "just went off."

The police arrived at the scene approximately 10 minutes after the shooting. Everbeck was semiconscious. Everbeck told an officer that he was in pain and that he had been shot by a black male. On the way to the hospital, Everbeck gave an approximate description of the age and height of the shooter. Everbeck did not explain the circumstances of the shooting nor indicate whether he had been robbed.

Another officer searching the area soon found Tucker, dressed in a white tank top and sweatpants, approximately three blocks from the gas station. Tucker was waiting at the corner and had no identification or other possessions on his person. Tucker gave the officer his brother's name as an alias.

The police also found a semiautomatic revolver and a red-and-white striped shirt under a tree. Tucker appears wearing that same shirt in the surveillance videos. The revolver was later identified as the weapon used in the shooting. Expert testimony established that the gun was working properly. When found, the gun contained five live rounds in the magazine and one live round in the chamber.

Everbeck died at the hospital as the result of the gunshot wound. The bullet had entered his lower abdomen, traveled through the liver and lacerated the abdominal aorta. There was no evidence of any injuries other than those attributable to the gunshot wound. The forensic pathologist stated that the bullet entered Everbeck at a slightly downward angle and exited through his back. According to the toxicology report, at the time of his death, Everbeck had a vitreous humor ethanol level of 0.174 and cannabinoids were also detected in his system.

The authorities found numerous items in Everbeck's pockets, including Everbeck's identification, approximately $15, cigarettes, two prescription oxycodone pills, and approximately 11.8 grams of what appeared to be marijuana. There was also a paycheck stub dated June 1, 2007, for $267.54. A witness indicated that Everbeck cashed this check earlier that day. The evidence was unclear, however, as to how much of that check Everbeck spent prior to the shooting.

Charges and Verdict

Tucker was charged with first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a felon. Tucker waived a jury trial. The parties stipulated that he was a convicted felon. The State's charge of first degree murder was based on alternative theories of premeditation and felony murder.

The court found Tucker guilty of the lesser-included offense of manslaughter "by unintentionally causing the death of . . . Everbeck while in the commission of an unlawful act." The court did not specify the unlawful act, although it also found Tucker guilty of possession of a deadly weapon by a felon. Finally, the court found Tucker guilty of use of a deadly weapon to commit a felony. In so doing, the court explained that the predicate felony to that offense was "assault — at least in the first and/or second degree on . . . Everbeck and/or a terroristic threat towards . . . Everbeck."

Nebraska Court of Appeals

Tucker appealed his convictions to the Nebraska Court of Appeals.[1] Among other assignments of error no longer relevant, Tucker argued there was insufficient evidence to convict him of the charge of use of a weapon to commit a felony, especially in light of the trial court's finding that he did not intentionally kill Everbeck. Although the Court of Appeals recognized that the predicate felony for use of a deadly weapon must be intentional, it found the evidence sufficient to support the trial court's finding of the intentional act of terroristic threats. The

[1] See *State v. Tucker*, 17 Neb. App. 487, 764 N.W.2d 137 (2009).

Court of Appeals did not address the trial court's findings of first or second degree assault. A partial dissent to the case argued that there was insufficient evidence to prove any of these predicate offenses. With regard to first or second degree assault, the dissent argued, "The mere fact that the victim in this case was killed does not allow an inference that Tucker intended to inflict any bodily injury . . . ."[2] As for terroristic threats, the dissent argued that the majority's opinion "results in the inescapable conclusion that anytime somebody holds a firearm in the presence of somebody else, there has been a terroristic threat, and there is no authority for such an expansive conclusion."[3]

We granted Tucker's petition for further review.

ASSIGNMENT OF ERROR

Tucker asserts that the Court of Appeals erred in affirming the use of a deadly weapon to commit a felony conviction, because there was insufficient evidence as a matter of law to sustain this finding.

STANDARD OF REVIEW

[1] On a question of law, an appellate court reaches a conclusion independent of the court below.[4]

[2] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[5]

ANALYSIS

The only conviction being challenged by this petition for further review is the use of a weapon to commit a felony. In his

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[2] *Id.* at 504, 764 N.W.2d at 152 (Irwin, Judge, concurring in part, and in part dissenting).

[3] *Id.* at 503, 764 N.W.2d at 152 (Irwin, Judge, concurring in part, and in part dissenting).

[4] *State ex rel. Reed v. State*, 278 Neb. 564, 773 N.W.2d 349 (2009).

[5] *State v. Canaday*, 263 Neb. 566, 641 N.W.2d 13 (2002).

petition for further review, Tucker makes three basic arguments under what he classifies as an insufficiency of the evidence claim. First, Tucker argues there was insufficient evidence to support the predicate offenses of first degree assault, second degree assault, or terroristic threats. Second, Tucker argues that such predicate offenses are inconsistent with the trial court's verdict that he unintentionally killed Everbeck. Third, Tucker asserts that second degree murder and terroristic threats cannot be used as the predicate offenses for the use of a weapon charge, because those crimes can be committed recklessly and the trial court did not specify under what theory he would be guilty.

Predicate Crime Must Be Intentional

[3] In *State v. Ring*,[6] we explained that use of a weapon "'to commit any felony'" was synonymous with use of a weapon "'for the purpose of committing any felony.'" Thus, the felony motor vehicle homicide presented in that case, which is by definition committed unintentionally, could not form the basis of a use of a weapon conviction. We explained that a person cannot use a weapon "for the purpose of" unintentionally committing another crime.[7]

In *State v. Pruett*,[8] we similarly reversed the defendant's use of a weapon conviction where the jury found the defendant guilty of manslaughter by unintentionally causing another's death during a reckless assault. The defendant in *Pruett* thought there was only a "dummy round" in the chamber, and he was trying "'to mess with'" his friend when he fired in his direction.[9] We explained that both manslaughter and reckless assault are unintentional crimes and thus could not be used as predicate offenses for the use of a weapon conviction.

Later, in *State v. Thurman*,[10] we explained that while a purely unintentional crime could not form the predicate offense

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[6] *State v. Ring*, 233 Neb. 720, 724, 447 N.W.2d 908, 911 (1989).

[7] *Id.* at 725, 447 N.W.2d at 911.

[8] *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002).

[9] *Id.* at 102, 638 N.W.2d at 813.

[10] *State v. Thurman*, 273 Neb. 518, 730 N.W.2d 805 (2007).

for a use of a weapon conviction, the predicate crime need not be a specific intent crime. Instead, the predicate offense could be a general intent crime. Thus, first degree sexual assault could be the predicate crime for the use of a weapon conviction. We noted it would be "'absurd'" to say a weapon was not used "'for the purpose of' subjecting another to sexual penetration through the use of force, threat of force, coercion, or deception."[11]

These cases make clear that Tucker's conviction of unintentional manslaughter could not form the basis of the use of a weapon conviction unless predicated on the commission of an intentional unlawful act. Reckless assault and reckless terroristic threats would be an insufficient basis for the use of a weapon conviction. In contrast, intentional terroristic threats or intentional assault could legally form the basis for an unintentional manslaughter conviction and the predicate for a use of a weapon charge.

Failure to Specify Intent

[4,5] We find no merit to Tucker's argument that his conviction must be reversed because the court failed to specify whether the predicate crimes were committed intentionally as opposed to recklessly. A trial judge is presumed in a jury-waived criminal trial to be familiar with and apply the proper rules of law, unless it clearly appears otherwise.[12] In this case, it is especially clear that the judge was aware that the predicate offense must be intentional. The crime of first degree assault can only be committed intentionally.[13] And although the crimes of second degree assault and terroristic threats can be committed recklessly, we will assume that the judge, being aware of the law, found Tucker had committed those crimes intentionally.

Inconsistent Verdict

We find no inherent inconsistency between the trial court's rejection of the murder charges and its conclusion that Tucker

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[11] *Id.* at 524, 730 N.W.2d at 812.

[12] *State v. Keup*, 265 Neb. 96, 655 N.W.2d 25 (2003).

[13] Neb. Rev. Stat. § 28-308 (Reissue 2008).

had committed intentional assault or intentional terroristic threats. In so concluding, we bear in mind that any rule barring an inconsistent judgment does not encompass cases where it is "merely difficult to find a truly satisfying explanation for the differing conclusions."[14] While it may at first appear the judge concluded the same act was both intentional and unintentional, a closer examination of the object of the mens rea for the different offenses reveals that the crimes do not involve the same act and that the judge's findings were reconcilable.

Both first[15] and second[16] degree murder are specific intent crimes. Thus, by acquitting Tucker of first and second degree murder, the trial court made the implicit finding that Tucker lacked the specific intent to kill and that he also lacked the specific intent to commit any of the listed felonies for felony murder. By finding Tucker guilty of unintentional manslaughter, the court found that Tucker did not intend to kill Everbeck, but that he did kill Everbeck during the intentional commission of an unlawful act.[17]

The crime of terroristic threats requires the specific intent to terrorize, not an intent to kill, and it is not one of the felonies listed for felony murder. Assault is a general intent crime that requires only the intent to commit the assault, and not the specific injury that results.[18] Assault also is not a listed predicate felony for felony murder. It was consistent for the court to conclude that Tucker intended to commit assault but did not intend for Everbeck to die as a result of the assault. It was likewise legally consistent for the court to conclude that Tucker intended to terrorize Everbeck,[19] but did not intend to kill him.

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[14] *United States v. Wilson*, 342 F.2d 43, 45 (2d Cir. 1965).

[15] *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006); *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006); *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991).

[16] See, *State v. Davlin, supra* note 15; *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004); *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998); *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991).

[17] See Neb. Rev. Stat. § 28-305 (Reissue 2008).

[18] See, e.g., *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993).

[19] See Neb. Rev. Stat. § 28-311.01 (Reissue 2008).

Sufficiency of Evidence

The final question Tucker presents is whether the evidence was sufficient for the trial court to conclude he had committed these predicate crimes of assault and/or terroristic threats. A reversal for insufficiency of the evidence should be treated no differently than a trial court's granting a judgment of acquittal at the close of all the evidence. A trial court, in passing on such a motion, considers all of the evidence it has admitted, and to make the analogy complete, it must be this same quantum of evidence which is considered by the reviewing court.[20] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[21]

We do not express any opinion as to the crime of, nor the sufficiency of the evidence of, terroristic threats, because we determine that assault constitutes the predicate felony for the use of a weapon charge. We find, instead, that the evidence was sufficient to support intentional assault, the element of which is intentionally or knowingly causes serious bodily injury to another person. There was testimony at trial that the gun was in working order, and Tucker admitted he shot Everbeck. While Tucker testified that he did not know the gun was loaded and that it "just went off," Tucker's credibility was a matter for the trier of fact. Although the trial court concluded that Tucker did not rob Everbeck and did not intend to kill him, the court was not thereby obligated to accept Tucker's explanation that the shooting was accidental. Viewed in a light most favorable to the State, the facts that the gun was operational, was loaded, and was used to shoot Everbeck are enough to infer that Tucker pulled the trigger intentionally—even if he harbored such intent only briefly. Thus, the evidence was sufficient to establish that Tucker intended to commit an assault.

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[20] *State v. Palmer*, 257 Neb. 702, 600 N.W.2d 756 (1999).

[21] *State v. Canaday, supra* note 5.

CONCLUSION

We find that based on the predicate offense of intentional assault, the evidence was sufficient to support the trial court's judgment that Tucker was guilty of use of a weapon to commit a felony. There being no further issues raised by Tucker in his petition for further review, we affirm the judgment of the Court of Appeals, which affirmed the judgment of the trial court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JORDAN M. GOODWIN, APPELLANT.
774 N.W.2d 733

Filed November 20, 2009. No. S-08-1159.

1. **Criminal Law: Courts: Juvenile Courts: Jurisdiction: Appeal and Error.** A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion.
2. **Criminal Law: Courts: Juvenile Courts: Jurisdiction: Words and Phrases.** The district court and the separate juvenile court have concurrent jurisdiction over felony prosecutions of a juvenile, defined as a person who is under the age of 18 at the time of the alleged criminal act.
3. **Courts: Juvenile Courts: Jurisdiction.** In determining whether a case should be transferred to juvenile court, a court should consider those factors set forth in Neb. Rev. Stat. § 43-276 (Reissue 2004). In order to retain the proceedings, the court does not need to resolve every factor against the juvenile; moreover, there are no weighted factors and no prescribed method by which more or less weight is assigned to each specific factor. It is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile.
4. **Courts: Juvenile Courts: Jurisdiction: Evidence.** When a court's basis for retaining jurisdiction over a juvenile is supported by appropriate evidence, it cannot be said that the court abused its discretion in refusing to transfer the case to the juvenile court.
5. **Motions to Suppress: Confessions: Constitutional Law: Miranda Rights: Appeal and Error.** In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, including claims that it was procured in violation of 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. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice

to meet the constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.

6. **Miranda Rights: Waiver.** *Miranda* rights can be waived if the suspect does so knowingly and voluntarily.
7. ____: ____. A valid *Miranda* waiver must be voluntary in the sense that it was the product of a free and deliberate choice and made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.
8. ____: ____. In determining whether a *Miranda* waiver is knowingly and voluntarily made, a court applies a totality of the circumstances test. Factors to be considered include the suspect's age, education, intelligence, prior contact with authorities, and conduct.
9. **Miranda Rights: Right to Counsel.** In order to require cessation of custodial interrogation, the subject's invocation of the right to counsel must be unambiguous and unequivocal.
10. **Confessions: Due Process.** The Due Process Clause of U.S. Const. amend. XIV and the due process clause of Neb. Const. art. I, § 3, preclude admissibility of an involuntary confession.
11. **Confessions: Proof: Police Officers and Sheriffs.** The prosecution has the burden to prove by a preponderance of the evidence that incriminating statements by the accused were voluntarily given and not the product of coercion. In making this determination, a totality of the circumstances test is applied, and factors to consider include the tactics used by the police, the details of the interrogation, and any characteristics of the accused that might cause his or her will to be easily overborne. An additional factor to consider is whether the suspect is a minor, but this factor is not determinative.
12. **Confessions: Police Officers and Sheriffs.** Coercive police activity is a necessary predicate to a finding that a confession is not voluntary.
13. **Confessions.** The confession of an accused may be involuntary and inadmissible if obtained in exchange for a promise of leniency.
14. **Confessions: Police Officers and Sheriffs.** Under certain circumstances, a promised benefit might be inferred from an officer's statement to an accused, if such an inference is reasonable. In any circumstance, the benefit offered to a defendant must be definite and must overbear his or her free will in order to render the statement involuntary.
15. ____: ____. Mere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by either a threat or promise, does not make a subsequent confession involuntary.
16. **Constitutional Law: Due Process.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
17. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
18. **Jury Instructions: Lesser-Included Offenses.** Step instructions which require consideration of the most serious crime charged before consideration of lesser-included offenses are not erroneous.

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

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

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

Stephan, J.

After giving a statement to police in which he admitted firing shots which killed a 6-year-old girl, Jordan M. Goodwin was charged in the district court for Douglas County with first degree murder and use of a firearm in the commission of a felony. Goodwin was 14 years 3 months of age at the time of the shooting. The district court denied Goodwin's motion to transfer his case to juvenile court and Goodwin's motion to suppress a statement he gave to police. Goodwin was tried before a jury. His defense was that he fired the fatal shots, but that he did so without the intent to kill and was therefore guilty only of manslaughter. After the jury received a step instruction which permitted it to find Goodwin guilty of first degree murder, guilty of second degree murder, guilty of manslaughter, or not guilty, the jury returned a verdict of guilty of second degree murder. The jury also found Goodwin guilty of the related weapons charge. The court entered judgment on the convictions and sentenced Goodwin to 50 to 50 years' imprisonment on the second degree murder conviction and to a consecutive term of 10 to 10 years' imprisonment on the weapons charge, with credit given for time served. This is Goodwin's direct appeal.

I. BACKGROUND

The fatal shooting occurred in the late afternoon of October 5, 2007, outside an Omaha residence. The exact circumstances of the shooting were disputed at trial. Generally, however, the record shows that on the day of the shooting, Goodwin, who

had previously run away from an enhanced treatment group home where he had been placed following a juvenile court delinquency adjudication, was living in a rented duplex with two adults to whom he was not related. All three sold drugs out of the residence.

Earlier in the afternoon of the shooting, Goodwin was involved in an argument with Maya Mack in the presence of several other persons who were gathered in a garage near Mack's home. At one point during the argument, Goodwin pointed a handgun in Mack's direction. Mack told him not to point the gun at her unless he planned to use it, and a witness to the argument told Mack not to worry because the gun was not loaded. Mack then threw a container of spray paint at Goodwin. After Mack left the gathering, Goodwin told another person who was present that he needed ammunition for the handgun.

Later that afternoon, Mack was driven by her stepsister, Alexis Holford, to a home located in Mack's neighborhood for the purpose of buying marijuana. Mack's friend Brianna Russ and 6-year-old Alazia Alford were also passengers in the vehicle driven by Holford. As Holford's vehicle arrived, a vehicle driven by Michael Coleman, in which Goodwin and another person were passengers, pulled out of a parking space behind the house and parked nearby. Holford parked in the vacated parking space, and Mack and Russ exited the vehicle and began walking toward the rear entrance of the house. As she walked, Mack shouted something to Goodwin and Coleman, who were still in their vehicle. Moments later, Mack and Russ heard gunfire, and Mack turned to see Goodwin standing outside the vehicle and shooting at them. Both women were struck by gunshots, Russ in the left leg and Mack in the left arm. Neither was seriously injured. Holford, who was still seated in the vehicle, also observed Goodwin shooting. Immediately after the shots were fired, Coleman and Goodwin left the scene in the vehicle driven by Coleman.

At least two of the shots fired by Goodwin entered the rear window of the vehicle which Mack and Russ had exited, striking and killing Alford. The record generally reflects that

Goodwin did not know that Alford was in the vehicle at the time of the shooting. Before giving her own statement to police, Russ called Goodwin and informed him that he had "killed the little girl." He responded that he had not intended to do so.

Additional background information will be included in our discussion of each of Goodwin's assignments of error.

II. ANALYSIS

1. Motion to Transfer to Juvenile Court

(a) Additional Background

Shortly after charges were filed, Goodwin filed a motion requesting the district court to waive jurisdiction and transfer the case to the separate juvenile court. The district court conducted an evidentiary hearing on the motion. The evidence presented at that hearing reflects that Goodwin was born on June 23, 1993. In June 2004, he was charged in juvenile court with third degree arson, a misdemeanor, and placed on juvenile diversion. In 2006, after he was charged in juvenile court with disorderly conduct, Goodwin was referred for a comprehensive child and adolescent assessment, which was conducted in October 2006 by Visinet, Inc. The evaluators noted that Goodwin had an extensive history of behavior problems in school and at home, where he lived with his grandmother. He admitted use of alcohol on an episodic basis and daily use of marijuana. The evaluators recommended therapeutic foster care placement, a regular substance abuse education course, and placement in an alternative school program due to his "history of aggressive and noncompliant behavior at school."

Goodwin was reevaluated by Visinet in March 2007 after being charged with use of a weapon to commit a felony and discharge of a firearm at an occupied building. At that time, Goodwin was being held at the Douglas County Youth Center. Evaluators recommended that Goodwin participate "in an enhanced treatment group home program that will address his behavioral concerns while providing him with increased structure and ongoing supervision." The Office of Juvenile Services

(OJS) took custody of Goodwin and placed him in a group home, where he received individual and group therapy, saw a psychologist, and received chemical dependency counseling. On two occasions, Goodwin did not return to the group home after receiving weekend passes, requiring issuance of capias warrants to secure his return.

On approximately September 5, 2007, Goodwin again ran away from the group home. After this, a group home therapist noted that Goodwin's whereabouts were unknown and that he "will need a locked facility until he is ready to positively function in the community once again. He will also need to be checked for chemical abuse."

On September 18, 2007, Goodwin was apprehended on a shoplifting charge and placed in a juvenile youth center in Council Bluffs, Iowa, pending transport back to Nebraska. During transport on September 21, Goodwin told the transportation officer that he needed to use the restroom; when he was allowed to do so, he escaped. Goodwin's OJS caseworker reestablished contact with him after his arrest following the shooting, and she saw him monthly at the Douglas County Youth Center, where he was held. She testified that Goodwin was "[u]nfriendly" and "very rude and disrespectful" during these visits and that he blamed her for the fatal shooting.

Grady Porter, the chief deputy probation officer in Douglas County, testified that when a juvenile is adjudicated in a delinquency case, he or she can be placed on probation, placed with the Department of Health and Human Services, placed with OJS, or committed to a secure juvenile correctional facility. Porter testified that commitment to a secure facility is for an indefinite period and that the longest stay in such a facility that he was aware of was approximately 18 months. Porter was unaware of any facility that would accept a juvenile adjudicated of first or second degree murder.

In its written order denying Goodwin's motion to transfer, the district court found, after examining all the relevant factors, that Goodwin's contacts with the juvenile system had not resulted in his rehabilitation and that the best interests of the public required keeping him in custody beyond the period of his minority.

(b) Assignment of Error and Standard of Review

[1] Goodwin contends that the district court erred in denying his motion to transfer his case to the separate juvenile court. A trial court's denial of a motion to transfer a pending criminal proceeding to the juvenile court is reviewed for an abuse of discretion.[1]

(c) Disposition

[2] The district court and the separate juvenile court have concurrent jurisdiction over felony prosecutions of a juvenile, defined as a person who is under the age of 18 at the time of the alleged criminal act.[2] When a felony charge against a juvenile is filed in district court, the juvenile may file a motion requesting that court to waive its jurisdiction to the juvenile court for further proceedings under the Nebraska Juvenile Code.[3] The district court "shall" transfer the case unless a sound basis exists for retaining jurisdiction.[4] The burden of proving a sound basis for retention lies with the State.[5]

At the time the district court considered Goodwin's motion, it was statutorily required to consider the following factors:

> (1) The type of treatment such juvenile would most likely be amenable to; (2) whether there is evidence that the alleged offense included violence or was committed in an aggressive and premeditated manner; (3) the motivation for the commission of the offense; (4) the age of the juvenile and the ages and circumstances of any others involved in the offense; (5) the previous history of the juvenile, including whether he or she had been convicted of any previous offenses or adjudicated in juvenile court,

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[1] *State v. Jones*, 274 Neb. 271, 739 N.W.2d 193 (2007); *State v. Reynolds*, 247 Neb. 608, 529 N.W.2d 64 (1995).

[2] Neb. Rev. Stat. §§ 43-245(4) and 43-247 (Cum. Supp. 2006).

[3] Neb. Rev. Stat. §§ 43-261 (Reissue 2004) and 29-1816 (Reissue 1995); *State v. Phinney*, 235 Neb. 486, 455 N.W.2d 795 (1990).

[4] §§ 43-261 and 29-1816. See, also, *State v. Doyle*, 237 Neb. 60, 464 N.W.2d 779 (1991).

[5] *State v. Doyle, supra* note 4.

> and, if so, whether such offenses were crimes against the person or relating to property, and other previous history of antisocial behavior, if any, including any patterns of physical violence; (6) the sophistication and maturity of the juvenile as determined by consideration of his or her home, school activities, emotional attitude and desire to be treated as an adult, pattern of living, and whether he or she has had previous contact with law enforcement agencies and courts and the nature thereof; (7) whether there are facilities particularly available to the juvenile court for treatment and rehabilitation of the juvenile; (8) whether the best interests of the juvenile and the security of the public may require that the juvenile continue in secure detention or under supervision for a period extending beyond his or her minority and, if so, the available alternatives best suited to this purpose; (9) whether the victim agrees to participate in mediation; (10) whether there is a juvenile pretrial diversion program established pursuant to sections 43-260.02 to 43-260.07; and (11) such other matters as the county attorney deems relevant to his or her decision.[6]

[3] In order to retain the proceedings, the court does not need to resolve every factor against the juvenile; moreover, there are no weighted factors and no prescribed method by which more or less weight is assigned to each specific factor.[7] It is a balancing test by which public protection and societal security are weighed against the practical and nonproblematical rehabilitation of the juvenile.[8]

In this case, the district court issued a 12-page order explaining its consideration and weighing of various factors set forth in § 43-276. The court noted that Goodwin had been in the juvenile court system for several years and that treatment efforts had been unsuccessful. It found that there was some evidence the shooting was premeditated and that the evidence

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[6] Neb. Rev. Stat. § 43-276 (Reissue 2004).

[7] *State v. Jones, supra* note 1.

[8] *Id.*

showed that Goodwin intended to shoot at Mack. Although the court considered the fact that Goodwin was only 14 years old at the time of the offense, it also found that he had "significant contacts" with the juvenile court and that his educational history was "replete with violent incidents." It expressly found that "[e]fforts at treatment have been ignored."

The district court also found that Goodwin had "demonstrated that he desires to live on his own and on his own terms." The court found that based on Goodwin's unsuccessful rehabilitation and supervision within the juvenile system, it did not appear that he could be rehabilitated prior to reaching the age of 19, when juvenile court jurisdiction would end. Based on its consideration of all the § 43-276 factors, the district court refused to transfer the proceeding to juvenile court.

In this appeal, Goodwin does not argue that any of the district court's findings were factually incorrect. Instead, he challenges the weighing process employed by the court in reaching its conclusion. He argues that the evidence before the court suggested manslaughter, not murder, and that the State failed to present evidence that Goodwin was not amenable to further treatment which could be provided through the juvenile court. Goodwin contends the district court should have afforded greater weight to the facts that he has lacked parental guidance and support throughout his life and that he has significant mental health and substance abuse issues. Goodwin argues that the only factor weighing against transfer to juvenile court was the violent nature of the charged offense.

[4] We do not consider lightly Goodwin's youth and his disadvantaged upbringing. But neither can we ignore the violent nature of the crime, Goodwin's previous history of violent and aggressive behavior, and his failure to respond positively to corrective treatment offered through the juvenile justice system prior to the shooting. When a court's basis for retaining jurisdiction over a juvenile is supported by appropriate evidence, it cannot be said that the court abused its discretion in refusing to transfer the case to the juvenile court.[9] Because there is ample evidence to support each of the findings which led the district

[9] *State v. Reynolds, supra* note 1.

court to deny Goodwin's motion to transfer, we cannot and do not conclude that it abused its discretion.

2. Statement to Police

(a) Additional Background

At approximately 8 p.m. on the day of the shooting, Goodwin, accompanied by his grandmother, arrived at the Omaha central police station and asked to speak to an officer. Det. Christopher Perna had received information about the homicide and was aware that witnesses had identified Goodwin as the shooter. Perna and Det. Doug Herout took Goodwin and his grandmother to an interview room. The room was approximately 8 by 12 feet in size with one door and no windows. A sign outside the room stated that the room was subject to audio and video recording.

Goodwin and his grandmother were left alone in the room for approximately 6 minutes. The detectives then entered and began speaking with Goodwin and his grandmother. The interview was videotaped. Goodwin's grandmother told the detectives that she was his legal guardian. Prior to interviewing Goodwin, Perna used an Omaha Police Department form to advise Goodwin of his *Miranda* rights. The detectives directed the questions from the rights advisory form to Goodwin, and he answered. When the officers informed Goodwin that he had the right to an attorney, his grandmother identified Goodwin's attorney by name and stated that she would need to call the attorney, but neither she nor Goodwin requested that the attorney be present. No other mention of an attorney was made, and both Goodwin and his grandmother stated they were willing to talk to the officers.

Goodwin originally told the officers that he generally stayed to himself and had no friends. Perna told him to either "be straight" with them or say he could not answer a question. Perna stated that he knew a lot of the answers to his questions already, so he would know when Goodwin was being honest. Goodwin then said that he had been at a shopping mall that day, alone, buying shoes and shirts. He said that after leaving the mall, he visited a girl whom he refused to identify. The officers asked why Goodwin thought he was there for

questioning. He replied that his grandmother had told him he was accused of murder and that he was "surprised." The officers told him that his name had come up in the investigation and that someone had identified him as the shooter. They said there was a "good chance" there was no intent to kill the child, that the shooter was just intending to send a message, and that the death was a "tragic accident." Goodwin almost immediately began crying and said that he just wanted to shoot in the air to scare Mack and Russ and that he did not mean to shoot at the car. At that point, his grandmother asked to stop the interview, and it was stopped.

Goodwin filed a pretrial motion to suppress the statement he gave to the police. He argued that the statement was inadmissible because it was obtained without a voluntary waiver of his right to counsel and was the product of police coercion and inducement. After conducting an evidentiary hearing, the district court denied the motion. The videotaped statement was received in evidence at trial over Goodwin's objection and published to the jury.

(b) Assignments of Error and Standard of Review

Goodwin contends that the district court erred in receiving his statement in evidence, because (1) he had not made a knowing, voluntary, and intelligent waiver of his right to counsel and his privilege against self-incrimination and (2) the statement was not voluntary, but, rather, was a product of police coercion and inducements of leniency.

[5] In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, including claims that it was procured in violation of the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*,[10] an appellate court applies a two-part standard of review. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law,

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

which an appellate court reviews independently of the trial court's determination.[11]

(c) Disposition

(i) Did Goodwin Voluntarily Waive His Miranda *Rights Before Making His Statement?*

In *Miranda v. Arizona*,[12] the Supreme Court held that authorities must employ procedural safeguards during a custodial interrogation to protect a suspect's privilege against self-incrimination. Specifically, authorities must advise an individual in custody that he has the right to remain silent and the right to an attorney.[13] In its order overruling Goodwin's motion to suppress, the district court noted the State's argument that Goodwin was not in custody at the time of the interview, but it did not address this issue, because it found that Goodwin had waived his *Miranda* rights. On appeal, the State does not argue that Goodwin was not in police custody at the time of his statement. Accordingly, we assume he was in custody and focus our review on the waiver issue.

[6-8] *Miranda* rights can be waived if the suspect does so knowingly and voluntarily.[14] A valid *Miranda* waiver must be voluntary in the sense that it was the product of a free and deliberate choice and made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.[15] In determining whether a waiver is knowingly and voluntarily made, a court applies a totality of the circumstances test.[16] Factors to be considered include the suspect's age, education, intelligence, prior contact with authorities, and conduct.[17]

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[11] *State v. Hilding, ante* p. 115, 769 N.W.2d 326 (2009); *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[12] *Miranda v. Arizona, supra* note 10.

[13] *Id.*; *In re Interest of C.H.*, 277 Neb. 565, 763 N.W.2d 708 (2009).

[14] *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006).

[15] *Id.*, citing *Colorado v. Spring*, 479 U.S. 564, 107 S. Ct. 851, 93 L. Ed. 2d 954 (1987).

[16] See *State v. Walker, supra* note 14.

[17] *Id.*

Based upon principles articulated by the U.S. Supreme Court in *In re Gault*,[18] Goodwin argues that the district court did not adequately consider the significance of his youth in determining that he voluntarily waived his rights prior to his inculpatory statement to police. In *In re Gault*, the Court held that constitutional procedural safeguards, including the privilege against self-incrimination and the right to counsel, are applicable in juvenile delinquency proceedings which may result in commitment to an institution in which the juvenile's freedom is curtailed. The Court noted that "admissions and confessions of juveniles require special caution,"[19] and further stated:

> If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.[20]

Goodwin argues that because of his youth, police should have conducted further inquiries beyond the familiar *Miranda* warnings to ensure that Goodwin fully understood the potential consequences of waiving his rights and making a statement to police about his involvement in the shooting. Goodwin urged the trial court and now this court to adopt the following position taken by the American Bar Association:

> "Youth should not be permitted to waive the right to counsel without consultation with a lawyer, and only after a full inquiry by a court into the youth's comprehension of that right and his or her capacity to make the choice intelligently and understandingly. Any waiver of counsel must be in writing and made of record."[21]

This court has utilized the "totality of the circumstances test" to determine whether there has been a voluntary and effective

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[18] *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

[19] *Id.*, 387 U.S. at 45.

[20] *Id.*, 387 U.S. at 55.

[21] Brief for appellant at 27-28.

waiver of *Miranda* rights by adults[22] and juveniles[23] alike. We have employed the same test in the different but related context of determining whether a juvenile has knowingly and intelligently waived the right to counsel in juvenile proceedings.[24] In another related context, we have noted that while the minority of an accused is a factor to consider in determining the voluntariness of a confession, it is not determinative.[25] Because the age, education, and intelligence of an accused are included within the totality of circumstances which a court must assess in determining whether there has been a knowing and voluntary waiver of *Miranda* rights prior to a custodial interrogation, a court necessarily exercises "special caution" with respect to juveniles.[26] Accordingly, we decline to modify the totality of the circumstances test for determining the voluntariness of *Miranda* waivers by minors.

The district court's findings of historical fact are not clearly erroneous; they are fully supported by the record. Goodwin came to the police station with his grandmother, who was also his legal guardian, after she learned that he had been implicated in the shooting and advised him to cooperate with the investigation. After obtaining preliminary information from Goodwin, Perna explained that because there were accusations directed at Goodwin and they were in a police facility, he needed to advise Goodwin of his rights before asking further questions. Perna asked Goodwin if he understood what *Miranda* rights were, and Goodwin acknowledged that he did. Before questioning, Goodwin further acknowledged his understanding that Perna was a police officer, that Goodwin had a right to remain silent and not answer questions, that anything Goodwin said could be used against him in court, that Goodwin had a right to consult with a lawyer and have a lawyer present during questioning, and that if Goodwin could

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[22] See, e.g., *State v. Walker, supra* note 14.

[23] *State v. McDonald*, 195 Neb. 625, 240 N.W.2d 8 (1976).

[24] *In re Interest of Dalton S.*, 273 Neb. 504, 730 N.W.2d 816 (2007).

[25] *State v. Garner*, 260 Neb. 41, 614 N.W.2d 319 (2000).

[26] See *In re Gault, supra* note 18.

not afford a lawyer, one would be appointed for him. After receiving these advisements and indicating that he understood them, Goodwin agreed to speak to police. There is nothing in the record to indicate that Goodwin was impaired by drugs or alcohol at the time of the questioning. As noted above, Goodwin's prior contacts with law enforcement authorities are well-documented, although the record does not reflect whether he was ever previously advised of his *Miranda* rights or subjected to custodial interrogation.

[9] In order to require cessation of custodial interrogation, the subject's invocation of the right to counsel must be unambiguous and unequivocal.[27] Statements such as "'[m]aybe I should talk to a lawyer'"[28] or "'I probably should have an attorney'"[29] do not meet this standard. Goodwin made no statement invoking his right to counsel. We conclude that his grandmother's comment regarding Goodwin's attorney did not constitute an unambiguous and unequivocal invocation of Goodwin's right to counsel on his behalf. Based upon our independent review of the totality of the circumstances, we likewise conclude that Goodwin knowingly and voluntarily waived his *Miranda* rights before talking to police about the shooting.

(ii) Was Goodwin's Statement to Police Voluntary?

[10-12] The Due Process Clause of U.S. Const. amend. XIV and the due process clause of Neb. Const. art. I, § 3, preclude admissibility of an involuntary confession.[30] The prosecution has the burden to prove by a preponderance of the evidence that incriminating statements by the accused were voluntarily given and not the product of coercion.[31] In making this determination, a totality of the circumstances test is applied, and factors

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[27] *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994); *State v. Hilding, supra* note 11.

[28] *Davis v. United States, supra* note 27, 512 U.S. at 455.

[29] *State v. Hilding, supra* note 11, *ante* at 117, 769 N.W.2d at 330.

[30] *In re Interest of Tyler F.*, 276 Neb. 527, 755 N.W.2d 360 (2008); *State v. Garner, supra* note 25.

[31] See *id.*

to consider include the tactics used by the police, the details of the interrogation, and any characteristics of the accused that might cause his or her will to be easily overborne.[32] An additional factor to consider is whether the suspect is a minor, but this factor is not determinative.[33] Coercive police activity is a necessary predicate to a finding that a confession is not voluntary.[34]

The pertinent historical facts are essentially undisputed. Goodwin came to the police station with his grandmother, who was seated next to him throughout the police questioning. Perna told Goodwin that his name had come up during the investigation and that he needed to "be straight" in answering questions about his activities that day. Several minutes later, after Goodwin had denied any involvement, Perna told him that a witness had identified him as the shooter. Perna said he thought there was a "good chance" that the shooter did not know there was a child in the car and that he did not intend to kill her. Both officers characterized the event as a "tragic accident," and Herout stated, "No one means to kill an innocent kid." At that point, Goodwin stated that he did not intend to shoot the girl in the car and stated that it was an accident. His grandmother then terminated the interview, which had lasted approximately 25 to 30 minutes. Prior to that time, Goodwin had not requested that the interview be stopped or indicated that he did not understand what was taking place.

Goodwin argues that the officers' comments about the lack of intent to kill and their characterization of the shooting as a tragic accident were "'minimizing' tactics" which amounted to an implicit promise that punishment would be less severe if Goodwin admitted his involvement.[35] In rejecting this argument, the district court noted that the officers' "reference to the crime being an 'accident' was unaccompanied by any other

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[32] *State v. Ray*, 266 Neb. 659, 668 N.W.2d 52 (2003).

[33] See *id*. See, also, *State v. Garner, supra* note 25; *State v. Chojolan*, 253 Neb. 591, 571 N.W.2d 621 (1997).

[34] *State v. Ray, supra* note 32; *State v. Garner, supra* note 25.

[35] Brief for appellant at 33.

express threats or promises and was made in the context of a continued effort by the officers to urge [Goodwin] to tell the truth."

[13-15] The confession of an accused may be involuntary and inadmissible if obtained in exchange for a promise of leniency.[36] For example, in *State v. Smith*,[37] we held that a police officer's statement that he would attempt to have the case transferred to juvenile court if the 15-year-old defendant cooperated with police was an inducement which rendered the subsequent confession involuntary. No such promise of leniency was expressly made in this case. But we have recognized that under certain circumstances, a promised benefit might be inferred from an officer's statement to an accused, if such an inference is reasonable.[38] In any circumstance, "the benefit offered to a defendant must be definite and must overbear his or her free will in order to render the statement involuntary."[39] Mere advice or exhortation by the police that it would be better for the accused to tell the truth, when unaccompanied by either a threat or promise, does not make a subsequent confession involuntary.[40]

Based upon our independent review, we conclude that no implied promise of leniency can reasonably be inferred from the questioning techniques utilized by the detectives. There was no suggestion of any definite benefit which Goodwin could expect to receive in exchange for his statement. The references to lack of intent and a "tragic accident" were made in the context of the detectives' efforts to persuade Goodwin to truthfully explain his involvement in the shooting. Although the record suggests that the detectives may have been downplaying the circumstances as a technique to get Goodwin to tell the truth, this fact alone does not amount to

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[36] *State v. Garner, supra* note 25.

[37] *State v. Smith*, 203 Neb. 64, 277 N.W.2d 441 (1979).

[38] *State v. Garner, supra* note 25.

[39] *Id.* at 50, 614 N.W.2d at 327. See, also, *State v. Ray, supra* note 32; *State v. Walker*, 242 Neb. 99, 493 N.W.2d 329 (1992).

[40] *State v. Garner, supra* note 25.

an implied promise of leniency or persuade us that Goodwin's will was overborne.[41]

Based upon our independent review of the historical facts as determined by the district court, and which we find to be supported by the record, we conclude that Goodwin's statement to police was voluntary and admissible at trial.

3. Step Instructions

(a) Additional Background

In the formal jury instructions, the jury was told that count I of the information charged Goodwin with first degree murder. The jury was informed that under this count, it could find Goodwin (1) guilty of first degree murder, (2) guilty of second degree murder, (3) guilty of manslaughter, or (4) not guilty. One jury instruction set out the material elements the State needed to prove beyond a reasonable doubt in order to convict Goodwin of first degree murder, e.g., an intentional killing done purposely with deliberate and premeditated malice. It then stated:

> If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements . . . is true, it is your duty to find [Goodwin] guilty of the crime of murder in the first degree done purposely and with deliberate and premeditated malice, and you shall so indicate by your verdict.
>
> If, on the other hand, you find that the State has failed to prove beyond a reasonable doubt any one or more of the material elements . . . it is your duty to find [Goodwin] not guilty of the crime of murder in the first degree. You shall then proceed to consider the lesser-included offense of murder in the second degree . . . .

The instruction then set forth the material elements of second degree murder, e.g., an intentional killing without premeditation. It then stated:

> The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material

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[41] See *id.*

> elements for conviction of the crime of murder in the second degree.
>
> If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements . . . is true, it is your duty to find [Goodwin] guilty of the crime of murder in the second degree done intentionally but without premeditation, and you shall so indicate by your verdict.
>
> If, on the other hand, you find that the State has failed to prove any one or more of the material elements . . . it is your duty to find [Goodwin] not guilty of the crime of murder in the second degree. You shall then proceed to consider the lesser-included offense of manslaughter . . . .

The jury instruction then set forth the material elements for manslaughter, e.g., an unintentional killing while in the commission of an unlawful act. Goodwin objected to the giving of this step instruction on the ground that it violated his right to due process, but he did not request an alternative instruction. The jury was also instructed on the doctrine of transferred intent as follows: "When one attempts to kill a certain person but by mistake or inadvertence kills a different person, the crime, if any so committed, is the same as though the person originally intended to be killed had been killed."

During its deliberations, the jury sent a written question to the trial judge, asking: "Do we have to agree or disagree una[n]imously on the presence of or lack of intent before moving on to the lesser count?" After consultation with counsel, and with their concurrence, the judge submitted a supplemental jury instruction in response to the question, stating: "The instructions that you have embody all of the law to be applied in this case."

(b) Assignment of Error and Standard of Review

[16,17] Goodwin contends that the district court erred in giving the "acquittal first" step instruction to the jury, because it deprived him of his due process right to have the jury consider his defense to the charges. The determination of whether the

procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.[42] On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.[43]

(c) Resolution

[18] We have long held that step instructions which require consideration of the most serious crime charged before consideration of lesser-included offenses are not erroneous.[44] We have noted that such instructions provide "'for a more logical and orderly process for the guidance of the jury in its deliberations.'"[45] Goodwin contends that this practical justification must yield to the principle that "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, . . . the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"[46] Goodwin contends that the step instruction deprived him of the right to present the defense that he fired the shots without an intent to kill and was therefore guilty only of manslaughter, because it required the jury to acquit him of first and second degree murder before considering the offense of manslaughter. He argues that just as an evidence rule requiring exclusion of certain evidence may violate a

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[42] *State v. Parker*, 276 Neb. 661, 757 N.W.2d 7 (2008).

[43] *State v. Arterburn*, 276 Neb. 47, 751 N.W.2d 157 (2008).

[44] See, e.g., *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006); *State v. Benzel*, 269 Neb. 1, 689 N.W.2d 852 (2004); *State v. Mowell*, 267 Neb 83, 672 N.W.2d 389 (2003); *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000); *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

[45] *State v. Jones, supra* note 44, 245 Neb. at 828, 515 N.W.2d at 658, quoting *State v. Wussler*, 139 Ariz. 428, 679 P.2d 74 (1984).

[46] *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986), quoting *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984).

defendant's constitutional right to a complete defense,[47] the "acquittal first" step instruction given in this case violated his due process right to present his defense that he acted without intent to kill.

In *State v. Jones*,[48] we held that an "acquittal first" step instruction similar to that given in this case did not prevent the jury from considering the defendant's contention that he was guilty only of manslaughter. We reasoned that although the jury's final verdict must be unanimous, the instruction did not require the jury, in its preliminary deliberation and discussion, to unanimously decide that the defendant was not guilty of a greater offense before considering a lesser-included offense. In the years since *Jones*, courts in other states have approved or disapproved the giving of "acquittal first" step instructions based upon various statutory and policy considerations,[49] but we have been directed to no case holding such instructions to be unconstitutional. The Arizona Supreme Court has directed trial courts to abandon the "acquittal first" instruction approved in *State v. Wussler*,[50] which we cited with approval in *Jones*, in favor of an instruction which permits a jury to render a verdict on a lesser-included offense if, after full and careful consideration of the evidence, it is unable to reach agreement with respect to the greater charged offense.[51] But the court characterized this change as "procedural in nature" and stated that "we remain persuaded that the acquittal-first requirement does not violate the United States or Arizona Constitutions."[52] Other courts

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[47] *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).

[48] *State v. Jones, supra* note 44.

[49] See, e.g., *Green v. State*, 119 Nev. 542, 80 P.3d 93 (2003); *State v. Mays*, 158 N.C. App. 563, 582 S.E.2d 360 (2003); *People v. Helliger*, 96 N.Y.2d 462, 754 N.E.2d 756, 729 N.Y.S.2d 654 (2001).

[50] *State v. Wussler, supra* note 45.

[51] *State v. LeBlanc*, 186 Ariz. 437, 924 P.2d 441 (1996).

[52] *Id.* at 439-40, 924 P.2d at 443-44.

have also held that "acquittal first" step instructions are not constitutionally deficient.[53]

We reach the same conclusion. The step instruction did not prevent the jury from considering the critical issue of whether Goodwin had formed an intent to kill when he fired the fatal shots. Unlike the circumstances presented in *Holmes v. South Carolina*,[54] Goodwin was not precluded from offering evidence to support his theory of defense. Nor was his lawyer restricted in any way from arguing that Goodwin did not intend to kill anyone and was therefore guilty of the lesser offense of manslaughter. In the end, the jury had to decide whether Goodwin acted with the requisite intent, and it was free to consider all evidence bearing on that issue in its deliberations with respect to first and second degree murder. The step instruction did not violate Goodwin's constitutional right to present a complete defense.

For completeness, we note Goodwin's argument that the step instruction given in this case was based upon NJI Crim. 14.06 and that NJI2d Crim. 3.1, the current pattern instruction for lesser-included offenses, does not utilize the language requiring the jury to find a defendant not guilty of a greater offense before considering a lesser offense. NJI2d Crim. 3.1 includes a listing of the offenses which the jury is to consider and the elements of each offense. It then instructs the jury:

> You must separately consider in the following order the crimes of (here insert crimes charged beginning with the greatest and listing included crimes in sequence). For the (here insert greatest crime) you must decide whether the state proved each element beyond a reasonable doubt. If the state did so prove each element, then you must find the defendant guilty of (here insert greatest crime) and [stop]. If you find that the state did not so prove, then you must proceed to consider the next crime in the list, the (here insert first lesser included). You must

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[53] See *Catches v. United States*, 582 F.2d 453 (8th Cir. 1978). See, also, *United States v. Moccia*, 681 F.2d 61 (1st Cir. 1982); *People v. Zwiers*, 191 Cal. App. 3d 1498, 237 Cal. Rptr. 123 (1987).

[54] *Holmes v. South Carolina, supra* note 47.

> proceed in this fashion to consider each of the crimes in sequence until you find the defendant guilty of one of the crimes or find (him, her) not guilty of all of them.[55]

Neither party requested that this instruction be given in this case. Although we find no constitutional infirmity or other error in the step instruction that was given, we conclude that NJI2d Crim. 3.1 provides a clearer and more concise explanation of the process by which the jury is to consider lesser-included offenses, and we encourage the trial courts to utilize the current pattern instruction in circumstances where a step instruction on lesser-included homicide offenses is warranted.[56]

III. CONCLUSION

For the reasons discussed, we conclude that Goodwin's assignments of error are without merit, and we affirm the judgment of the district court.

AFFIRMED.

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[55] NJI2d Crim. 3.1B.

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

STATE OF NEBRASKA, APPELLEE, V.
MARK A. MACEK, APPELLANT.
774 N.W.2d 749

Filed November 20, 2009. No. S-08-1196.

1. **Judgments: Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
2. **Collateral Attack: Jurisdiction.** Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter.
3. **Sentences: Prior Convictions: Drunk Driving: Time.** Under Neb. Rev. Stat. § 60-6,197.02(1)(a) (Reissue 2008), a conviction may be counted as a prior conviction for purposes of enhancement if it is for a violation that was committed within the previous 12 years.
4. **Sentences: Prior Convictions: Proof.** In order to prove a prior conviction for purposes of sentence enhancement, 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.

5. **Sentences: Prior Convictions: Due Process.** A prior conviction can be challenged if the conviction was obtained in violation of the due process requirements of the state and federal Constitutions.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed.

Peter K. Blakeslee for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

Mark A. Macek appeals his guilty plea and conviction in the Lancaster County District Court for driving under the influence of alcohol, fourth offense. Macek claims that two of his three prior convictions were improperly used to enhance his sentence because they were not final, appealable orders. We affirm the decision of the district court.

BACKGROUND

On November 22, 2007, Macek was stopped and cited for driving under the influence of alcohol (DUI) and refusing to submit to a chemical test. On June 9, 2008, Macek pled guilty to DUI in exchange for the State's agreement to drop the charge of refusal to submit to a chemical test. The trial court found that Macek understood his rights and the charges against him and that he freely, voluntarily, and knowingly entered a plea of guilty.

Macek objected to the use of two of his certified prior convictions for DUI on the ground that they were not final orders because they lacked a file stamp. The trial court found that his objection was an impermissible collateral attack on his prior convictions and accepted the certified copies into evidence. The trial court then found that the certified convictions were sufficient for enhancement and convicted Macek

of fourth-offense DUI. At the sentencing hearing on July 25, 2008, Macek was sentenced to 180 days in jail and ordered to pay costs, and his operator's license was suspended for 15 years. Macek appeals.

ASSIGNMENT OF ERROR

Macek assigns that the district court erred when it accepted two of his prior convictions for enhancement purposes because they lacked file stamps.

STANDARD OF REVIEW

[1] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.[1]

ANALYSIS

Macek argues that the district court erred in using two of his prior convictions for DUI to enhance his sentence because those two prior convictions lacked a file stamp. Macek largely relies upon Neb. Rev. Stat. § 25-1301(3) (Reissue 2008), and *State v. Estes*.[2] Section 25-1301(3) provides:

> The entry of a judgment, decree, or final order occurs when the clerk of the court places the file stamp and date upon the judgment, decree, or final order. For purposes of determining the time for appeal, the date stamped on the judgment, decree, or final order shall be the date of entry.

To support his claim, Macek cites to *Estes*, in which this court stated that a prior conviction still pending on appeal could not be used for enhancement purposes.[3] Macek claims that without a file stamp, a prior conviction is not final, much like the prior conviction in *Estes*. Macek also points to *State v. Brown*,[4] in which the Court of Appeals refused to accept jurisdiction of an

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[1] *Japp v. Papio-Missouri River NRD*, 271 Neb. 968, 716 N.W.2d 707 (2006).

[2] *State v. Estes*, 238 Neb. 692, 472 N.W.2d 214 (1991).

[3] *Id.*

[4] *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004).

appeal where there was no file stamp on the final order. Both cases are distinguishable.

In *Estes*, the prior conviction was still on appeal, and *Brown* involved a defendant who was currently appealing his conviction. In contrast, the two prior convictions in this case were used to enhance Macek's 2006 conviction for third-offense DUI, and both Macek and the State agree that the convictions took place in 2002. The waivers of rights contained in both prior convictions were entered in November 2002 and bear Macek's signature. Macek does not contend that either of the 2002 prior convictions are currently on appeal or that he would be able to appeal the convictions at this time.

[2] The State argues that Macek is making an impermissible collateral attack on his prior convictions, and we agree. We have stated that a defendant may not collaterally attack his or her prior conviction. In *State v. Keen*,[5] a defendant argued that a prior conviction could not be used to enhance his sentence for DUI. The defendant pled guilty to a DUI in 1998, under an ordinance that was later invalidated. We stated that "[c]ollateral attacks on previous proceedings are impermissible unless the attack is grounded upon the [trial] court's lack of jurisdiction over the parties or subject matter."[6] Therefore, even though the defendant's conviction under the invalid ordinance would likely have been overturned had he filed a direct appeal, it was sufficient for enhancement purposes.

[3] *State v. Royer*[7] involved a defendant who asserted that his prior conviction was invalid for the purpose of enhancing his sentence. In that case, a file-stamp date on a prior conviction was illegible. First, we found that the defendant was making an impermissible collateral attack on his prior conviction because it was not based on jurisdiction. Second, we found that other dates on the document demonstrated that the final order was entered on April 30, 2002. Under Neb. Rev. Stat. § 60-6,197.02(1)(a) (Reissue 2008), a conviction may be

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[5] *State v. Keen*, 272 Neb. 123, 718 N.W.2d 494 (2006).

[6] *Id.* at 130, 718 N.W.2d at 500.

[7] *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008).

counted as a prior conviction for purposes of enhancement if it is for a violation that was committed within the previous 12 years. The partial file stamp showed that the conviction took place within 12 years. Therefore, the prior conviction was properly used for enhancement.

[4,5] In order to prove a prior conviction for purposes of sentence enhancement, "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."[8] Macek does not argue that the State did not prove his prior convictions by a preponderance of the evidence, only that the lack of a file stamp prevents the prior convictions from being final orders. The only other basis upon which a prior conviction can be challenged is the claim that the conviction was obtained in violation of the due process requirements of the state and federal Constitutions.[9] Macek does not argue that his prior convictions were obtained in violation of due process requirements. Macek's appeal is therefore an impermissible attack on his prior convictions.

CONCLUSION

We conclude that Macek is making an impermissible collateral attack on his prior DUI convictions and that those prior convictions were properly used for enhancement purposes. Macek's assignment of error is without merit, and the judgment of the district court is affirmed.

AFFIRMED.

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[8] *State v. Hall*, 270 Neb. 669, 674, 708 N.W.2d 209, 214 (2005).

[9] See *State v. Royer, supra* note 7.

STATE OF NEBRASKA, APPELLEE, V.
DOMINGO J. SEPULVEDA, APPELLANT.
775 N.W.2d 40

Filed November 20, 2009. No. S-08-1291.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion.
2. **Convictions: Weapons: Intent.** When the felony which serves as the basis of the use of a weapon charge is an unintentional crime, the accused cannot be convicted of use of a firearm to commit a felony.
3. **Assault: Intent.** The intent required by the assault statutes relates to the act which produces the injury, not to the consequences which result from the assault.
4. **Postconviction: Appeal and Error.** A party cannot raise an issue in a postconviction motion if he or she could have raised that same issue on direct appeal.
5. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
6. **Postconviction: Appeal and Error.** Plain error cannot be asserted in a postconviction proceeding to raise claims of error by the trial court.
7. **Appeal and Error.** Consideration of plain error occurs at the discretion of an appellate court.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Sarah M. Mooney, of Mooney Law Office, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

WRIGHT, J.

NATURE OF CASE

Domingo J. Sepulveda was convicted by a jury of manslaughter and use of a firearm to commit a felony. His convictions and sentences were affirmed on direct appeal. In this postconviction action, Sepulveda seeks reversal of his conviction for use of a firearm to commit a felony. We affirm the judgment of the trial court denying postconviction relief.

SCOPE OF REVIEW

[1] When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion. See *State v. Dunster, ante* p. 268, 769 N.W.2d 401 (2009).

FACTS

On November 25, 1995, Sepulveda attended a party in a second-floor apartment in Omaha, Nebraska, where a large number of people were drinking beer and listening to a live band. Chris Reich testified that during the party, Sepulveda showed him a gun in his coat pocket. Shortly thereafter, Reich got into an argument with a group of other men. A fight started and moved outside, and many of the partygoers followed. Three of the men involved in the fight, including the victim, James Geiger, began to run down the street. Reich saw Sepulveda pull out his gun, point it at the men, and begin shooting. Reich heard three or four shots, after which Geiger fell to the street.

Lorenzo Walker testified that after the gunfire began, people were "running all over the place," trying to avoid getting shot. Walker saw the gun in Sepulveda's right hand and heard four or five shots. Later that night, Walker picked up Sepulveda. Sepulveda bragged about the shooting and stated that he had made a $20 bet with someone that he would fire his gun that night.

Justin Doane testified that before the shooting, Sepulveda had Doane feel the gun in his coat pocket. After the fight, Doane saw Sepulveda pull the gun from his coat pocket and fire shots. Another witness testified that after the fight, Sepulveda ran down the street and fired his gun. She also saw Sepulveda standing with the gun in his hand after the shooting.

One of Sepulveda's shots hit Geiger in the back of the head and caused him to fall down. Geiger was eventually able to get up and continue walking down the street. A police officer found him on the porch of a nearby house, and he was taken to the hospital. Geiger died November 27, 1995, from a single gunshot wound to the back of his head.

Sepulveda was charged with murder in the second degree and use of a firearm to commit a felony. A jury found him guilty of the lesser-included offense of manslaughter and use of a firearm to commit a felony. The district court sentenced Sepulveda to 15 to 20 years' imprisonment on the manslaughter conviction and 30 to 50 years' imprisonment on the use of a firearm to commit a felony conviction. It ordered the sentences to run consecutively. Separately, Sepulveda was found guilty of violation of probation and sentenced to 59 to 60 months' imprisonment.

On direct appeal, Sepulveda claimed that the district court erred in (1) not allowing him various preliminary hearings, (2) allowing the State to introduce evidence of the manner in which he was arrested, (3) imposing excessive sentences, and (4) finding that there was sufficient evidence to support a guilty verdict on both charges. In a memorandum opinion filed on April 30, 1997, in case No. A-96-909, the Nebraska Court of Appeals affirmed Sepulveda's convictions and sentences. This court denied his petition for further review.

Sepulveda's motion for postconviction relief alleges that his trial and appellate counsel were ineffective for failing to recognize that his convictions of manslaughter and use of a firearm to commit a felony were legally inconsistent. He asserts that he cannot be convicted of use of a firearm to commit a felony when the underlying felony is an unintentional crime. Sepulveda claims it is plain error to allow convictions for manslaughter and use of a firearm to commit a felony. He also claims that his trial counsel erred in failing to call several witnesses in his defense.

After an evidentiary hearing, the district court concluded that Sepulveda's trial and appellate counsel were not ineffective. The district court denied postconviction relief and dismissed the action. Sepulveda appeals.

ASSIGNMENTS OF ERROR

Sepulveda claims, summarized and restated, that the postconviction court (1) erred in concluding that manslaughter upon a sudden quarrel is an intentional crime; (2) erred in not finding that Sepulveda's trial counsel was ineffective because

he did not object to the jury instruction for use of a firearm to commit a felony when Sepulveda was convicted of manslaughter, was ineffective because he did not object to convictions for both manslaughter and use of a firearm to commit a felony, and was ineffective because he failed to call certain witnesses at trial; (3) erred in not finding that Sepulveda's appellate counsel was ineffective for failing to assign ineffectiveness of trial counsel regarding the firearm conviction in his direct appeal; (4) erred in not finding that Sepulveda was innocent; and (5) erred in refusing to find that it was plain error to allow convictions for both manslaughter and use of a firearm to commit a felony.

ANALYSIS

MANSLAUGHTER

Sepulveda was initially charged with second degree murder, but the jury found him guilty of manslaughter. Sepulveda claims that the trial court erred in finding that manslaughter upon a sudden quarrel is an intentional felony. We conclude that the trial court did not make such a finding. The court stated that a sudden quarrel involves an intentional act and determined Sepulveda had not met his burden of proof to show that the decision reached would have been different if the jurors had received different instructions. This was the extent of the court's finding on this issue.

[2] When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion. See *State v. Dunster, ante* p. 268, 769 N.W.2d 401 (2009). Sepulveda argues that his manslaughter conviction cannot serve as the basis for a use of a firearm conviction. When the felony which serves as the basis of the use of a weapon charge is an unintentional crime, the accused cannot be convicted of use of a firearm to commit a felony. See *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002). Thus, if an unintentional act by Sepulveda was the predicate felony for the charge of use of a firearm to commit a felony, Sepulveda could not be convicted of that charge. Sepulveda's argument fails because his manslaughter conviction was not the predicate felony for his use of a firearm conviction.

PREDICATE FELONY FOR USE OF FIREARM TO COMMIT FELONY

Use of a deadly weapon to commit a felony occurs when a person

> uses a firearm, a knife, brass or iron knuckles, or any other deadly weapon to commit any felony which may be prosecuted in a court of this state or . . . unlawfully possesses a firearm, a knife, brass or iron knuckles, or any other deadly weapon during the commission of any felony which may be prosecuted in a court of this state . . . .

Neb. Rev. Stat. § 28-1205(1) (Reissue 2008). In accordance with the statute, the defendant must commit an underlying or predicate felony before he or she can be convicted of use of a deadly weapon to commit a felony.

Sepulveda's reliance on *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989), and *State v. Pruett, supra*, is misplaced because *Ring* and *Pruett* are distinguishable from the facts of this case. In *State v. Ring, supra*, the defendant was convicted of felony motor vehicle homicide and using a motor vehicle as a deadly weapon to commit a felony. We interpreted the language "'to commit any felony'" to mean "'for the purpose of committing any felony.'" *Id.* at 724, 447 N.W.2d at 911. Accordingly, to prove a charge of use of a deadly weapon to commit a felony, the State was required to prove that the defendant used the motor vehicle for the purpose of committing a felony. The elements of motor vehicle homicide include that the defendant caused the death of the victim unintentionally while unlawfully operating a motor vehicle and that the unlawful operation of the motor vehicle was a result of either driving while under the influence of alcohol or driving recklessly. The State did not prove that the defendant intentionally used the motor vehicle as a deadly weapon. Because there was no intentional action, motor vehicle homicide could not be the predicate felony for a use of a deadly weapon to commit a felony conviction. *Id.*

In *State v. Pruett, supra*, the defendant was convicted of manslaughter and use of a deadly weapon to commit a felony while committing the offense of reckless assault. The

defendant killed his friend by accidentally firing a live round instead of a "dummy round" at the friend as a joke. On appeal, the defendant claimed that he could not be convicted of both manslaughter and use of a deadly weapon to commit a felony because both manslaughter and reckless assault were unintentional crimes. We agreed. When the felony which served as the basis of the use of a weapon charge is an unintentional crime, the accused cannot be convicted of use of a weapon to commit a felony. *Id*. Because the defendant did not commit any intentional acts, he could not be convicted of use of a deadly weapon to commit a felony. *Id*.

In the case at bar, the jury found that Sepulveda intentionally used a firearm in the commission of the crime of manslaughter. Manslaughter is defined as an unintentional crime; however, assault is not. The trial court instructed the jury that to convict Sepulveda of manslaughter, it must find four elements:

> 1. That the Defendant, Domingo J. Sepulveda killed James Geiger;
>
> 2. That he did so without malice, either:
>
> a. upon a sudden quarrel, or
>
> b. unintentionally while in the commission of an unlawful act;
>
> 3. That he did so on or about the 25th day of November, 1995 in Douglas County, Nebraska; and
>
> 4. That the Defendant did not act in the defense of another.

The jury was also instructed:

> Before you can find the Defendant guilty of unlawfully using a firearm in the commission of a felony as charged in Count II of the Information, the burden is upon the State of Nebraska to establish beyond a reasonable doubt each and all of the following:
>
> 1. That on or about November 25, 1995, in Douglas County, Nebraska, the Defendant did commit murder in the second degree or manslaughter as set forth in the above;
>
> 2. That in the commission of said crime a firearm was used by Defendant;

3. That such use of a firearm in the commission of the crime was intentional; and

4. That Defendant did not act in the defense of another.

If the crime of manslaughter were the underlying felony for the weapons charge, Sepulveda could not be convicted of use of a firearm to commit a felony. However, Sepulveda incorrectly assumes that the predicate felony for a conviction of use of a firearm to commit a felony must be the manslaughter conviction. The jury was instructed that "assault in any degree is an unlawful act within the meaning of the manslaughter statute."

[3] First degree assault is intentionally or knowingly causing serious bodily injury to another person. Neb. Rev. Stat. § 28-308 (Reissue 2008). First degree assault is a felony and a general intent crime. *State v. Cebuhar*, 252 Neb. 796, 567 N.W.2d 129 (1997). The intent required by the assault statutes relates to the act which produces the injury, not to the consequences which result from the assault. See *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993).

Although Sepulveda may not have intended that Geiger would be killed as a result of Sepulveda's actions, there is no doubt that Sepulveda intended the assault of Geiger. Manslaughter can occur either upon a sudden quarrel or unintentionally while in the commission of an unlawful act. There was no evidence that Sepulveda suddenly quarreled with Geiger or even that Sepulveda had personal contact with Geiger.

There was evidence that Sepulveda bet someone $20 that he would fire his gun that night and showed the gun to several people before the shooting. Witnesses saw Sepulveda chase Geiger, point the loaded gun at him, and pull the trigger as Geiger ran away. This action resulted in the death of Geiger. The jury found that Geiger's death was unintentional. It also found that Sepulveda's use of the firearm in the commission of the crime was intentional. Under the circumstances, the act of firing the gun at Geiger which resulted in Geiger's death was an intentional and unlawful assault and was the predicate offense of use of a firearm to commit a felony. To hold otherwise would be to ignore the facts.

Ineffective Assistance of Counsel

[4] Sepulveda claims ineffective assistance of trial and appellate counsel based on the failure to raise the issue of manslaughter as an underlying felony of use of a firearm to commit a felony. The State argues that these claims are barred. A party cannot raise an issue in a postconviction motion if he or she could have raised that same issue on direct appeal. *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008). However, Sepulveda alleges ineffective assistance of appellate counsel in failing to claim ineffective assistance of trial counsel. Postconviction was Sepulveda's first opportunity to bring this claim; therefore, it is not procedurally barred. See *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002).

[5] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Hudson*, 277 Neb. 182, 761 N.W.2d 536 (2009).

Intentional assault rather than manslaughter was the predicate felony to use of a firearm to commit a felony; therefore, convictions for both manslaughter and use of a firearm to commit a felony were not inconsistent. Sepulveda's trial counsel's failure to raise the issue was not deficient performance and did not result in ineffective assistance of counsel. Because Sepulveda's trial counsel did not render ineffective assistance of counsel, Sepulveda's appellate counsel was not ineffective for failing to address the issue on appeal. These assignments of error are without merit.

Plain Error and Actual Innocence

Sepulveda alleges that the postconviction court should have found that it was plain error for the trial court to instruct the jury in a way that it could find Sepulveda guilty of use of a firearm to commit a felony if it found him guilty of manslaughter. He also argues that it was plain error to allow the jury's verdict of guilty on both charges to stand. He also asserts that the court erred in not finding plain error because he was legally innocent of the crime of use of a firearm to commit a

felony, as the underlying crime of manslaughter is an unintentional crime.

[6,7] Sepulveda essentially argues that the trial court erred in not recognizing the inconsistency between convictions for both use of a firearm to commit a felony and manslaughter, and not instructing the jury accordingly. Plain error cannot be asserted in a postconviction proceeding to raise claims of error by the trial court. Consideration of plain error occurs at the discretion of an appellate court. *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007). Sepulveda's claims of plain error merely repackage his other assignments of error. Accordingly, plain error is not a claim that Sepulveda can raise in this postconviction motion.

Ineffective Assistance of Counsel for Failing to Call Witnesses

Finally, Sepulveda claims that he received ineffective assistance of counsel because his trial counsel did not call several individuals to testify on his behalf at trial. A party cannot raise an issue in a postconviction motion if he or she could have raised that same issue on direct appeal. *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008). Sepulveda had different counsel at trial and on direct appeal and could have raised the issue of his trial counsel's failure to call these witnesses at that time. To preserve this claim, Sepulveda needed to allege ineffective assistance of appellate counsel for failing to raise the claim on direct appeal. See *State v. Dunster, ante* p. 268, 769 N.W.2d 401 (2009). He did not, and accordingly, this assignment of error is barred.

CONCLUSION

Sepulveda was properly convicted of use of a firearm to commit a felony because the underlying felony was an intentional assault. All of Sepulveda's assignments of error are without merit. Accordingly, we affirm the judgment of the district court.

Affirmed.

KELLY RUSSELL, APPELLEE, V. KERRY, INC., AND LIBERTY MUTUAL FIRE INSURANCE, APPELLANTS.

775 N.W.2d 420

Filed December 4, 2009. No. S-08-146.

1. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **Judgments: Appeal and Error.** An appellate court independently decides questions of law.
4. **Workers' Compensation: Final Orders.** An employer's appeal from a postjudgment proceeding to enforce a workers' compensation award does not disturb the finality of an award imposing a continuing obligation on the employer to pay benefits.
5. **Workers' Compensation: Jurisdiction: Penalties and Forfeitures: Costs: Appeal and Error.** A trial judge of the Workers' Compensation Court has continuing jurisdiction to enforce an employer's obligation to pay benefits pending the employer's appeal of the judge's previous order imposing a penalty and costs for a delayed payment.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and SIEVERS and CASSEL, Judges, on appeal thereto from the Workers' Compensation Court. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

Scott A. Lautenbaugh and Julie M. Martin, of Nolan, Olson, Hansen & Lautenbaugh, L.L.P., for appellants.

Rolf Edward Shasteen, of Shasteen & Scholz, P.C., for appellee.

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

CONNOLLY, J.

SUMMARY

Kerry, Inc., failed to timely pay the trial judge's award of workers' compensation benefits to Kelly Russell within 30 days. Russell then sought a waiting-time penalty and attorney fees. For brevity, we shall refer to the postjudgment filings as "enforcement motions" and "enforcement orders." While

Russell's first enforcement motion was pending, Kerry also stopped paying Russell's ongoing temporary partial disability benefits. Russell again sought an enforcement order for the second violation. But before Russell filed her second motion, Kerry had perfected its appeal to the workers' compensation review panel from the trial judge's first enforcement order. After the trial judge denied Russell's second enforcement motion, she appealed to the review panel, which consolidated the two appeals.

Regarding Russell's appeal, the workers' compensation review panel concluded that the trial judge did not have jurisdiction over the second enforcement motion while Kerry's appeal of the first enforcement order was pending. Regarding Kerry's appeal, the review panel recalculated the trial judge's interest assessment but otherwise affirmed. In a memorandum opinion filed on June 16, 2009, in case No. A-08-146, the Nebraska Court of Appeals affirmed. We granted Russell's petition for further review.

This appeal presents two issues:

• Did the Court of Appeals correctly conclude that the trial judge did not have jurisdiction to consider Russell's second enforcement motion while Kerry's appeal from the previous enforcement order was pending?

• Did the review panel correctly recalculate the interest Kerry owed?

We conclude that Kerry's appeal of the first enforcement order did not divest the trial judge of jurisdiction to consider future violations of the award, which was final. We reverse that part of the Court of Appeals' decision, but otherwise affirm.

BACKGROUND

In 2004, Russell injured her back while lifting sacks of ingredients at Kerry. On July 12, 2006, the trial judge entered an award for benefits for temporary total disability and temporary partial disability. The order specified two different periods for which she was entitled to temporary total disability benefits; the second period was from "December 13, 2005, through July 31, 2005." In addition, because the court found she had not yet reached maximum medical improvement, it awarded

her $51.85 per week in temporary partial disability, beginning August 1, 2005.

On July 20, 2006, the court, on its own motion, entered a nunc pro tunc order, correcting the order's designation of the second period of temporary total disability benefits to read "from December 13, 2004," instead of 2005. Liberty Mutual Fire Insurance (Liberty Mutual) sent a check to Russell for benefits on August 16, 2006. But Liberty Mutual should have paid benefits by August 11, using the original award date—July 12—as the commencement of the 30-day period.

Because of the late payment, on August 18, 2006, Russell filed an enforcement motion for a waiting-time penalty and attorney fees. In November, the trial judge sustained that motion. He concluded that absent an appeal, an award is final on the date it is entered, that Nebraska's statutes mandate payment within 30 days of a final workers' compensation award, and that the nunc pro tunc order did not change the date of the final award. Besides assessing a waiting-time penalty and attorney fees, the trial judge determined that Nebraska's statutes required an assessment of interest when a court awards attorney fees to a claimant.

On December 5, 2006, Kerry and Liberty Mutual (collectively Kerry) appealed the enforcement order to the review panel. Two days later, Russell filed her second enforcement motion. She alleged that Kerry had stopped paying weekly benefits for her temporary partial disability on October 24.

At the hearing, Russell argued that she was not required to comply with Workers' Comp. Ct. R. of Proc. 3(B)(4) (2002), which at one time provided that parties filing motions must show consultation with the nonmoving party.[1] She argued that the rule did not apply to Kerry's failure to comply with an unappealed award. But in January 2007, the trial judge overruled Russell's motion because she had not shown reasonable efforts to resolve the issues and consult with Kerry. Russell appealed that decision to the review panel. The review panel consolidated the appeals.

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[1] See Workers' Comp. Ct. R. of Proc. 3(D)(4) (2009) (current rule).

In deciding Russell's appeal from the second enforcement order, the review panel concluded that the trial judge did not have jurisdiction to decide that motion while Kerry's appeal from the first enforcement order was pending. Accordingly, it concluded that the order was void. In deciding Kerry's appeal, the review panel affirmed the trial judge's order that the nunc pro tunc order did not alter the final date of the original award for commencing the 30-day period for paying benefits. It further affirmed the trial judge's award of interest but recalculated the interest owed. Kerry appealed, and Russell cross-appealed. In a memorandum opinion, the Court of Appeals affirmed in all respects.

ASSIGNMENTS OF ERROR

Russell assigns that the Court of Appeals erred in affirming the review panel's conclusions that (1) the trial judge's January 2007 order was void for lack of jurisdiction and (2) the trial judge incorrectly calculated the interest assessment.

STANDARD OF REVIEW

[1-3] A jurisdictional issue that does not involve a factual dispute presents a question of law.[2] Statutory interpretation presents a question of law.[3] We independently decide questions of law.[4]

ANALYSIS

JURISDICTION

The Court of Appeals affirmed the review panel's conclusion that the trial judge was divested of jurisdiction to hear Russell's second enforcement order because Kerry had perfected its appeal of the trial judge's first enforcement order. It relied on cases in which we have held that a district court is divested of jurisdiction when a party perfects an appeal from the court's final judgment. We do not believe those cases apply.

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[2] See *Miller v. Regional West Med. Ctr.*, 278 Neb. 676, 772 N.W.2d 872 (2009).

[3] See *Weber v. Gas 'N Shop*, 278 Neb. 49, 767 N.W.2d 746 (2009).

[4] See, *Miller, supra* note 2; *Weber, supra* note 3.

We have held that after a party perfects an appeal to an appellate court, the lower courts are divested of subject matter jurisdiction over that case.[5] But this rule is applied when a party appeals the trial court's final judgment. Here, Kerry was not appealing from the award. It was appealing from a separate postjudgment proceeding to enforce the award. Neither party appealed from the trial judge's determination that Russell was entitled to benefits for temporary total disability and temporary partial disability. The award was therefore final 30 days after the trial judge entered it.[6]

[4] Neb. Rev. Stat. § 48-125 (Cum. Supp. 2008) clearly authorizes the compensation court to enforce an award by assessing a waiting-time penalty, attorney fees, and interest for *all* delinquent payments made 30 days after the award becomes final. The issues raised by Russell's first enforcement motion and Kerry's appeal involved only (1) the trial judge's determination that Kerry had not timely paid benefits by August 11, 2006, and (2) the judge's assessment of interest. That appeal obviously divested the trial judge of jurisdiction to reconsider the issues decided in that proceeding. But an employer's appeal from a postjudgment proceeding to enforce a workers' compensation award does not disturb the finality of an award imposing a continuing obligation on the employer to pay benefits. And Kerry's appeal of the first violation was entirely independent of its second violation of the award.

[5] We believe these enforcement proceedings are akin to postjudgment contempt proceedings in other types of civil cases. And courts generally hold that an appeal of a contempt order does not divest a trial court of jurisdiction to consider a separate act of contempt.[7] To conclude otherwise would give the offending party carte blanche to decide whether to

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[5] *Billups v. Scott*, 253 Neb. 293, 571 N.W.2d 607 (1997).

[6] See *Roth v. Sarpy Cty. Highway Dept.*, 253 Neb. 703, 572 N.W.2d 786 (1998).

[7] *Hoffman, Etc. v. Beer Drivers & Salesmen's, Etc.*, 536 F.2d 1268 (9th Cir. 1976); *Yalem v. Yalem*, 800 S.W.2d 811 (Mo. App. 1990); *Town of Ruston v. Wingard*, 70 Wash. 2d 388, 423 P.2d 543 (1967).

comply with the court's order pending its appeal. We conclude that the trial judge had continuing jurisdiction to enforce Kerry's obligation to pay benefits pending its appeal of the judge's previous order imposing a penalty and costs for a delayed payment.[8]

Interest Assessment

The Court of Appeals affirmed the review panel's conclusion that the trial judge incorrectly calculated the interest Kerry owed. The trial judge determined that under Neb. Rev. Stat. § 48-119 (Reissue 2004) and § 48-125, when a judge awards a claimant attorney fees, he or she is also entitled to interest on the total compensation owed when the employer paid the award, starting from the date that the compensation was first payable. But the review panel stated that interest does not accrue on the entire balance for the entire period. Instead, it concluded that the employer owed interest on each week of benefits as they became due until it paid the award.

In her petition for further review, Russell does not dispute the review panel's method for calculating interest from the date each weekly installment of benefits became due until the date of payment. Instead, she contends that the trial judge's ruling was correct because the statutes show the Legislature intended to make the employer's delinquent payments costly to encourage the prompt payment of benefits. We view the question presented as whether the statutes require a trial judge to assess interest on the full amount of benefits owed from the first date that compensation was payable or to assess interest from the time each installment of benefits became due to the date of payment.

Absent a statutory indication to the contrary, we will give words in a statute their ordinary meaning.[9] To the extent an appeal calls for statutory interpretation or presents questions of law, we must reach a conclusion independent of

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[8] Compare *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001).

[9] *In re Estate of Chrisp*, 276 Neb. 966, 759 N.W.2d 87 (2009).

the lower court's determination.[10] A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose.[11]

Section 48-125(3), in relevant part, provides:

> When an attorney's fee is allowed pursuant to this section, there shall further be assessed against the employer an amount of interest on the final award obtained, computed from the date compensation was payable, as provided in section 48-119, until the date payment is made by the employer, at a rate equal to the rate of interest allowed per annum under section 45-104.01, as such rate may from time to time be adjusted by the Legislature. Interest shall apply only to those weekly compensation benefits awarded which have accrued as of the date payment is made by the employer.

Section 48-119 provides: "No compensation shall be allowed for the first seven calendar days of disability . . . except that if such disability continues for six weeks or longer, compensation shall be computed from the date disability began."

We do not view these statutes to specify whether a court can impose interest on the full amount of benefits owed from the first day that any compensation was payable or from the date that the benefits were due. But contrary to the trial judge's conclusion, the reference to § 48-119 in § 48-125(3) simply clarifies the start date for calculating interest—not that interest must be assessed on the full amount of benefits owed from the first day of compensation. And we reject Russell's argument that the Legislature intended this result to make delayed payments costly.

The penalty for a delayed payment is imposed under § 48-125(1), which provides that "[f]ifty percent shall be added for waiting time for all delinquent payments . . . ." But it does not follow that every allowable cost under § 48-125

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[10] See *In re Interest of Dustin S.*, 276 Neb. 635, 756 N.W.2d 277 (2008).

[11] *Concrete Indus. v. Nebraska Dept. of Rev.*, 277 Neb. 897, 766 N.W.2d 103 (2009).

was intended as a penalty to the employer. The principal purpose of the Nebraska Workers' Compensation Act is to provide an injured worker with prompt relief from the adverse economic effects caused by a work-related injury or occupational disease.[12] Courts have reasoned that preaward interest is not a penalty but a means of fully compensating the claimant for not having use of the money that the employer owed.[13] Consistent with that purpose, courts have held that interest may be assessed on each installment of compensation benefits from the date it became due.[14]

We agree with these decisions. Absent a clear indication that the Legislature intended an employer to pay interest on the full amount of benefits as a penalty, we believe that interest is assessed to fully compensate the claimant for not having the use of money to which he or she is entitled. Permitting interest on the full amount of benefits from a date when they were not yet owed is inconsistent with that purpose. We conclude that the review panel's calculation of interest from the date each installment became due was correct.

CONCLUSION

We conclude that the Court of Appeals incorrectly determined that the workers' compensation trial judge did not have jurisdiction to entertain Russell's second enforcement motion while Kerry's appeal from the judge's first enforcement order was pending before the review panel. We reverse that part of the Court of Appeals' decision. But we affirm the Court of Appeals' determination that under § 48-125(3), the review panel correctly assessed interest on Russell's final award from

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[12] *Risor v. Nebraska Boiler*, 274 Neb. 906, 744 N.W.2d 693 (2008).

[13] See, *McLaughlin v. Hill City Oil Co.*, 702 So. 2d 786 (La. App. 1997), citing *Sharbono v. Steve Lang & Son Loggers*, 696 So. 2d 1382 (La. 1997); *Drake v. Norge Division, Borg-Warner*, 367 Mich. 464, 116 N.W.2d 842 (1962); *Frymiare v. W.C.A.B. (D. Pileggi & Sons)*, 105 Pa. Cmwlth. 325, 524 A.2d 1016 (1987).

[14] See, e.g., *Strachan Shipping Company v. Wedemeyer*, 452 F.2d 1225 (5th Cir. 1971); *McLaughlin, supra* note 13; *Petrulo v. M. O'Herron Company*, 122 Pa. Super. 163, 186 A. 397 (1936).

the date that each installment of benefits became due to the date of Kerry's payment. We remand the cause to the Court of Appeals with instructions to remand the cause to the workers' compensation review panel to address Russell's appeal from the trial court's second enforcement order.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

RICHARD D. MYERS, TRUSTEE OF THE FLOORS & MORE, INC., CHAPTER 7 BANKRUPTCY ESTATE, APPELLEE, V. JEFF CHRISTENSEN ET AL., APPELLEES, AND CHARTER WEST NATIONAL BANK, GARNISHEE-APPELLANT.

776 N.W.2d 201

Filed December 4, 2009. No. S-08-1212.

1. **Garnishment: Appeal and Error.** Garnishment is a legal proceeding. To the extent factual issues are involved, the findings of the fact finder will not be set aside on appeal unless clearly wrong; however, to the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.
2. **Garnishment: Liability: Service of Process: Time.** A garnishee's liability is to be determined as of the time the garnishment summons is served.
3. **Judgments: Debtors and Creditors: Garnishment.** The claim of a judgment creditor garnishor against a garnishee can rise no higher than the claim of the garnishor's judgment debtor against the garnishee.
4. **Garnishment: Liability: Service of Process: Time.** In determining the liability of a garnishee to a garnishor, the test is whether, as of the time the summons in garnishment was served, the facts would support a recovery by the garnishor's judgment debtor against the garnishee.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Reversed and remanded with directions.

Jeffrey A. Silver for garnishee-appellant.

Brett S. Charles, of McGill, Gotsdiner, Workman & Lepp, P.C., L.L.O., for appellee Richard D. Myers.

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

STEPHAN, J.

This is an appeal from an order finding Charter West National Bank (Charter West), as garnishee, liable to judgment creditor Richard D. Myers, trustee of the Floors & More, Inc., bankruptcy estate. Charter West contends that the district court failed to consider its properly perfected security interest in the judgment debtor's bank deposit accounts when determining liability.

FACTS

The facts are largely undisputed and arise primarily out of a banking relationship between Charter West and Gencon, Inc., a general contractor formerly known as Christensen Interior Contractors, Inc. In September 2005, Gencon executed a commercial security agreement granting Charter West a security interest in, among other things, all of Gencon's deposit accounts with Charter West. The security interest applied to all current and future loan proceeds advanced by Charter West to Gencon. Charter West perfected its security interest in 2005 by filing a Uniform Commercial Code (U.C.C.) financing statement with the Nebraska Secretary of State.

In 2006 and 2007, Charter West made various loans to Gencon, all documented by promissory notes. In January 2008, the trustee of the bankrupt Floors & More, Inc., which had provided materials and services to Gencon, obtained a default judgment in the amount of $10,450.65 against Gencon in the U.S. Bankruptcy Court for the District of Nebraska. On February 14, the trustee sought to enforce the judgment by commencing a garnishment proceeding against Charter West in the district court for Douglas County. In his affidavit, the trustee alleged that Charter West "ha[d] property of and [was] indebted to" Gencon. Charter West received the summons and order of garnishment by certified mail on February 20. At the time the garnishment summons was received, Gencon's loans with Charter West were in excess of $400,000 and were in default.

On the day the summons was received, Gencon's deposit account at Charter West had a balance of $30,702.06. After its receipt of the summons in garnishment, Charter West continued to honor checks written on Gencon's account. Charter West's

president testified that the bank chose to honor the checks because it was aware that Gencon had recently commenced a large construction project and the bank thought its best chance of recovering its indebtedness from Gencon was to give Gencon an opportunity to succeed with the new project. The balance of Gencon's account was $26,561.23 on February 21, 2008; $25,385.31 on February 22; and $571.45 on February 25. On February 26, the account was overdrawn by $2,360.22, and on February 27, it was overdrawn by $4,498.33. Charter West did not exercise its right to set off the amount in Gencon's account to cover the defaults on the loans until sometime after February 29. Gencon ultimately ceased doing business, and Charter West wrote off losses in excess of $400,000.

In its answers to the interrogatories served in the garnishment proceeding, Charter West responded affirmatively to the question of whether it had "property belonging to the judgment debtor, or credits or monies owed to the judgment debtor, whether due or not." Charter West listed the "[p]roperty of the judgment debtor in [its] possession" to be "Deposits." It noted, however, that the money or credits were "not due and owing to the Debtor since all of Debtor's property is subject to a perfected security interest in favor of Charter West."

After receiving Charter West's answers to the garnishment interrogatories, the trustee filed an application to determine Charter West's liability as a garnishee. The district court conducted an evidentiary hearing and found Charter West liable to the trustee in the full amount of the trustee's $10,450.05 claim. The court reasoned that Charter West did not comply with the Nebraska garnishment statutes because it failed to hold all funds in Gencon's account after receiving the garnishment summons and further found that such failure waived Charter West's right to a setoff. The court did not specifically analyze the effect of Charter West's perfected security interest in the deposit account.

Charter West filed this timely appeal, which we moved to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

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[1] Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

ASSIGNMENT OF ERROR

The sole error assigned is that the court erred in finding Charter West liable as a garnishee in light of Charter West's perfected security interest in Gencon's deposit account.

STANDARD OF REVIEW

[1] Garnishment is a legal proceeding. To the extent factual issues are involved, the findings of the fact finder will not be set aside on appeal unless clearly wrong; however, to the extent issues of law are presented, an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the court below.[2]

ANALYSIS

Garnishment is a legal aid in the execution of a judgment; it is a method by which a judgment creditor can recover against a third party for the debt owed by a judgment debtor.[3] Under Nebraska's garnishment statutes, a judgment creditor may request that the court issue a summons of garnishment against any person or business which "has property of and is indebted to the judgment debtor."[4] The garnishee then must answer interrogatories and disclose "the property of every description and credits of the defendant in his possession or under his control" at the time of the garnishment.[5] A garnishee can be discharged if he chooses to "pay the money owing to the defendant by him" into court.[6] But if the garnishee does not pay the funds into court and the garnishor is not satisfied with the garnishee's answers to the interrogatories, the garnishor may file an application to determine the liability of the garnishee, and "may allege facts showing the existence of indebtedness of

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[2] See *Davis Erection Co. v. Jorgensen*, 248 Neb. 297, 534 N.W.2d 746 (1995). See, also, *Petersen v. Central Park Properties*, 275 Neb. 220, 745 N.W.2d 884 (2008); *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002).

[3] See 38 C.J.S. *Garnishment* § 1 (2008).

[4] Neb. Rev. Stat. § 25-1056(1) (Reissue 2008).

[5] Neb. Rev. Stat. § 25-1026 (Reissue 2008).

[6] Neb. Rev. Stat. § 25-1027 (Reissue 2008).

the garnishee to the defendant or of the property and credits of the defendant in the hands of the garnishee."[7] After conducting an evidentiary hearing, the court may then find the garnishee liable if the garnishee was either "indebted to the defendant" or "had any property or credits of the defendant, in his possession or under his control at the time of being served with the notice of garnishment."[8]

[2-4] A garnishee's liability is to be determined as of the time the garnishment summons is served.[9] The claim of a judgment creditor garnishor against a garnishee can rise no higher than the claim of the garnishor's judgment debtor against the garnishee.[10] Accordingly, in determining the liability of a garnishee to a garnishor, the test is whether, as of the time the summons in garnishment was served, the facts would support a recovery by the garnishor's judgment debtor against the garnishee.[11]

In this case, the trustee is the judgment creditor, or garnishor; Gencon is the judgment debtor; and Charter West is the garnishee. The case turns on the question of whether, on the date the garnishment summons was served, Gencon had a right to the deposit account which was superior to that of Charter West. Only if that were so could Charter West have been "indebted to" or holding "property or credits of" Gencon within the meaning of the garnishment statutes and therefore liable as a garnishee.[12]

It is undisputed from the record that Charter West had a perfected security interest in Gencon's deposit account which predated the trustee's judgment and the service of garnishment interrogatories, that Gencon was in default on the loans secured thereby on the date that the garnishment summons was issued,

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[7] Neb. Rev. Stat. § 25-1030 (Reissue 2008).

[8] Neb. Rev. Stat. § 25-1030.02 (Reissue 2008).

[9] See *Spaghetti Ltd. Partnership v. Wolfe, supra* note 2.

[10] *Fokken v. Steichen*, 274 Neb. 743, 744 N.W.2d 34 (2008); *Spaghetti Ltd. Partnership v. Wolfe, supra* note 2.

[11] *Davis Erection Co. v. Jorgensen, supra* note 2.

[12] See § 25-1030.02.

and that the amount in default far exceeded the balance in the deposit account on that date. Under article 9 of the U.C.C., a creditor with a perfected security interest has certain rights and remedies when a debtor defaults under a loan agreement.[13] Under the U.C.C. as enacted in Nebraska, after default, a secured party "may reduce a claim to judgment, foreclose, or otherwise enforce the . . . security interest . . . by any available judicial procedure."[14] A secured party can take possession of collateral after default "without judicial process, if it proceeds without breach of the peace."[15] Even more specifically, if, after default, the secured party "holds a security interest in a deposit account perfected by control," it "may apply the balance of the deposit account to the obligation secured by the deposit account."[16] A bank "has control of a deposit account" if it "is the bank with which the deposit account is maintained."[17] Thus, upon Gencon's default prior to the service of the garnishment summons, Charter West had the right to enforce its perfected security interest in the deposit account simply by applying the balance of the account to Gencon's loan obligations.

The question presented here is whether the fact that Charter West did not exercise that right until after it was served with the garnishment summons operated to extinguish its priority as a secured creditor and to subordinate its interest to that of the garnishor. In concluding that it did, the district court relied upon our decisions in *Davis Erection Co. v. Jorgensen*[18] and *United Seeds v. Eagle Green Corp.*[19] Both of these cases involved claimed setoffs asserted as a defense to garnishment proceedings. In *United Seeds*, we held that in order to maintain a setoff, a party must demonstrate an intent and decision to

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[13] See *McFarland v. Brier*, 850 A.2d 965 (R.I. 2004).

[14] Neb. U.C.C. § 9-601(a)(1) (Cum. Supp. 2008).

[15] Neb. U.C.C. § 9-609(b)(2) (Reissue 2001).

[16] Neb. U.C.C. § 9-607(a)(4) (Reissue 2001).

[17] Neb. U.C.C. § 9-104(a) (Reissue 2001).

[18] *Davis Erection Co. v. Jorgensen, supra* note 2.

[19] *United Seeds v. Eagle Green Corp.*, 223 Neb. 360, 389 N.W.2d 571 (1986).

exercise the right to setoff, a subsequent action which completes the setoff, and a record which verifies that the action was taken. We determined in that case that the district court had correctly found that a garnishee bank had not exercised a valid setoff. Citing an Oregon case,[20] we also held that the bank had waived any right of setoff by allowing the judgment debtor to draw on the garnished account after notice of garnishment was received. In *Davis Erection Co.*, which involved a claimed setoff arising from amounts due on related construction contracts, we reversed a judgment for the garnishee upon a determination that it had not exercised a right of setoff under the test adopted in *United Seeds* as of the date it was served with garnishment summons. In this case, the district court reasoned that because Charter West had not completed the three steps held essential to a setoff in *United Seeds* prior to its receipt of the garnishment summons, and had honored checks drawn on the Gencon account after receiving the summons, it had not established a right of setoff and had waived any claimed right.

United Seeds and *Davis Erection Co.* are distinguishable from this case in that neither involved a garnishee with a prior perfected security interest in the property which was the subject of the garnishment proceeding. Under Nebraska law, a "perfected security interest . . . has priority over a conflicting unperfected security interest"[21] in the same collateral. Application of the principles of *United Seeds* and *Davis Erection Co.* to the facts of this case would ignore and indeed negate the statutory priority to which a holder of a prior perfected security interest is entitled. Due to the existence of Charter West's perfected security interest, Gencon had no enforceable right to the proceeds of the deposit account on the date that the garnishment summons was served and therefore, the trustee could have no such right. In other words, the trustee could not acquire a claim by garnishment which was superior to the claim of Charter West arising from its perfected security interest. We therefore conclude as a matter of law that by

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[20] See *Coastal Adj. Bureau v. Hutchins*, 229 Or. 418, 367 P.2d 430 (1961).

[21] Neb. U.C.C. 9-322(a)(2) (Reissue 2001).

virtue of its perfected security interest in the deposit account, which was far exceeded by the amount of Gencon's indebtedness then in default, Charter West was not "indebted to" or holding "property or credits of" Gencon at the time of service of the garnishment summons.[22]

Because of this basic factual distinction, the waiver principle articulated and applied in *United Seeds* is likewise inapplicable in this case. The record reflects that Charter West made a calculated business decision to honor certain checks drawn on the Gencon account as a means of enabling Gencon to perform on a contract and thus produce revenue which could be applied to its indebtedness. In so doing, Charter West was placing some of its collateral at risk in order to produce receivables of an anticipated greater amount which would also be subject to its perfected security interest and applicable to Gencon's debt. Because Charter West had rights in the collateral superior to that of the trustee, this decision cannot be viewed as a waiver of Charter West's security interest.

Finally, we address the trustee's argument that Charter West failed to comply with § 25-1056(1) after service of the garnishment summons and should therefore be foreclosed from asserting its right to the deposit account. The pertinent provisions of § 25-1056(1) require that, except when wages are involved, a party served with a garnishment summons "shall hold the property of every description and the credits of the defendant in his or her possession or under his or her control at the time of the service of the summons and interrogatories until the further order of the court." The trustee's argument is based upon the principle that because the garnishment statutes are in derogation of common law, they are to be strictly construed.[23] Thus, the trustee argues, "[r]egardless of its security interest, Charter West violated the Nebraska garnishment statutes and is liable to the Trustee for the judgment amount."[24] This argument removes the strict construction rule from its proper context. Because

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[22] See § 25-1030.02.

[23] *Spaghetti Ltd. Partnership v. Wolfe, supra* note 2.

[24] Brief for appellee Myers at 11.

the garnishment statutes give the judgment creditor rights not available to the judgment creditor at common law, the statutes must be construed strictly so as to limit those rights to only those granted, and not to deprive third parties of their lawful rights.[25] But the trustee asks us to apply the strict construction rule proactively to make a garnishee liable to a judgment creditor for a debt which the garnishee does not owe the judgment debtor. We decline to do so. Furthermore, because we conclude on the facts of this case that the deposit account was not the property of Gencon and therefore not subject to garnishment, Charter West's failure to strictly comply with the garnishment statutes was not prejudicial to any party and did not frustrate the objective of the garnishment statutes in any way.

CONCLUSION

For the reasons discussed, we conclude that the district court erred in entering judgment in favor of the trustee. We reverse the judgment of the district court and remand the cause with directions to dismiss the garnishment proceeding.

REVERSED AND REMANDED WITH DIRECTIONS.

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[25] See 38 C.J.S., *supra* note 3, §§ 3 and 5.

LUCKY 7, L.L.C., APPELLANT, V. THT REALTY, L.L.C., AND PAMELA K. WATANABE-GERDES, APPELLEES.

775 N.W.2d 671

Filed December 4, 2009. No. S-08-1290.

1. **Judgments: Appeal and Error.** In a bench trial, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous.
2. ____: ____. The Nebraska Supreme Court determines questions of law independently of the trial court's conclusions.
3. **Negligence: Fraud.** Negligent misrepresentation has essentially the same elements as fraudulent misrepresentation, with the exception of the defendant's mental state.
4. ____: ____. In both negligent and fraudulent misrepresentation cases, whether the plaintiff exercised ordinary prudence is relevant to whether the plaintiff justifiably relied on the misrepresentation when the means of discovering the truth was in the plaintiff's hands.

5. **Fraud.** A plaintiff is justified in relying upon a positive statement of fact if an investigation would be required to discover the truth.
6. ____. In determining whether an individual reasonably relied on a misrepresentation, courts consider the totality of the circumstances, including the nature of the transaction; the form and materiality of the representation; the relationship of the parties; the respective intelligence, experience, age, and mental and physical condition of the parties; and their respective knowledge and means of knowledge.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Donald J. Buresh and John D. Stalnaker, of Stalnaker, Becker & Buresh, P.C., for appellant.

Heather Voegele-Andersen, of Koley Jessen, P.C., L.L.O., for appellees.

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

CONNOLLY, J.

SUMMARY

Lucky 7, L.L.C., purchased commercial property consisting of a warehouse facility abutted by an office building from THT Realty, L.L.C. (THT). After water leaked through the roof of the office building, Lucky 7 brought suit seeking damages for fraudulent and negligent misrepresentation based upon statements made by THT regarding the condition of the roof. After a bench trial, the district court dismissed both claims. The court found the evidence insufficient to show that THT or its agents intentionally misled Lucky 7 to its detriment. Lucky 7 does not appeal this finding. The court also found that Lucky 7 did not exercise ordinary prudence when it inspected the property, because the roof's condition was discoverable upon reasonable inspection. We agree and affirm.

BACKGROUND

This controversy centers on commercial property in Omaha, Nebraska. The property has three separate roofing systems—one covering the warehouse and two separate roof levels on the office building. In September 2002, THT replaced the warehouse roof and obtained a 10-year warranty on the roof. THT did not replace the roof on the office building.

In December 2004, THT contracted with Coldwell Banker Commercial World Group (Coldwell Banker) to sell the property. Coldwell Banker's listing agent was Robert Pollard. To prepare the listing, Pollard requested information on the property. The information that THT provided stated that the building had a "[n]ew 10-year roof." Pollard testified that the statement about the roof's condition indicated to him that the entirety of the roof was new and under a 10-year warranty.

Using this information, Pollard created a property information sheet that Coldwell Banker circulated. Regarding the roof, the sheet states: "Roof: New 10-year." Pollard placed the information into circulation via mailings, fliers, and Internet listings.

William Beard, the managing partner of Lucky 7, discovered Coldwell Banker's listing. He contacted his real estate agent, who scheduled a showing for the property. Based upon the information sheet, Beard and his real estate agent believed that the property had a new roof with a 10-year warranty.

Beard attended three showings of the property. Beard testified that he believed the building had a new roof because the roof on the warehouse portion was visible from ground level and he could see that it was made with new roofing material. But standing on the ground, Beard could not see the two separate roof sections on the building's office portion. Those roof sections could be inspected by Beard only if he were on the roof. Beard admitted that if he had examined those two roof sections, he would have been able to see that they were made of a different roofing material and were not new. But based upon his visual inspections and the statements on the information sheet that the roof was new, Beard did not believe it was necessary to inspect the roof before entering into the purchase agreement.

Later in January 2005, Beard agreed to purchase the property. The purchase agreement, in relevant part, stated:

> Buyer will have sixty (60) days from Seller's acceptance of this Agreement ("Inspection Period") to conduct such inspections, reviews and investigations of the Property, including all reports, topographical surveys, paid tax receipts, roof or building inspections, leases and any

> other information pertinent to the ownership, operation and management of the Property, as the Buyer determines necessary ("Inspections"). During the Inspection Period, Buyer and its agents and representatives shall have the right to reasonable access to the Property. . . .
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> . . . .
>
> THIS OFFER IS BASED UPON BUYER'S PERSONAL INSPECTION OR INVESTIGATION OF THE PROPERTY AND NOT UPON ANY REPRESENTATION OR WARRANTIES OF CONDITION BY THE SELLER OR SELLER'S AGENT.

Before the parties closed on the purchase, Beard received a copy of the roof warranty. The warranty did not indicate whether it covered the entire roof; it stated only that it covered roofing material and did not specify whether the entire roof or just part of the roof was covered by the warranty. After purchasing the property, Beard assigned his interest to Lucky 7, which placed a tenant in the building.

Shortly afterward, the tenant informed Beard that the roof was leaking over the office area. A roofing contractor who examined the roof informed Beard that the two roof sections over the office building were not new. Beard also inspected the roof and saw that the warehouse roof was different from the office roof and that the office roof was not new.

In May 2005, the roofing contractor repaired portions of the roof. The repair costs totaled $1,503.36. The contractor also gave Beard an estimate to replace the roof sections on the office. Later, the contractor estimated that it would cost $4,500 for replacing the upper office roof and that the cost to replace the lower office roof was $24,200. Beard has since obtained updated estimates of $4,700 and $25,800.

Lucky 7 filed suit alleging that THT had intentionally and negligently misrepresented the roof's condition. The district court dismissed Lucky 7's complaint. Regarding the intentional misrepresentation claim, it found that although the advertisement and statements about the 10-year roof warranty were misleading, the evidence was insufficient to show that THT intentionally misled Beard to his detriment. In dismissing the negligent misrepresentation claim, the court found that because

the roof's condition would have been obvious upon a reasonable inspection, Lucky 7 failed to show that it acted in an ordinarily prudent manner.

ASSIGNMENTS OF ERROR

Lucky 7 assigns two errors:

(1) The district court erred as a matter of law in applying the "ordinary prudence" standard to the negligent misrepresentation claim.

(2) In the alternative, the district court erred in finding that because Lucky 7 failed to inspect the roof, it did not exercise ordinary prudence.

STANDARD OF REVIEW

[1,2] In a bench trial, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous.[1] But we determine questions of law independently of the trial court's conclusions.[2]

ANALYSIS

The first issue is whether ordinary prudence is a factor in determining whether Lucky 7 was justified in relying upon THT's representations. When the means of discovering the truth was in the hands of the party defrauded, we have held that no action will lie where ordinary prudence would have prevented the deception.[3] Lucky 7 concedes that ordinary prudence is a factor in determining justifiable reliance in a fraudulent misrepresentation claim.[4] But it argues it is not a factor in a negligent misrepresentation claim. We disagree.

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[1] See *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

[2] See *In re Interest of Tyler F.*, 276 Neb. 527, 755 N.W.2d 360 (2008).

[3] *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994), citing *Omaha Nat. Bank v. Manufacturers Life Ins. Co.*, 213 Neb. 873, 332 N.W.2d 196 (1983). Accord *Schuelke v. Wilson*, 250 Neb. 334, 549 N.W.2d 176 (1996).

[4] See *Precision Enters. v. Duffack Enters.*, 14 Neb. App. 512, 710 N.W.2d 348 (2006).

We have adopted the negligent misrepresentation definition in the Restatement (Second) of Torts § 552.[5] Under § 552, "[o]ne of the elements of a cause of action for negligent misrepresentation is justifiable reliance on the part of the plaintiff."[6] The Restatement reads, in relevant part:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.[7]

[3] Negligent misrepresentation has essentially the same elements as fraudulent misrepresentation, with the exception of the defendant's mental state[8]:

> In fraudulent misrepresentation, one becomes liable for breaching the general duty of good faith or honesty. However, in a claim of negligent misrepresentation, one may become liable even though acting honestly and in good faith if one fails to exercise the level of care required under the circumstances.[9]

In claims of fraudulent or negligent misrepresentation, the supplier of false information must have intended that the user of the information would be influenced by the information and rely on it.[10] But in a case of negligent

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[5] Restatement (Second) of Torts § 552 (1977). See *Gibb, supra* note 3.

[6] See *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 182, 738 N.W.2d 831, 838 (2007), citing *Washington Mut. Bank v. Advanced Clearing, Inc.*, 267 Neb. 951, 679 N.W.2d 207 (2004).

[7] Restatement, *supra* note 5, § 552 at 126-27. Accord, *Brummels v. Tomasek*, 273 Neb. 573, 731 N.W.2d 585 (2007); *Agri Affiliates, Inc. v. Bones*, 265 Neb. 798, 660 N.W.2d 168 (2003); *Gibb, supra* note 3.

[8] Compare Restatement, *supra* note 5 with §§ 525 and 526. See *Gibb, supra* note 3.

[9] *Gibb, supra* note 3, 246 Neb. at 371, 518 N.W.2d at 921. See, also, Restatement, *supra* note 5, § 552, comment *a*.

[10] See *Gibb, supra* note 3.

misrepresentation, the defendant need not know the statement is false. That is, the defendant's carelessness or negligence in ascertaining the statement's truth will suffice for negligent misrepresentation.[11]

[4] We understand Lucky 7's argument to be that once the defendant supplies information to the plaintiff, the plaintiff is not required to make any inquiry as to the accuracy of the information. We disagree. If a plaintiff is required to show he exercised ordinary prudence in relying on an intentionally false statement, we believe the ordinary prudence rule should apply with equal force absent a showing that the defendant intended the plaintiff to rely on a knowingly false statement. So whether the plaintiff was justified in relying upon representations made by the defendant requires the same inquiry whether it is a fraudulent or negligent misrepresentation claim.[12] As summarized by the Illinois Appellate Court: "[N]o recovery for fraudulent misrepresentation, fraudulent concealment or negligent misrepresentation is possible unless plaintiffs can prove justifiable reliance, i.e., that any reliance was reasonable."[13] We hold that in both negligent and fraudulent misrepresentation cases, whether the plaintiff exercised ordinary prudence is relevant to whether the plaintiff justifiably relied on the misrepresentation when the means of discovering the truth was in the plaintiff's hands.

[5] Lucky 7, however, argues that it was justified in relying on THT's representation that the roof was new. It argues the general rule is that a plaintiff is justified in relying upon a positive statement of fact if an investigation would be required to discover the truth.[14] But we have never held that an "investigation" includes an inspection of the property. To the contrary, we have rejected misrepresentation claims when the truth of

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[11] See *Washington Mut. Bank, supra* note 6. See, generally, *Gibb, supra* note 3.

[12] See *Gibb, supra* note 3.

[13] *Neptuno v. Arbor*, 295 Ill. App. 3d 567, 575, 692 N.E.2d 812, 818, 229 Ill. Dec. 823, 829 (1998).

[14] See *Omaha Nat. Bank, supra* note 3.

the property's condition was obviously apparent to a potential buyer upon inspection.[15] In other cases, we have concluded that the buyer reasonably relied on a seller's misrepresentation only after concluding that an inspection could have been fruitless or that the seller interfered with the buyer's ability to inspect.[16] As other courts have noted, a plaintiff "'may not close his eyes to what is obviously discoverable by him.'"[17]

But when the plaintiff would not have discovered the needed information by inspection of the property, we have found his or her reliance on the defendant's statements reasonable. For example, in *Cao v. Nguyen*,[18] the buyers sought rescission of a purchase agreement based upon alleged misrepresentations by the sellers that the property was a duplex which could be rented to two families, when in fact the property was not wide enough to meet the municipal code requirement for a two-family dwelling. The sellers did not provide the buyers with information which would have placed them on notice that the home did not meet the municipal code requirement for a two-family dwelling. The sellers informed the buyers that they had rented the house to two families in the past, and the property was divided into two units. And, the advertisement for the property described it as a duplex. To prove the sellers' representations were false, the buyers would have had to contact the city, research the public records, and compare the building code to the actual structure of the home. The means of discovering the truth of the sellers' representations were not in the buyers' hands. Therefore, we concluded that the buyers' reliance was reasonable.

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[15] *Christopher v. Evans*, 219 Neb. 51, 361 N.W.2d 193 (1985); *Bibow v. Gerrard*, 209 Neb. 10, 306 N.W.2d 148 (1981); *Dyck v. Snygg*, 138 Neb. 121, 292 N.W. 119 (1940); *Kucera v. Pellan*, 132 Neb. 739, 273 N.W. 10 (1937).

[16] *Foxley Cattle Co. v. Bank of Mead*, 196 Neb. 1, 241 N.W.2d 495 (1976); *Martin v. Harris*, 121 Neb. 372, 236 N.W. 914 (1931); *Donelson v. Michelson*, 104 Neb. 666, 178 N.W. 219 (1920).

[17] *Ritchie v. Clappier*, 109 Wis. 2d 399, 404, 326 N.W.2d 131, 134 (Wis. App. 1982).

[18] *Cao v. Nguyen*, 258 Neb. 1027, 607 N.W.2d 528 (2000).

[6] Obviously, justifiable reliance must be decided on a case-by-case basis. In determining whether an individual reasonably relied on a misrepresentation, courts consider the totality of the circumstances, including "'"the nature of the transaction, the form and materiality of the representation, the relationship of the parties, the respective intelligence, experience, age, and mental and physical condition of the parties, and their respective knowledge and means of knowledge."'"[19]

Here, the district court's findings suggest that despite THT's representations regarding the newness of the roof, Beard's reliance on the representations was unreasonable because of the following:

(1) Beard was a businessman with experience in purchasing commercial property.

(2) The limiting language in the purchase agreement: The contract explicitly stated that the purchase was based on the buyer's personal inspection and not conditioned on any representations made by the seller.

(3) The purchase agreement explicitly provided for an inspection period.

(4) Beard could have observed the roof's condition if he had examined it.

(5) The value of the building: Beard was purchasing a large commercial building for $1,750,000.

(6) The warranty indicated that the roof had been replaced in 2002, 3 years before Beard bought the building.

Under these circumstances, the district court found that ordinary prudence would demand that Beard inspect the building, including the roof, before finalizing the purchase.

We agree. The record shows that Beard had routinely examined heating and air-conditioning units on roofs, so an inspection of this roof did not pose any hardship. And as an experienced purchaser of commercial buildings, he understood the importance of inspecting the condition of the property. The district court was not clearly wrong in finding that Beard should

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[19] *Finomore v. Epstein*, 18 Ohio App. 3d 88, 90, 481 N.E.2d 1193, 1196 (1984), citing 37 Am. Jur. 2d *Fraud and Deceit* § 248 (1968).

have inspected the roof and that the condition of it would have been obvious had he done so.

CONCLUSION

Ordinary prudence is a factor in determining whether a plaintiff is justified in relying upon a defendant's representations. The district court did not err as a matter of law in applying an ordinary prudence standard to Lucky 7's negligent misrepresentation claim. We also conclude the court's factual findings were not clearly wrong. The district court looked at the context and type of transaction, and Beard's knowledge, experience, and access to pertinent information. Based upon those factors, the district court found that Beard was not justified in relying on THT's representations. We agree.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DARYLE M. DUNCAN, APPELLANT.

775 N.W.2d 922

Filed December 4, 2009. No. S-08-1308.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion.
3. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** To establish a right to postconviction relief because of counsel's ineffective assistance, the defendant has the burden, under *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 in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. A court may address the two prongs of this test, deficient performance and prejudice, in either order.
4. **Rules of Evidence: Hearsay.** Hearsay requires a statement made by an out-of-court declarant, and the statement requires an oral or written assertion.

5. **Constitutional Law: Criminal Law: Trial: Witnesses.** The Confrontation Clauses of U.S. Const. amend. VI and Neb. Const. art. I, § 11, guarantee defendants the right to confront and cross-examine the witnesses against them.
6. **Trial: Evidence: Appeal and Error.** An erroneous admission of evidence is considered prejudicial to a criminal defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
7. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury 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.
8. **Effectiveness of Counsel: Appeal and Error.** When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred.
9. ____: ____. When claims of a trial counsel's performance are procedurally barred, an appellate court examines claims regarding trial counsel's performance only if the defendant assigns as error that appellate counsel was ineffective for failing to raise trial counsel's performance.
10. **Appeal and Error.** An appellate court does not consider errors which are argued but not assigned.

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

Brian S. Munnelly for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

CONNOLLY, J.

SUMMARY

The State convicted Daryle M. Duncan of first degree murder and use of a deadly weapon to commit a felony for the December 4, 1999, death of Lucille Bennett. He received consecutive sentences of life in prison for first degree murder and 19 to 20 years' imprisonment for use of a deadly weapon to commit a felony. We affirmed his convictions and sentences

on direct appeal.[1] Duncan now appeals the district court's order denying his motion for postconviction relief. We affirm.

BACKGROUND

The facts underlying Duncan's convictions are set forth in *State v. Duncan*,[2] and we summarize those facts which relate to this postconviction proceeding.

In April 2001, Duncan was convicted of killing 87-year-old Bennett. Shortly before 10:30 a.m. on Sunday, December 5, 1999, Bennett's body was found in her home. Bennett died of a stab wound to the right side of the neck, which penetrated two major arteries. The State charged Duncan with first degree murder and use of a deadly weapon to commit a felony. A jury found Duncan guilty of both charges. After retaining new counsel, Duncan appealed his convictions and sentences, and we affirmed.[3]

One issue Duncan raised on direct appeal was ineffective assistance of trial counsel for failing to object to testimony regarding Crimestoppers telephone calls. Omaha police officer Steven Henthorn was the lead investigator and testified generally as to the investigation of Bennett's murder. The specific portions of Henthorn's testimony on direct examination and redirect examination at issue are set forth below.

> Q. Let me ask you, on December 5th or December 6th — and I don't want you to tell me anything about what was said — but on December 5th or 6th of 1999, were there Crime Stoppers reports coming in to the police department about this murder?
>
> [Defense]: I'll object on relevance. Calls for a hearsay response.
>
> [State]: I'm not asking him what was in them. I just wanted to know if they were coming in.
>
> [Defense]: Relevance.
>
> THE COURT: You may answer.
>
> [A.] No, we were not.

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[1] *State v. Duncan*, 265 Neb. 406, 657 N.W.2d 620 (2003).

[2] *Id.*

[3] *Id.*

. . . .

Q. . . . On the 7th of December, did Crime Stoppers calls — did you have any Crime Stoppers calls?

[Defense]: Objection, relevance. Calls for hearsay response.

[State]: Not what was in them.

THE COURT: Crime Stoppers calls in connection with what?

[State]: Regarding the murder of Lucille Bennett.

THE COURT: You may answer.

[A.] Yes, we did.

Q. . . . About what time was that?

A. I believe it was about 9:30 in the morning.

Q. Okay. And at some point in time did you begin investigating Mr. Duncan?

A. Yes.

Q. When was that?

A. About 9:30 in the morning —

Q. Okay.

A. — on the 7th of December.

Q. Okay. Did — what did you do after — at some point in time you got some information that Mr. Duncan — you started looking at him?

A. Yes.

. . . .

Q. . . . And did you get — in this particular case, did you get Crime Stoppers reports before — how many Crime Stoppers reports did you get before the 10th of December?

[Defense]: Objection, relevance, foundation.

THE COURT: You may answer.

[A.] Two.

On direct appeal, we determined that the district court properly overruled Duncan's hearsay objections but that the court erred in overruling Duncan's relevance objections.[4] We concluded, however, that Duncan's convictions were "surely

[4] *Id.*

unattributable to this error."[5] On direct appeal, Duncan also argued that his counsel provided ineffective assistance for failing to object to some Crimestoppers questions on different specified grounds.[6] But, we did not address this issue because we concluded it necessitated an evidentiary hearing.[7]

So Duncan, through new counsel, filed the present motion for postconviction relief.[8] In his operative motion, Duncan alleged that trial counsel was ineffective for many reasons, including failing to object to the above Crimestoppers testimony. He also alleged that his appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffective assistance on direct appeal.

After an evidentiary hearing, the district court concluded that trial counsel was not deficient; thus, it implicitly concluded that Duncan's claims regarding appellate counsel's ineffective assistance were without merit.

ASSIGNMENTS OF ERROR

On appeal to this court, Duncan assigns six errors regarding trial counsel's performance. But he does not assign that the district court erred in failing to find his appellate counsel provided ineffective assistance. Duncan assigns the court erred in failing to find that trial counsel was ineffective for failing to (1) object to the Crimestoppers testimony in violation of his rights under U.S. Const. amends. VI and XIV; Neb. Const. art. I, § 11; and Nebraska Evidence Rules; (2) call a necessary witness; (3) object to the trial court's limiting his cross-examination of a witness in violation of U.S. Const. amend. VI; (4) effectively cross-examine a witness; (5) not allow Duncan to testify; and (6) call witnesses on Duncan's behalf.

STANDARD OF REVIEW

[1,2] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the

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[5] *Id.* at 418, 657 N.W.2d at 631.

[6] *Duncan, supra* note 1.

[7] *Id.*

[8] Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008).

district court will not be disturbed unless they are clearly erroneous.[9] When reviewing a question of law, we resolve the question independently of the lower court's conclusion.[10]

ANALYSIS

[3] Duncan's assigned errors all raise issues of his trial counsel's ineffective assistance. To establish a right to postconviction relief because of counsel's ineffective assistance, the defendant has the burden, under *Strickland v. Washington*,[11] to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.[12] Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.[13] 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.[14] A court may address the two prongs of this test, deficient performance and prejudice, in either order.

Issues Raised on Direct Appeal

We first address arguments raised by Duncan on direct appeal that we determined needed an evidentiary hearing. Duncan alleges that the trial counsel was ineffective for failing to object to the State's questions regarding the Crimestoppers testimony. As noted, Duncan's trial counsel objected twice to this line of questioning. But Duncan claims that his trial counsel should have objected to all questions the State asked Henthorn regarding the Crimestoppers call. Duncan argues that trial counsel's failure to object violated his rights under U.S.

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[9] *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

[10] See, *State v. Dunster, ante* p. 268, 769 N.W.2d 401 (2009); *State v. Bazer*, 276 Neb. 7, 751 N.W.2d 619 (2008).

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

[12] See *State v. Rhodes*, 277 Neb. 316, 761 N.W.2d 907 (2009).

[13] *Id.*

[14] *Id.*

Const. amends. VI and XIV; Neb. Const. art. I, § 11; and Neb. Evid. R. 401, 403, 801, and 802.[15] Duncan also claims his trial counsel was ineffective for failing to move for a mistrial based on this testimony.

On direct appeal, we concluded that the district court properly overruled Duncan's hearsay objections because the two questions he objected to asked whether and when the police received any Crimestoppers calls. We determined that because the questions did not call for an oral or written assertion made by an out-of-court declarant and the content of those calls was never explicitly divulged, there was no hearsay.[16]

[4] Similarly, for the questions trial counsel did not object to, there was no statement which would implicate a hearsay issue.[17] Hearsay requires a statement made by an out-of-court declarant, and the statement, as relevant here, requires an oral or written assertion.[18] The questions Duncan's trial counsel did not object to do not require Henthorn to reiterate an oral or written assertion made by an out-of-court declarant, and he did not divulge any of the information contained in the Crimestoppers calls.[19] Trial counsel was not deficient for failing to object on hearsay grounds.

[5] Furthermore, the Confrontation Clauses of U.S. Const. amend. VI and Neb. Const. art. I, § 11, guarantee defendants the right to confront and cross-examine the witnesses against them.[20] And, as noted, Henthorn did not testify about what the Crimestoppers caller said. Henthorn mentioned the Crimestoppers call only to explain why he had investigated Duncan. Because the prosecutor never presented a statement

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[15] Neb. Rev. Stat. §§ 27-401, 27-403, 27-801, and 27-802 (Reissue 2008).

[16] *Duncan, supra* note 1.

[17] See Neb. Evid. R. 801 to 805, Neb. Rev. Stat. §§ 27-801 to 27-805 (Reissue 2008).

[18] Rule 801(1) and (3).

[19] See rule 801(3).

[20] U.S. Const. amend. VI. See *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

from the Crimestoppers caller to the jury, the Confrontation Clauses are not implicated; there was no statement, so no right to confront the maker of it was implicated.[21]

Duncan also argues that Henthorn's testimony was unnecessary and prejudicial and that the court should have excluded it under rule 403. He argues that the "testimonial and scientific evidence of [Duncan's] guilt was not overwhelming" and that it was "highly probable that this error contributed to the verdict, and was thus, not harmless."[22] On direct appeal, we concluded that the district court erred in overruling Duncan's relevance objections but concluded that the erroneous admission of the evidence was harmless because his conviction was unattributable to the error.[23]

[6,7] An erroneous admission of evidence is considered prejudicial to a criminal defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.[24] Harmless error review looks to the basis on which the jury 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.[25]

As we noted on direct appeal, the State presented evidence from Duncan's ex-wife, along with two other witnesses, which established that Duncan was privy to the details of Bennett's murder before Bennett's body was discovered and reported to the police. Duncan also told his ex-wife that he murdered Bennett. We conclude that any failure of Duncan's trial counsel to object to Henthorn's testimony was not prejudicial. The evidence supports Duncan's convictions and renders the court's erroneous admission of Henthorn's testimony harmless.

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[21] See *U.S. v. Cromer*, 389 F.3d 662 (6th Cir. 2004).

[22] Brief for appellant at 38.

[23] *Duncan, supra* note 1.

[24] *Sheets, supra* note 20.

[25] *State v. Brouillette*, 265 Neb. 214, 655 N.W.2d 876 (2003).

Claims of Ineffective Assistance of Appellate Counsel

[8,9] Duncan's remaining assignments of error all concern the actions of trial counsel that were not raised on direct appeal. When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record.[26] Otherwise, the issue will be procedurally barred.[27] All of Duncan's remaining postconviction claims of trial counsel's ineffective assistance were available to him on direct appeal. Because he did not raise those claims, they are procedurally barred. His claim that his appellate counsel provided ineffective assistance by failing to raise these issues on direct appeal is not procedurally barred.[28] But on appeal, Duncan has not assigned that the postconviction court erred in failing to find that his appellate counsel provided ineffective assistance. When claims of a trial counsel's performance are procedurally barred, we examine claims regarding trial counsel's performance only if the defendant assigns as error that appellate counsel was ineffective for failing to raise trial counsel's performance.[29]

[10] The district court addressed Duncan's claims regarding trial counsel's performance, and found them all to be meritless. On appeal before us, Duncan has failed to raise an issue regarding appellate counsel's performance. Because he has failed to assign this as error, we do not examine whether appellate counsel was ineffective for failing to raise trial counsel's performance. We do not consider errors which are argued but not assigned.[30] Having examined the record, we conclude that Duncan's assignments of error have no merit.

Affirmed.

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[26] See *Dunster, supra* note 10.

[27] *Id.*

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

[29] See *id.*

[30] *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007); *State v. King*, 272 Neb. 638, 724 N.W.2d 80 (2006); *State v. Hernandez*, 268 Neb. 934, 689 N.W.2d 579 (2004).

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. DONALD J. LOFTUS, RESPONDENT.

775 N.W.2d 426

Filed December 4, 2009. No. S-08-1330.

1. **Disciplinary Proceedings: States: Proof.** 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.
2. **Disciplinary Proceedings.** With respect to the type of attorney discipline that is appropriate, the Nebraska Supreme Court evaluates each case individually in light of the particular facts and circumstances of that case.
3. ____. Neb. Ct. R. § 3-304 provides that the following may be considered by the Nebraska Supreme Court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of or subsequent to suspension, on such terms as the court may designate; (4) censure and reprimand; (5) temporary suspension; or (6) private reprimand.
4. ____. For the purpose of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.

Original action. Judgment of suspension.

John W. Steele, Assistant Counsel for Discipline, for relator.

Donald J. Loftus, pro se.

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

PER CURIAM.

NATURE OF CASE

The Counsel for Discipline of the Nebraska Supreme Court, relator, has filed a motion for reciprocal discipline against Donald J. Loftus, respondent.

FACTS

Loftus was admitted to the practice of law in Nebraska in 1973 and in California in 1990. He was on inactive status with the Nebraska State Bar Association until June 19, 2009, when he was suspended for nonpayment of dues. There is no evidence that Loftus has been disciplined in either state before this case.

On November 7, 2007, the Review Department of the State Bar Court of California (Review Department) determined that Loftus was culpable of moral turpitude and therefore had violated California Business and Professions Code § 6106, because he instigated a conversation with an adverse party under false pretenses, secretly recorded it, and then lied about it and concealed it during litigation. It also concluded that Loftus harassed or embarrassed a juror in violation of California Rules of Professional Conduct § 5-320(D).

In accordance with the recommendation of the Review Department, on October 1, 2008, the Supreme Court of California suspended Loftus from the practice of law for 1 year, stayed except for the first 90 days, and placed him on probation for 18 months. The court also ordered Loftus to attend and successfully complete California's State Bar Ethics School, take and pass the Multistate Professional Responsibility Examination, and meet other conditions.

The Counsel for Discipline of the Nebraska Supreme Court filed a motion for reciprocal discipline on December 24, 2008. On January 14, 2009, we entered an order directing the parties to show cause as to why this court should or should not enter an order imposing identical discipline, or greater or lesser discipline, as the court deemed appropriate. Loftus responded, claiming that he was denied due process in the California proceedings.

ANALYSIS

[1] The issues in a disciplinary proceeding against a lawyer are whether this court should impose discipline and, if so, the type of discipline appropriate under the circumstances.[1] 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."'"[2] Based on the findings of the Supreme Court

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[1] *State ex rel. Counsel for Dis. v. Boose*, 277 Neb. 1, 759 N.W.2d 110 (2009).

[2] *Id.* at 4, 759 N.W.2d at 112-13.

of California, we conclude that misconduct occurred and that disciplinary measures are appropriate in this case.

[2-4] With respect to the type of attorney discipline that is appropriate, we evaluate each case individually in light of the particular facts and circumstances of that case.[3] Neb. Ct. R. § 3-304 provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of or subsequent to suspension, on such terms as the court may designate; (4) censure and reprimand; (5) temporary suspension; or (6) private reprimand.[4] For the purpose of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding.[5] We apply these factors to the instant reciprocal discipline case.

After considering the facts and circumstances of this case, the Supreme Court of California determined that a 1-year suspension, stayed except for the first 90 days of actual suspension, sufficiently protected the interests of the citizens of California. We conclude that a 90-day suspension would likewise protect the citizens of Nebraska.

Loftus' license to practice law in Nebraska is currently under nondisciplinary suspension for nonpayment of annual dues and fees. Pursuant to Neb. Ct. R. § 3-803(E), a member of the Nebraska State Bar Association suspended for nonpayment of dues and/or assessments is eligible to be reinstated if he or she pays all dues and assessments in arrears. As we noted in *State ex rel. NSBA v. Flores*,[6] in order for attorney discipline to have meaning, it must be added to the nondisciplinary suspension. Accordingly, Loftus will not be eligible for reinstatement until 90 days after he has paid all delinquent dues and assessments owed to the Nebraska State Bar Association and

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[3] See *State ex rel. Counsel for Dis. v. Wickenkamp*, 277 Neb. 16, 759 N.W.2d 492 (2009).

[4] *State ex rel. Counsel for Dis. v. Wadman*, 275 Neb. 357, 746 N.W.2d 681 (2008).

[5] *Id.*

[6] *State ex rel. NSBA v. Flores*, 261 Neb. 256, 622 N.W.2d 632 (2001).

has shown that he has successfully completed California's State Bar Ethics School, taken and passed the Multistate Professional Responsibility Examination, and shown that he has complied and is complying with his term of probation and other conditions imposed by California.

CONCLUSION

The motion for reciprocal discipline is granted. It is the judgment of this court that Loftus should be and is suspended from the practice of law for a period of 90 days immediately following the date when he becomes otherwise eligible for reinstatement from his current nondisciplinary suspension for nonpayment of dues and assessments.

Loftus shall comply with Neb. Ct. R. § 3-316, and upon failure to do so, he shall be subject to punishment for contempt of this court. He is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323(B) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF SUSPENSION.

CONNOLLY, J., not participating.

SHARI MILLER, APPELLEE, V. SCHOOL DISTRICT NO. 18-0011 OF CLAY COUNTY, NEBRASKA, ALSO KNOWN AS HARVARD PUBLIC SCHOOLS, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.

775 N.W.2d 413

Filed December 4, 2009. No. S-09-016.

1. **Schools and School Districts: Termination of Employment: Teacher Contracts: Evidence: Appeal and Error.** The standard of review in a proceeding in error from an order of a school board terminating the contract of a tenured teacher is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision.
2. **Schools and School Districts: Evidence.** The evidence presented to a school board is sufficient as a matter of law if the school board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.

3. **Schools and School Districts: Statutes: Intent: Appeal and Error.** The intent of the tenured teacher statutes is to guarantee a tenured, or permanent certificated, teacher continued employment except where specific statutory grounds for termination are demonstrated.
4. **Constitutional Law: Statutes: Governmental Subdivisions.** A governmental entity may not accomplish indirectly what it is prohibited from doing directly, whether prohibited by constitutional or statutory provisions.

Appeal from the District Court for Clay County: VICKY L. JOHNSON, Judge. Affirmed.

Karen A. Haase, Steve Williams, and Adam J. Prochaska, of Harding & Shultz, P.C., L.L.O., for appellant.

Scott J. Norby, of McGuire & Norby, for appellee.

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

STEPHAN, J.

Nebraska law permits a school district to terminate the contract of a permanent certificated employee only for certain reasons.[1] One reason is a reduction in force.[2] The question presented in this appeal is whether terminating the contract of a permanent certificated art teacher who had been employed by a school district on a half-time basis and replacing her with a probationary art teacher employed by another school district and shared on a half-time basis pursuant to an interlocal agreement constitutes a reduction in force. We conclude that it does not.

BACKGROUND

For 23 years, Shari Miller was employed by School District No. 18-0011 of Clay County, commonly known as Harvard Public Schools (School District), as its art teacher. She provided art instruction to students in grades 4 through 12. In 1997, Miller's position was reduced from a .75 full time equivalency (FTE) to a .5 FTE due to low enrollment in the art program. After 1997, Miller also taught art classes in the Aurora Public

[1] See Neb. Rev. Stat. § 79-829 (Reissue 2008).

[2] § 79-829(2) and Neb. Rev. Stat. §§ 79-846 to 79-849 (Reissue 2008).

Schools on a .5 FTE basis, in addition to her .5 FTE position as a certificated teacher with the School District.

At a January 14, 2008, meeting, the board of education of the School District (School Board) began discussing a possible expansion of its interlocal agreement with the Clay Center school district. Under the existing agreement, the two districts shared certain personnel, including teachers for Spanish, social studies, and industrial technology, as well as a paraprofessional and coaches. The School Board did not give public notice of the nature of the meeting because it did not want to "scare" its teachers. A short time later, the curriculum committees of both the School Board and the Clay Center school board met to discuss the possibility of sharing personnel for their art and speech pathology programs. No public notice was given, nor was an agenda issued or minutes prepared of the meeting.

At the time of these meetings, the Clay Center school district employed its own tenured 1.0 FTE art teacher. However, on February 3, 2008, that teacher submitted her resignation, effective at the end of the school year. On February 13, the Clay Center school district's superintendent, Lee Sayer, informed the Clay Center school board of the resignation and stated, "[The School District] wants to share [the art] position with us for next year, but we will need to hire a replacement teacher for next year. . . . **This needs to be confidential because [the School District] is going to RIF their art teacher who resides in Clay Center, and is unaware of this action.**" (Emphasis in original.) The Clay Center school district advertised the full-time art teacher position for the 2008-09 school year and eventually hired a person who had been teaching in Kansas. Miller saw the position advertised but did not apply for it. Sayer did not discuss the position with Miller, because he thought it was "illegal" to contact teachers under contract with another school. The School District's superintendant, Larry Turnquist, did not inform Miller of the position or advise her to apply, because he felt the hiring decision was the responsibility of the Clay Center school district.

On February 20, 2008, in an e-mail message to the School Board, Turnquist outlined the process for terminating Miller's

contract, stating that the School Board would first need to vote to eliminate the art program. Turnquist also stated:

> The teacher may ask for a hearing, but, the curriculum is totally in the hands of the board so if a hearing is called, it will be used as an opportunity by the teacher and the teacher's union (NEA) to intimidate the board. They know that once the board vote[s] to reduce, it is all over.

In followup communications with the School Board, Turnquist warned that the decision to eliminate the art program may be challenged and he recommended that the School Board cite only the Clay Center school district's offer to share its art teacher as the change in circumstance necessitating a reduction in force, rather than "create a school wide level of fear" with talk of budgetary concerns.

When Sayer advised Turnquist that the Clay Center school district had hired an art teacher for the 2008-09 school year, Turnquist requested a formal proposal for the sharing arrangement they had been discussing. Sayer then sent Turnquist a letter dated February 28, 2008, formally proposing that the two school districts share the art teacher position on a .5 FTE basis.

On March 3, 2008, Turnquist gave Miller written notice that the School District was considering a reduction in force which would eliminate her position and that the School Board would discuss the matter at a meeting scheduled for, and subsequently held on, March 10. Miller was invited to the meeting but, on the advice of her union representative, she did not attend. At the meeting, the School Board voted unanimously to reduce the School District's art program from .5 FTE to 0 FTE and recommended that the School District contract with the Clay Center school district for the provision of an art teacher.

Following notification of her proposed contract termination, Miller requested a hearing before the School Board which took place on July 21, 2008. Following the hearing, the School Board found that the following changes in circumstance necessitated a reduction in force:

> [T]he need for the [S]chool [D]istrict to be more efficient in the use of its resources, the increasing cost of operating the [S]chool [D]istrict, the reduced financial support for

> the [S]chool [D]istrict, the uncertainty of state aid, limitations on the [S]chool [D]istrict's ability to levy property taxes, statutory budgetary limits, the low student enrollment in [the School District], the low enrollment in the Art program [in the School District], and the opportunity for the [School] Board . . . to contract with the Board of Education of Clay Center Public Schools for the provision of Art instruction services.

The School Board also found that the change in circumstances specifically related to Miller, as her only teaching endorsement was in art and she did not qualify for any other vacancies in the district.

Miller filed a petition in error in the district court for Clay County, generally alleging the School Board's decision violated the reduction in force statutes, because it was not supported by competent evidence regarding a change in circumstances necessitating a reduction in force and allowed for the retention of a probationary employee to render services for which Miller was qualified to perform. At the hearing, Turnquist testified regarding the circumstances which led to Miller's termination, as summarized above. Turnquist admitted that under its proposed course of action, the only change in the district's art program would be the identity of the art teacher and a savings of approximately $8,785 as a consequence of replacing Miller with the shared probationary teacher employed by the Clay Center school district. Turnquist further conceded that cost savings would be approximately the same if the School District were to hire a new probationary teacher to replace Miller.

Following the hearing, the district court issued an order reversing and vacating the decision of the School Board. The court found that there had been no change in circumstances or reduction in force because the School District did not reduce its staff or demonstrate a reduced need. The School District perfected this timely appeal, which we moved to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[3]

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[3] Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

ASSIGNMENTS OF ERROR

The School District assigns, restated and consolidated, that the district court erred in determining that (1) there was not a change in circumstances necessitating a reduction in force and (2) the School District's termination of Miller's contract was not a reduction in force.

STANDARD OF REVIEW

[1,2] The standard of review in a proceeding in error from an order of a school board terminating the contract of a tenured teacher is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision.[4] The evidence presented to a school board is sufficient as a matter of law if the school board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.[5]

Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[6]

ANALYSIS

As a permanent certificated employee, Miller had a certain degree of job security guaranteed by law. But her contract could be terminated for one of the reasons specified in § 79-829, including reduction in force. Because this was the sole reason given for the termination, we must first resolve the disputed issue of whether the School District's agreement to share an art teacher with another district constituted a reduction in force. The district court found that the School District had a .5 FTE art teacher both before and after the purported reduction in force. The district court further found:

> [The School District's] curriculum was not changed, its staffing needs did not change; consequently, there was

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[4] See, *Wilder v. Grant Cty. Sch. Dist. No. 0001*, 265 Neb. 742, 658 N.W.2d 923 (2003); *Nickel v. Saline Cty. Sch. Dist. No. 163*, 251 Neb. 762, 559 N.W.2d 480 (1997).

[5] See *id.*

[6] *Metropolitan Comm. College Area v. City of Omaha*, 277 Neb. 782, 765 N.W.2d 440 (2009). See, also, *Wilder v. Grant Cty. Sch. Dist. No. 0001, supra* note 4.

> **NO** reduction in force. The only change was a lower overall cost because the . . . School Board agreed to utilize another teacher at a lower rate of pay by sharing her salary with the Clay Center Board of Education. The . . . School District "RIF" reduced its costs by replacing a teacher with 23 years of experience with a probationary teacher from another school district who could be obtained at a bargain.

In assigning error to this finding, the School District argues that there "has clearly been a reduction in force at [the School District] as the number of teachers employed by the district has been reduced."[7] The School District further argues that it made a transparent decision "to cease providing art to its students through district employees and to begin doing so through a cooperative agreement in order to save money."[8] It contends that its authority to do so is entitled to the traditional deference which this court has given to school boards in making this type of decision.[9]

The threshold question we must address in this case is not whether the School District properly exercised its broad discretion in carrying out a reduction in force, but, rather, whether a reduction in force actually occurred. If it did, then we must decide whether it was carried out in the manner which the statutes require. But if there was no reduction in force, the School District's stated reason for terminating Miller's contract would disappear.

[3] We have previously held that the intent of the tenured teacher statutes, including § 79-829, is to guarantee a tenured, or permanent certificated, teacher continued employment except where specific statutory grounds for termination are demonstrated.[10] Section 79-829(2) provides that a teacher's contract may be terminated due to "reduction in force as set

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[7] Brief for appellant at 33.

[8] *Id.* at 31.

[9] See, *Nickel v. Saline Cty. Sch. Dist. No. 163, supra* note 4; *Cross v. Board of Governors*, 204 Neb. 383, 281 N.W.2d 925 (1979).

[10] See, *Moser v. Board of Education*, 204 Neb. 561, 283 N.W.2d 391 (1979); *Witt v. School District No. 70*, 202 Neb. 63, 273 N.W.2d 669 (1979).

forth in sections 79-846 to 79-849." Although the statute does not specifically define the phrase "reduction in force," this court has held that as used in the teacher tenure statutes, it "involves terminating a teacher['s contract] 'due to a surplus of staff.'"[11] School districts are statutorily required to adopt reduction in force policies, and "[n]o such policy shall allow the reduction of a permanent or tenured employee while a probationary employee is retained to render a service which such permanent employee is qualified . . . to perform . . . ."[12] Section 79-847 provides:

> Before a reduction in force occurs, the school board or board of education and the school district administration shall present competent evidence demonstrating that a change in circumstances has occurred necessitating a reduction in force. Any alleged change in circumstances must be specifically related to the teacher or teachers to be reduced in force, and the board, based upon evidence produced at the hearing required by sections 79-824 to 79-842, shall be required to specifically find that there are no other vacancies on the staff for which the employee to be reduced is qualified by endorsement or professional training to perform.

By enacting these statutes, "'the Legislature has attenuated a school [district's] discretion to pare its staff in the face of reduced needs and has imposed specified procedures for achieving a reduction in force.'"[13]

Applying these principles, we have held that a reduction in force occurred where a community college eliminated its machine shop program due to a decline in enrollment and decided not to renew the contract of the sole machine shop

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[11] *Roth v. School Dist. of Scottsbluff*, 213 Neb. 545, 548, 330 N.W.2d 488, 491 (1983) (superseded by statute on other grounds as stated in *Kennedy v. Board of Ed. of Sch. Dist. of Ogallala*, 230 Neb. 68, 430 N.W.2d 49 (1988)), quoting *Moser v. Board of Education, supra* note 10.

[12] § 79-846.

[13] *Wilder v. Grant Cty. Sch. Dist. No. 0001, supra* note 4, 265 Neb. at 747, 658 N.W.2d at 927, quoting *Trolson v. Board of Ed. of Sch. Dist. of Blair*, 229 Neb. 37, 424 N.W.2d 881 (1988).

instructor, and no new teacher was hired to fill a position for which the former machine shop instructor was qualified.[14] But we determined that no reduction in force occurred where a teacher was told that her position had been eliminated, and the school district subsequently hired a new teacher to fill a position for which the discharged teacher was qualified.[15]

[4] We conclude that the district court correctly determined that no reduction in force occurred in this case. There was no "surplus" of staff in the art department, i.e., "the amount that remains when use or need is satisfied,"[16] as evidenced by the fact that the School District planned to replace its only .5 FTE art teacher with another .5 FTE art teacher. The School District was not paring its staff to meet reduced needs; it was changing the method by which it secured the services of a .5 FTE art teacher in order to save money. The School District would have paid its share of the new teacher's salary and fringe benefits, but the amount would have been less than it had paid Miller, primarily because the shared teacher held probationary status and earned a lower salary. We note that the School District would have been legally prohibited by Nebraska's teacher tenure statutes from terminating Miller's contract and then hiring a probationary teacher to replace her.[17] A governmental entity may not accomplish indirectly what it is prohibited from doing directly, whether prohibited by constitutional or statutory provisions.[18]

The School District urges us to follow other state courts which have upheld termination of tenured teachers' contracts in circumstances where their duties were assumed by other personnel. We have reviewed the cases cited by the School District and find them to be distinguishable, in that none involved "reduction in force" as a statutory basis for termination of a teacher's contract and all involved factual circumstances which

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[14] *Cross v. Board of Governors, supra* note 9.

[15] *Witt v. School District No. 70, supra* note 10.

[16] Webster's Third New International Dictionary, Unabridged 2301 (1993).

[17] See, § 79-846; *Moser v. Board of Education, supra* note 10.

[18] *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006).

are different in varying degrees from this case. The School District's core argument is that it should be free to structure its workforce in the most economical way possible, in this case, through an interlocal agreement for the sharing of a teacher with another school district. It may well be that under certain circumstances, a teacher-sharing arrangement between school districts would be an appropriate and effective means of controlling costs and conserving scarce resources. But under Nebraska law, reduction of personnel cost is not itself a legal basis for terminating the contract of a tenured teacher; the savings must be achieved by a reduction in force. The district court correctly concluded that no reduction in force occurred in this case.

CONCLUSION

For the reasons discussed, we affirm the judgment of the district court.

AFFIRMED.

BSB CONSTRUCTION, INC., A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT, V. PINNACLE BANK, A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE.

776 N.W.2d 188

Filed December 4, 2009. No. S-09-018.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly erroneous.

5. ____: ____. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
6. **Escrow: Words and Phrases.** An escrow is properly defined as a written instrument, which by its terms imports a legal duty that a deposit is to be kept by the depositary until the performance of a condition or the happening of a certain event and then to be delivered over to take effect.
7. **Escrow.** No precise form of words is necessary to create an escrow. The term "escrow" need not be used.
8. **Escrow: Negligence: Liability.** Where a party assumes to and does act as the depositary in escrow, it is absolutely bound by the terms and conditions of the deposit and charged with a strict execution of the duties voluntarily assumed. It is held to strict compliance with the terms of the escrow agreement. If it violates instructions or acts negligently, it is ordinarily liable for any loss occasioned by its breach of duty.
9. **Contracts.** The law does not require a party to perform a useless act.
10. **Summary Judgment: Proof.** A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial.
11. ____: ____. Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a genuine issue of material fact that prevents judgment as a matter of law shifts to the party opposing the motion.
12. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved.
13. **Prejudgment Interest: Claims.** Prejudgment interest under Neb. Rev. Stat. § 45-103.02 (Reissue 2004) is recoverable only when the claim is liquidated, that is, when there is no reasonable controversy as to either the plaintiff's right to recover or the amount of such recovery.
14. ____: ____. A two-pronged inquiry is required to determine whether a claim is liquidated. There must be no dispute either as to the amount due or as to the plaintiff's right to recover.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Todd R. McWha and S. David Schreiber, of Waite, McWha & Harvat, for appellant.

Nichole S. Bogen, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee.

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

MILLER-LERMAN, J.

NATURE OF THE CASE

This appeal involves the release of funds by appellant, Pinnacle Bank (Pinnacle), from an escrow account for the benefit of appellee and cross-appellant, BSB Construction, Inc. (BSB), to an entity other than BSB. BSB had contracted with TC Properties LLC to construct two roads in a community development. An online bank account was opened with Pinnacle, and money was deposited in the account to pay BSB. When additional costs for construction of the development arose, TC Properties transferred money out of the account and into one of TC Properties' other accounts with Pinnacle to cover the additional costs.

BSB filed an action in the district court for Lancaster County. BSB claimed, inter alia, that Pinnacle breached the terms of the agreements governing the bank account. Upon summary judgment, the district court concluded that the bank account was an escrow account and that Pinnacle had breached its duties to the detriment of BSB. The district court thereafter held a trial on certain amounts owed to BSB. Pinnacle appeals the money judgment entered against it, and BSB cross-appeals, challenging the amount of the damages awarded and the denial of attorney fees and prejudgment interest. We affirm.

STATEMENT OF FACTS

TC Properties was established in 2000 to create the Trails Crossing Resort project, a resort-type community on the south shore of Lake McConaughy in Keith County, Nebraska. TC Properties had a planned unit development approved by Keith County officials that included 1,700 residential units, a commercial complex area, two golf courses, and a variety of other amenities.

Dennis Rosengarten was the president and general manager of TC Properties and was responsible for the financial and legal aspects of the project. Dan Eggers was a TC Properties employee who was responsible for handling all of the construction-related issues on the project, including supervising the project manager, Todd Hatterman.

The lender for the project was SLF Series A, LLC, a Utah limited liability company. SLF Series A designated T Capital Partners as the administrator for the project, whose duties involved overseeing the progress of the construction, the distribution of funds, and the payment of submitted draw requests.

In April 2004, TC Properties contracted with BSB to construct two roads. The procedure for paying BSB was set forth in the road construction contract, which stated:

> Upon approval of progress payment by [the project engineer] and [TC Properties], [TC Properties] will submit a "Draw Authorization" form . . . to [T Capital Partners] for approval. This authorization will include the signatures of [TC Properties, the project engineer, and T Capital Partners] for approval of payout as defined in paragraph 502.2 [sic] above. Once approved for payout, an officer of Pinnacle Bank of Ogallala will acknowledge receipt of "Draw Authorization" and proceed to issue payment of [BSB's] progress payment invoice from the "draw-down" account established at Pinnacle Bank by [T Capital Partners and TC Properties]. [T Capital Partners] agrees to fund the draw-down account in the amount of [BSB's] bid defined in 501.D above. Proof of these funds will be submitted to [BSB] prior to start-up.

Norma Lashley (Norma), as president of BSB, signed the contract. Norma has been the president of BSB since 2002. In April 2004, Norma oversaw all aspects of the construction business and all contracts and was solely responsible for the company's financial matters. Ted Lashley (Ted), Norma's son, was vice president of BSB and put together bids on projects. Ted's bids had to be approved by Norma before they could be submitted.

On April 22, 2004, TC Properties opened an account (Account 31101) with Pinnacle, a Nebraska corporation, located in Ogallala, Nebraska. This account, which is at issue in this case, was opened to pay BSB under the road construction contract discussed above. The account was an online account and was opened because BSB wanted assurance that

money would be available to pay it under the terms of the road construction contract, and T Capital Partners was not willing to deposit its financing money into TC Properties' general account. T Capital Partners wanted to exercise some control over the distribution of the moneys being lent on the Trails Crossing Resort project.

On April 22, 2004, to address the concerns of T Capital Partners and BSB, TC Properties, T Capital Partners, and Pinnacle entered into an addendum with respect to the account. The addendum stated:

> 1. Account [31101] is a single payer account only to BSB . . . .
>
> 2. Pinnacle . . . is not responsible to verify the authenticity of any of the signatures of the other signatories on the Draw Authorization Form and shall have not [sic] liability in connection therewith.
>
> 3. . . . Hatterman is hereby authorized to release such funds from said account each time the Draw Authorization Form pertaining thereto is duly executed by all the Signatories.

On April 22, 2004, $338,250.47 was deposited into the account, representing that the funds were available to cover the amount of BSB's initial contract price.

In early May 2004, TC Properties became aware that a new water law was going to require it to have more water available to the project by July 1. In order to comply with the new law, TC Properties had to have wells drilled or contracts in place prior to July 1, to provide the additional water required. T Capital Partners was not willing to have money from Account 31101 used for drilling or acquisition. Nevertheless, between May 10 and September 30, in order to cover the new expenses, Eggers, with the authorization of Rosengarten, transferred $92,000 online out of Account 31101 to another TC Properties account serviced by Pinnacle. The $92,000 was paid to people and entities other than BSB.

Eggers testified that once discovering the need for additional water, he had a conversation with Ted and Rosengarten. The witnesses dispute what was discussed in the conversation. Eggers contends that after he informed Ted that

without additional funds, the project could not go forward, Ted approved the transfer of money out of Account 31101 to another TC Properties account. Ted denies that he had this conversation. Rosengarten remembers the conversation but does not recall Ted's consenting to Eggers' transferring the funds. Norma stated that she was not informed by Ted or anyone at TC Properties prior to October 2004 that the money was being transferred out of Account 31101.

BSB attempted to recover the funds removed from the account but was unsuccessful. BSB thereafter filed this action in the district court for Lancaster County against Pinnacle, claiming, inter alia, that Pinnacle breached the addendum and was negligent in administering the account. The parties filed cross-motions for summary judgment. The district court received evidence and granted partial summary judgment in favor of BSB. The district court concluded that Account 31101 was an escrow account and found that there were no genuine issues as to any material facts as to whether BSB was a third-party beneficiary of the addendum to the account, whether Pinnacle violated the terms of the April 22, 2004, addendum to Account 31101, and whether BSB was owed $56,445.09 in damages for retainage and for trenching and seedwork. The district court found there were genuine issues of material fact concerning the amount owed to BSB with respect to the delivery and placement of the construction material referred to as "riprap" and partially denied BSB's motion on this ground and set this aspect of the damage claim for trial. The district court denied Pinnacle's motion for summary judgment.

The case was tried on the issue of the riprap. After trial, the district court entered an order finding that BSB was owed $38,040.12 in damages for the riprap and that BSB was not entitled to attorney fees or prejudgment interest. Pinnacle appealed, and BSB cross-appealed.

ASSIGNMENTS OF ERROR

Pinnacle claims, restated and summarized, that the district court erred in (1) concluding that the Pinnacle Account 31101 was an escrow account and that as such, Pinnacle was liable

to BSB for any losses that resulted if Pinnacle violated the terms of the addendum; (2) finding that BSB's failure to obtain a signed draw authorization form was not a bar to BSB's recovery; (3) denying Pinnacle's request to raise an issue of "contract interpretation" at the pretrial conference; (4) finding that there was no issue of material fact whether BSB consented to TC Properties' withdrawals from Account 31101; and (5) awarding BSB the sum of $38,040.12 for the delivery and placement of the riprap. On cross-appeal, BSB claims that the district court erred in (1) awarding it $38,040.12 rather than $41,341.20 for the riprap and (2) failing to award BSB attorney fees and prejudgment interest.

STANDARDS OF REVIEW

[1] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Harvey v. Nebraska Life & Health Ins. Guar. Assn.*, 277 Neb. 757, 765 N.W.2d 206 (2009).

[2,3] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose 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. *Hauptman, O'Brien v. Turco*, 277 Neb. 604, 764 N.W.2d 393 (2009). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[4,5] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly erroneous. *Pick v. Norfolk Anesthesia*, 276 Neb. 511, 755 N.W.2d 382 (2008). In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Id.*

ANALYSIS

Appeal: Pinnacle Account 31101 Was an Escrow Account, and Pinnacle Was Bound by the Duties of an Escrow Account Depositary.

Pinnacle claims on appeal that the district court erred in concluding that the bank account in question was an escrow account. We reject this claim.

Pinnacle argues that Account 31101 was not an escrow account and that TC Properties was allowed to transfer funds from the account. Pinnacle claims that the terms of the account do not satisfy the definition of an escrow account. Pinnacle notes that the account was not titled as an escrow account but instead was called a single-payer account. Pinnacle suggests that the proper characterization of the account created a genuine issue of material fact which precluded summary judgment.

[6,7] This court has previously stated that "'an escrow . . . is properly defined as "a written instrument, which by its terms imports a legal [duty that a deposit is] to be kept by the depositary until the performance of a condition or the happening of a certain event and then to be delivered over to take effect." . . .'" *Pike v. Triska*, 165 Neb. 104, 119, 84 N.W.2d 311, 321 (1957). See, similarly, *In re ANR Advance Transp. Co., Inc.*, 247 B.R. 771 (E.D. Wis. 2000); 28 Am. Jur. 2d *Escrow* § 1 (2000); Black's Law Dictionary 20 (9th ed. 2009) (defining "escrow account"). It is well settled that "[n]o precise form of words is necessary to create an escrow. The term 'escrow' need not be used." 28 Am. Jur. 2d, *supra*, § 6 at 8-9.

We agree with the district court that as a matter of law, the account at issue in this case was an escrow account. Although Account 31101 was not titled as an escrow account, given the addendum, it possessed all of the hallmarks of an escrow, including that Pinnacle was required to hold the money deposited in the account until the happening of the identified condition, which in this case was the receipt of a draw authorization form signed by the specified persons, at which time the money could be transferred solely to BSB. Therefore, the district court properly determined that Account 31101 was an escrow account.

[8] With respect to the duties of a depositary of an escrow, our jurisprudence establishes:

> Where a [party] assumes to and does act as the depositary in escrow, [it] is absolutely bound by the terms and conditions of the deposit and charged with a strict execution of the duties voluntarily assumed. [It] is held to strict compliance with the terms of the escrow agreement. If [it] violates instructions or acts negligently, [it] is ordinarily liable for any loss occasioned by [its] breach of duty.

Katleman v. U. S. Communities, Inc., 197 Neb. 443, 447, 249 N.W.2d 898, 901 (1977). See, also, *A.G.A. Inc. v. First Nat. Bank*, 239 Neb. 74, 474 N.W.2d 655 (1991).

Because we have concluded that Pinnacle Account 31101 was an escrow account, Pinnacle was required to strictly comply with the terms of the addendum, including the requirement that payments be made solely to BSB and not without a draw authorization form signed by TC Properties and T Capital Partners representatives. By allowing TC Properties to transfer significant sums into another account, Pinnacle violated these terms and is liable for the loss suffered by BSB.

[9] Pinnacle devotes considerable argument on appeal to the effect that BSB is precluded from recovering losses attributable to the lack of sufficient funds in Account 31101, because BSB did not submit a properly endorsed draw authorization form for the requested sums prior to filing suit. Under the controlling documents, in the ordinary course, the draw authorization form would include the signature of a TC Properties representative. However, because TC Properties was in the process of improperly diminishing the funds in the account, we believe it is neither logical nor required that BSB have attempted in vain to obtain the signature of the very entity that was in the course of improperly transferring the funds out of Account 31101 as a condition precedent to BSB's recovery of the funds taken. The law does not require a party to perform a useless act. See *Bank of Papillion v. Nguyen*, 252 Neb. 926, 567 N.W.2d 166 (1997).

In sum, because Account 31101 was an escrow account, and because Pinnacle did not comply with the terms and conditions of the agreement governing the account, we affirm the district

court's decision that there were no genuine issues of material fact whether Pinnacle was liable for the losses BSB suffered as a result of TC Properties' improperly removing funds from the account.

Our resolution of these assignments of error effectively resolves Pinnacle's assigned error claiming that the district court erred when it denied Pinnacle's request to raise at the trial what Pinnacle described as an issue of "contract interpretation." In its pretrial conference memorandum, which was submitted after the entry of summary judgment, Pinnacle stated that there existed an issue of law as to whether "the construction contract require[d] that TC Properties and [T] Capital [Partners] fund Pinnacle Bank Checking Account [31101] for both the original contract amount and change orders." BSB objected to Pinnacle's raising this issue at this late stage in the proceedings. The district court directed the parties to brief the matter. After briefing, the court entered an order denying Pinnacle's request to raise the issue of contract interpretation. The district court reasoned that because the court had entered summary judgment on the contractual status of the parties, this issue had been implicitly resolved and the only issue remaining for trial was the amount BSB was owed for the riprap.

We agree with the district court's reasoning and conclusion on this issue. The additional "contract interpretation" issue raised by Pinnacle goes to the issue of Pinnacle's liability under the controlling agreements and the law. The partial summary judgment order entered by the district court resolved the issue of Pinnacle's liability, and the only issue remaining was the amount of damages owed BSB for the riprap. Therefore, the issue of "contract interpretation" raised by Pinnacle in the pretrial memorandum had been resolved and was not relevant to the trial. The court properly disallowed the issue to be raised at trial.

Appeal: There Was No Genuine Issue of Material Fact Whether BSB Consented to the Withdrawal of Funds by TC Properties From Account 31101.

Pinnacle next argues that there was a genuine issue of material fact whether BSB consented to the withdrawal of funds by

TC Properties from Account 31101, precluding the grant of summary judgment in favor of BSB on the issue of liability. Pinnacle claims in effect that BSB waived the escrow features of the account. In support of this argument, Pinnacle points to testimony relative to a conversation among Ted, Eggers, and Rosengarten about which Eggers testified and stated that Ted agreed that TC Properties could transfer the funds. Although there may be a dispute as to this conversation, given the terms of the escrow account and Ted's unchallenged lack of authority, any dispute is not material.

The district court concluded that there was no "waiver" by BSB which would allow TC Properties to remove the funds from the account. The court reasoned that, in addition to Account 31101's being an escrow account, it is undisputed that Ted did not have the authority to act on behalf of BSB with respect to the disposition of funds. Instead, the undisputed evidence showed that Norma had that authority and that Norma did not participate in the conversation. Further, as the court noted, Rosengarten, who was said to be a party to the conversation with Eggers and Ted, does not recall Ted's giving Eggers permission to remove the funds. Under the evidence, the court noted that Pinnacle was at no time informed that TC Properties had purportedly obtained BSB's consent to remove the funds. The district court determined that, even taking the inferences in favor of Pinnacle, there had not been an effective agreement between BSB and TC Properties about which Pinnacle was informed, allowing TC Properties to remove the funds.

[10,11] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Lamar Co. v. City of Fremont, ante* p. 485, 771 N.W.2d 894 (2009). A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. *Appleby v. Andreasen*, 276 Neb. 926, 758 N.W.2d 615 (2008). Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a genuine issue of material

fact that prevents judgment as a matter of law shifts to the party opposing the motion. See *id*.

We agree with the district court's determination that BSB demonstrated its entitlement to judgment and that Pinnacle did not show the existence of a genuine issue of material fact whether BSB consented to the removal of the funds. Although there may have been a dispute about the contents of the conversation on which Pinnacle relies, the undisputed fact that Ted was without authority to consent to the transfer of funds out of escrow Account 31101 renders any such dispute not material. Therefore, we affirm the district court's grant of partial summary judgment in favor of BSB.

Appeal and Cross-Appeal: The Trial Court Did Not Err in Awarding $38,040.12 to BSB for the Riprap.

On cross-appeal, BSB claims that the district court erred in awarding it $38,040.12 rather than $41,341.20 for the riprap. On appeal, Pinnacle claims that BSB's evidence was insufficient to establish its damages for the riprap. We find no error by the district court.

On appeal, both parties challenge the amount of damages awarded for the riprap. Pinnacle argues that the trial court's award was in error because there was no support in the record for the amount awarded and that it is impossible to determine how the court arrived at the figure it awarded. BSB argues that the court erred in not awarding it the $41,341.20 it requested in damages. BSB contends that it presented evidence that showed it was due $42,944.40 for the riprap and that by removing 96 tons and mitigating its damages by $1,603.20, it was owed $41,341.20.

[12] The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved. *State ex rel. Stenberg v. Consumer's Choice Foods*, 276 Neb. 481, 755 N.W.2d 583 (2008).

In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but

considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Pick v. Norfolk Anesthesia*, 276 Neb. 511, 755 N.W.2d 382 (2008).

With respect to the issue of damages relative to the riprap, at trial, the court heard the testimony of Ted and Norma of BSB and that of Hatterman, the Trails Crossing Resort project manager. Further, the district court reviewed evidence submitted, including invoices and certificates for payments. In its order, the court found that exhibit 14 showed that BSB was owed $42,944.40 for the riprap on "Change Order 6," as of November 2004. The court found the evidence established that prior to that date, 840.6 tons of riprap had been delivered to the Trails Crossing Resort project, and of that 840.6 tons, 96 tons were removed and delivered to another entity, leaving 744.6 tons. The trial court noted in its order the discrepancy between the testimony of Ted and the testimony of Hatterman with respect to the amount of riprap at the construction site.

As Pinnacle acknowledges, there was a conflict in the evidence at trial concerning the amount of riprap that was actually "placed." The following exchange occurred at the trial in regard to this conflict:

> THE COURT: Okay. And your position would be that [the riprap] that's laid gets the $60 [a ton]; [the riprap] that's not laid, does not get 8 to $10 because it hasn't been laid yet, and so that's taken off the 60, so it would be either 50 or 52.
>
> [Counsel for Pinnacle]: Correct.
>
> THE COURT: Once you determine how much is left out there.
>
> [Counsel for Pinnacle]: Exactly.
>
> . . . .
>
> THE COURT: . . . I mean, at least what I heard [counsel for Pinnacle] talking about was the difference between laid and not laid. And the testimony was, laid, the cost is eight to ten bucks. So if I determine "x" amount wasn't laid, regardless of what was invoiced for, then I would take that amount and just subtract, from 60, eight to ten

> dollars and then multiply that figure times whatever I determine has not been laid. . . .

Based on this record, it is clear that in weighing the evidence at trial, the district court accepted BSB's evidence showing that after the removal of the 96 tons of riprap, BSB was owed $41,341.20, but credited Pinnacle $3,301.08 for the riprap it concluded was not "placed." Taking all inferences in favor of the successful party, and not reweighing the evidence presented to the trial court, see *Pick v. Norfolk Anesthesia, supra*, we determine that the award is reasonably related to the evidence presented at trial, and we reject the assignments of error on appeal and cross-appeal related to this issue and affirm the district court's award of damages at trial.

Cross-Appeal: It Was Not Error for the Trial Court to Deny BSB Attorney Fees and Prejudgment Interest.

The remaining issues on cross-appeal are BSB's claims that it was entitled to attorney fees and prejudgment interest. We determine that the district court did not err when it denied BSB's request for attorney fees and prejudgment interest.

Attorney Fees.

BSB argues that it was owed attorney fees pursuant to various provisions of Nebraska's Uniform Commercial Code (U.C.C.), Neb. U.C.C. § 1-101 et seq. (Reissue 2001). The following U.C.C. provisions are relevant to our consideration of BSB's cross-appeal claiming attorney fees.

Section 4A-305 states:

> (a) If a funds transfer is completed but execution of a payment order by the receiving bank in breach of section 4A-302 results in delay in payment to the beneficiary, the bank is obliged to pay interest to either the originator or the beneficiary of the funds transfer for the period of delay caused by the improper execution. Except as provided in subsection (c), additional damages are not recoverable.
>
> (b) If execution of a payment order by a receiving bank in breach of section 4A-302 results in (i) noncompletion of the funds transfer, (ii) failure to use an intermediary

> bank designated by the originator, or (iii) issuance of a payment order that does not comply with the terms of the payment order of the originator, the bank is liable to the originator for its expenses in the funds transfer and for incidental expenses and interest losses, to the extent not covered by subsection (a), resulting from the improper execution. Except as provided in subsection (c), additional damages are not recoverable.
>
> . . . .
>
> (e) Reasonable attorney's fees are recoverable if demand for compensation under subsection (a) or (b) is made and refused before an action is brought on the claim. If a claim is made for breach of an agreement under subsection (d) and the agreement does not provide for damages, reasonable attorney's fees are recoverable if demand for compensation under subsection (d) is made and refused before an action is brought on the claim.

Section 4A-103 defines "payment order" as follows:

> (1) "Payment order" means an instruction of a sender to a receiving bank, transmitted orally, electronically, or in writing, to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary if:
>
> (i) the instruction does not state a condition to payment to the beneficiary other than time of payment.

The thrust of BSB's claim is that under § 4A-305(e), a bank can be liable for attorney fees in connection with a wrongful payment if demand for compensation is made on the bank for payment and payment is refused before an action is brought on the claim. We will assume but do not decide that the transfers on which BSB relies were "funds transfers" referred to in § 4A-305(a) and (b). By definition, to fall within the scope of § 4A-305, upon which BSB relies for its claim of attorney fees, a transaction must begin with a "payment order," the definition of which refers to a "receiving bank" or "another bank," which we will assume without deciding includes Pinnacle.

In this case, BSB claims that the June 8, 2005, demand letter sent by its counsel to Pinnacle requesting payment after discovery of the missing funds should be treated as its "payment order." The letter stated in relevant part: "Please be advised that

this office needs to receive a cashier's check or money order **payable to BSB . . . in the amount of $95,897.56 no later than 5:00 p.m. on Monday, June 17, 2005.**"

By definition, the instructions associated with a "payment order" must not state conditions, and cases and treatises have noted that in determining whether article 4A applies, it is necessary first to determine if the payment order is or is not conditional. See *Trustmark Ins. Co. v. Bank One, Arizona, NA*, 202 Ariz. 535, 48 P.3d 485 (Ariz. App. 2002) (citing Alvin C. Harrell, *UCC Article 4A*, 25 Okla. City U.L. Rev. 293 (2000)). White and Summers' treatise on the U.C.C. explains that although a "payment order" need not order immediate payment, and may specify that a certain amount of money must be paid on a certain date to a particular beneficiary, imposition of other conditions are inconsistent with the definition of a "payment order." The treatise states:

> To understand why the drafters did not wish to involve banks in inquiries into whether other conditions have occurred, let us return to the transactions that are contemplated by Article 4A: "The function of banks in a funds transfer under Article 4A is comparable to the role of banks in the collection and payment of checks in that it is essentially mechanical in nature. The low price and high speed that characterize funds transfers reflect this fact. Conditions to payment . . . other than time of payment impose responsibilities on [the] bank that go beyond those in Article 4A funds transfers."

3 James J. White & Robert S. Summers, Uniform Commercial Code § 22-3 at 25 (5th ed. 2008).

Even assuming that the June 8, 2005, letter was intended to transfer funds, compare § 4A-104(a), and even assuming Pinnacle could be characterized as a "receiving bank," compare § 4A-305, the demand letter failed to meet the test of certainty required for a "payment order" under § 4A-103(a)(1). By its terms, the letter provides for a period of time during which the amount demanded may be paid but does not direct payment be made on a date certain and no other. We conclude that BSB's reliance on article 4A of the U.C.C. as a basis for attorney fees is misplaced. Therefore, we conclude that it was not error

for the district court to deny BSB's request for attorney fees under § 4A-305.

Prejudgment Interest.

BSB asserts that it is entitled to prejudgment interest based on two distinct theories. First, BSB argues that it is entitled to prejudgment interest pursuant to Neb. Rev. Stat. § 45-104 (Reissue 2004), because Pinnacle wrongfully "retained" BSB's funds. In the alternative, BSB argues that it was entitled to prejudgment interest pursuant to Neb. Rev. Stat. § 45-103.02 (Reissue 2004) on the $56,445.09 awarded upon partial summary judgment, which it characterizes as the "liquidated" portion of its damages. We conclude that under either theory, it was not error for the district court to deny BSB prejudgment interest.

Section 45-104 states:

> Unless otherwise agreed, interest shall be allowed at the rate of twelve percent per annum on money due on any instrument in writing, or on settlement of the account from the day the balance shall be agreed upon, on money received to the use of another and retained without the owner's consent, express or implied, from the receipt thereof, and on money loaned or due and withheld by unreasonable delay of payment. Unless otherwise agreed or provided by law, each charge with respect to unsettled accounts between parties shall bear interest from the date of billing unless paid within thirty days from the date of billing.

As Pinnacle notes in opposition to BSB's claim for prejudgment interest, § 45-104 provides the interest rate for prejudgment interest upon the happening of events outlined in the statute. The actions of Pinnacle at issue in this case involve Pinnacle's release of funds to an entity other than BSB. As such, the subject matter of the present action is not one listed in § 45-104 and prejudgment interest is not warranted under § 45-104.

[13,14] BSB also claims that it is entitled to prejudgment interest under § 45-103.02 on the purported liquidated portion of its damages. See *Travelers Indemnity Co. v. International*

Nutrition, 273 Neb. 943, 734 N.W.2d 719 (2007). Prejudgment interest under § 45-103.02 is recoverable only when the claim is liquidated, that is, when there is no reasonable controversy as to either the plaintiff's right to recover or the amount of such recovery. *Travelers Indemnity Co. v. International Nutrition, supra.* A two-pronged inquiry is required to determine whether a claim is liquidated. There must be no dispute either as to the amount due or as to the plaintiff's right to recover. *Id.*

BSB argues it is entitled to prejudgment interest on the portion of damages it was awarded on summary judgment, which damages it claims were liquidated. However, our review of the record indicates that there was a reasonable controversy as to the nature and extent of BSB's work, and therefore, the damages were uncertain and required evidentiary testing at the summary judgment hearing and at trial. We cannot say that the damages were liquidated. Therefore, it was not error for the trial court to deny BSB prejudgment interest and this decision is affirmed.

CONCLUSION

With respect to the appeal, we conclude that the district court was correct when it concluded that Account 31101, the Pinnacle single-payer account controlled by the addendum, was an escrow account. As such, Pinnacle had a duty to comply with the terms of the addendum governing the account and to release the funds only to BSB. By releasing funds to an entity other than BSB, Pinnacle failed to comply with the terms of the addendum. The district court correctly determined that Pinnacle was liable to BSB, and we affirm the district court's grant of partial summary judgment in favor of BSB and the damages awarded pursuant to the judgment after trial.

With respect to the cross-appeal, because the damages award for the riprap was supported by the evidence, we affirm the award of damages at trial. We further conclude that the demand letter sent by BSB does not qualify as a payment order as defined in the U.C.C. and that the U.C.C. provision upon which BSB relies does not support an award of attorney fees.

Finally, we determine that under the facts of this case, there is no basis for an award of prejudgment interest to BSB. The district court's decision is affirmed in all respects.

AFFIRMED.

STEPHAN, J., not participating.

MARIA OFELIA CORONA DE CAMARGO, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOAQUIN CAMARGO-MARTINEZ, SR., APPELLANT, V. ARTHUR J. SCHON, AN INDIVIDUAL, ET AL., APPELLEES.

MARIA OFELIA CORONA DE CAMARGO, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CRISTOBAL CAMARGO-CORONA, APPELLANT, V. ARTHUR J. SCHON, AN INDIVIDUAL, ET AL., APPELLEES.

776 N.W.2d 1

Filed December 4, 2009. Nos. S-09-166, S-09-167.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Limitations of Actions: Appeal and Error.** Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.
4. **Summary Judgment: Motions to Dismiss: Rules of the Supreme Court: Pleadings.** Under Neb. Ct. R. Pldg. § 6-1112(b)(6), when a matter outside the pleadings is presented by the parties and accepted by the trial court, a defendant's motion to dismiss must be treated as a motion for summary judgment.
5. **Summary Judgment: Motions to Dismiss: Notice.** When receiving evidence which converts a motion to dismiss into a motion for summary judgment, it is important for the trial court to give the parties notice of the changed status of the motion.
6. **Wrongful Death: Damages.** Wrongful death recovery is limited to the loss suffered by a decedent's next of kin, and it provides no basis upon which to recover a decedent's own damages.

7. **Wrongful Death.** The next of kin may recover in a wrongful death action only those losses sustained after the injured party's death by reason of being deprived of what the next of kin would have received from the injured party from the date of his or her death, had he or she lived out a full life expectancy.
8. ____. The pain and suffering of the deceased is not an element that may be recovered under the wrongful death statutes.
9. **Constitutional Law: Legislature: Intent.** The Legislature had mandated that Nebraska adopt only so much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the Legislature of this state.
10. **Actions: Constitutional Law: Decedents' Estates.** Under the Nebraska Constitution, a cause of action exists for personal injury that neither expressly nor by necessary implication requires the institution of a suit prior to the injured person's death as a condition precedent to recovery by his or her administrator, nor in any manner conditions the remedy it provides on that fact.
11. **Actions: Abatement, Survival, and Revival: Wrongful Death.** Neb. Rev. Stat. § 25-1401 (Reissue 2008) is applicable in establishing a survival claim as a proper cause of action, separate and distinct from the wrongful death statutes, because a survival claim is an action which survives at common law.
12. **Limitations of Actions: Abatement, Survival, and Revival: Wrongful Death.** A survival claim is not governed by the 2-year statute of limitations applicable to wrongful death claims.
13. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of the trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.
14. **Summary Judgment: Proof.** A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.
15. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
16. **Negligence.** A legal duty on the part of a defendant to protect the plaintiff from injury is an essential element to an actionable negligence claim.

Appeals from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed in part, and in part reversed.

Jason M. Finch and Kevin J. McCoy, of Smith, Gardner, Slusky, Lazer, Pohren & Rogers, L.L.P., for appellant.

Thomas A. Grennan, Elizabeth M. Callaghan, and Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., for appellees Arthur J. Schon, Mary E. Schon, Schon Enterprises, Inc., and Sara Gonzalez.

Lawrence E. Welch, Jr., of Welch Law Firm, P.C., for appellee General Fire & Safety Equipment Company of Omaha, Inc.

Gregory G. Barntsen and Marvin O. Kieckhafer, of Smith Peterson Law Firm, L.L.P., for appellee Multi-Vest Realty Co.

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

MCCORMACK, J.

NATURE OF CASE

The principal issue in these consolidated appeals is whether the 2-year statute of limitations for wrongful death actions governs personal injury actions brought on behalf of the victims' estates to recover for the pain and suffering they experienced before death. We hold that it does not.

FACTS

On August 1, 2006, a fire occurred in the Colonial Apartments building, killing Joaquin Camargo-Martinez, Sr., and Cristobal Camargo-Corona. The building was owned by Arthur J. Schon and Mary E. Schon. General Fire & Safety Equipment Company of Omaha, Inc. (General Fire), allegedly installed, maintained, and/or inspected the fire protection system for the Colonial Apartments.

Maria Ofelia Corona de Camargo is the personal representative of the decedents' estates. Cristobal was her son, and Joaquin was her husband. On August 4, 2008, Maria filed complaints against the Schons; the Schons' company, Schon Enterprises, Inc.; Sara Gonzalez, the manager of the Colonial Apartments building; and General Fire. She also filed suit against Multi-Vest Realty Co. (Multi-Vest). Maria and General Fire have since entered into a settlement agreement, and General Fire is no longer a party to this appeal.

Maria alleged two causes of action: (1) personal injury of the victims, including their physical and mental pain and suffering, fear or apprehension of imminent death, or other mental anguish from the time they became aware of the fire until their deaths, and (2) wrongful death recovery for Maria's loss of love, support, services, comfort, solace, protection, society, companionship, counseling, advice, and guidance.

The defendants the Schons, Schon Enterprises, the building manager, and General Fire moved to dismiss Maria's complaints as barred by the wrongful death 2-year statute of limitations. At a hearing in connection with the motions, the court considered various exhibits offered by the defendants establishing the date of the fire and the victims' deaths.

Defendant Multi-Vest filed motions for summary judgment on the ground that Multi-Vest lacked any ownership or other duties in relationship to the Colonial Apartments. According to an affidavit signed by Mary, as president of Multi-Vest, Multi-Vest paid the building manager's wages, but she was on loan to Schon Enterprises. Schon Enterprises reimbursed Multi-Vest for all of its wage payments to the building manager during the time she worked as the manager of the Colonial Apartments. Mary further testified that Multi-Vest had no ownership interest or managerial duties in connection with the Colonial Apartments. Multi-Vest also introduced into evidence the rental agreement demonstrating that Maria rented from Schon Enterprises, and not from Multi-Vest.

At the hearing on the motions, Multi-Vest argued that in addition to having no duty, Maria's actions were barred by the 2-year statute of limitations. The 2-year bar was raised in Multi-Vest's answers to Maria's complaints.

The district court dismissed all of Maria's claims as barred by the 2-year statute of limitations. In so doing, the court characterized all of the parties' motions as motions to dismiss. The court did not specifically address whether summary judgment was proper as to Multi-Vest on the alternative ground that it lacked any duty. On appeal, Maria admits the wrongful death claims were barred because the claims were filed more than 2 years after the incident, but she argues that the personal injury actions are governed by the 4-year statute of limitations

applicable to tort action.[1] It is not disputed that the claims were filed within 4 years of the incident.

ASSIGNMENT OF ERROR

Maria asserts that the district court erred in concluding that the personal injury actions brought by the victims' estates was barred by the statute of limitations.

STANDARD OF REVIEW

[1] Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.[2]

[2] Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court.[3]

[3] 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, giving that party the benefit of all reasonable inferences deducible from the evidence.[4]

ANALYSIS

We begin by noting that although the district court characterized all the motions as motions to dismiss, they should in fact be considered motions for summary judgment. Multi-Vest's motions never purported to be anything other than motions for summary judgment, and a hearing was held in which the parties referred to the motions as motions for summary judgment and considered evidence in support of the motions.

[4] As for the remaining defendants, although they referred to their motions as motions to dismiss, they offered several exhibits at the hearing, including an affidavit by the fire captain demonstrating the date of the fire and death certificates

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[1] See Neb. Rev. Stat. § 25-207 (Reissue 2008).

[2] *Olsen v. Farm Bureau Ins. Co.*, 259 Neb. 329, 609 N.W.2d 664 (2000).

[3] *Id.*

[4] *Johnson v. Anderson, ante* p. 500, 771 N.W.2d 565 (2009).

demonstrating the dates Cristobal and Joaquin died. When a matter outside the pleadings is presented by the parties and accepted by the trial court, a defendant's motion to dismiss must be treated as a motion for summary judgment.[5]

[5] It is true that when receiving evidence which converts a motion to dismiss into a motion for summary judgment, it is important for the trial court to give the parties notice of the changed status of the motion.[6] It does not appear that Maria was given such notice. However, the purpose of the notice is to give the party sufficient opportunity to discover and bring forward factual matters which may become relevant in the summary judgment context, as distinct from the dismissal context.[7] And Maria was given a reasonable opportunity to present argument and evidence relevant to the statute of limitations issue. Indeed, Maria now concedes the underlying facts pertinent to this issue are not in dispute, i.e., that her claims were made more than 2 years after the occurrence. Thus, while the motions to dismiss were converted into motions for summary judgment without notice to Maria, there was no prejudice, because the motions presented an issue of law of which Maria was notified in the motions to dismiss.[8]

We now determine whether, as a matter of law, the decedents' pain and suffering claims are governed by the 2-year wrongful death statute of limitations. We also determine whether, viewing the evidence in a light most favorable to Maria, there is a material issue of fact that Multi-Vest owed no duty to the decedents.

Statute of Limitations

The defendants do not dispute that a cause of action for pain and suffering will generally survive a victim's death. The

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[5] Neb. Ct. R. Pldg. § 6-1112(b)(6); *Nebraska Coalition for Ed. Equity v. Heineman*, 273 Neb. 531, 731 N.W.2d 164 (2007).

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

[7] See *Ichtertz v. Orthopaedic Specialists of Neb.*, 273 Neb. 466, 730 N.W.2d 798 (2007). See, also, *Doe v. Omaha Pub. Sch. Dist., supra* note 6.

[8] See *id.*

dispute is whether such a claim is encompassed by a cause of action for wrongful death—or at least by the wrongful death statute of limitations.[9] We conclude that a claim on behalf of the victim's estate for the victim's predeath pain and suffering is separate and distinct from a wrongful death action brought on behalf of the next of kin for his or her damages incurred as a direct result of the victim's death. Accordingly, claims for predeath pain and suffering are not governed by the 2-year statute of limitations.

Section 30-809(1) sets forth a wrongful death action:

> Whenever the death of a person . . . is caused by the wrongful act, neglect, or default of any person, company, or corporation, and the act, neglect, or default is such as would, if death had not ensued, have entitled the person injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which, would have been liable if death had not ensued, is liable in an action for damages, notwithstanding the death of the person injured, and although the death was caused under such circumstances as amount in law to felony.

The defendants argue that this provision plainly created but a single cause of action for wrongful death which encompasses any actions for damages the persons injured would have had but for the fact that death ensued.

The defendants misread the statute. The focus of the broad language of § 30-809(1) is to list who may be sued. While § 30-809(1) refers broadly to "an action for damages," we disagree with the defendants' contention that this implies wrongful death actions are the only means to recover any and all damages relating to the event causing the victims' deaths.

[6-8] In addition, § 30-809(1) must be read in conjunction with § 30-810. Section 30-810 states in relevant part:

> [The action] shall be brought by and in the name of the person's personal representative for the exclusive benefit of the widow or widower and next of kin. The

[9] See Neb. Rev. Stat. §§ 30-809 and 30-810 (Reissue 2008).

> verdict or judgment should be for the amount of damages *which the persons in whose behalf the action is brought have sustained*.[10]

In *Nelson v. Dolan*,[11] we explained that this language limits a wrongful death recovery to the loss suffered by a decedent's next of kin and that it provides no basis upon which to recover a decedent's own damages. The next of kin may recover in a wrongful death action only those losses sustained after the injured party's death by reason of being deprived of what the next of kin would have received from the injured party from the date of his or her death, had he or she lived out a full life expectancy.[12] Consistent with the fact that wrongful death recovery is for injuries suffered solely by the next of kin, § 30-810 allows that "[s]uch amount shall not be subject to any claims against the estate of such decedent." In *Nelson*, we specifically held that the pain and suffering of the deceased is not an element that may be recovered under the wrongful death statutes.[13]

Although not covered by the wrongful death statutes, we also held in *Nelson* that a claim for predeath pain and suffering survived as a separate cause of action.[14] We cited to Neb. Rev. Stat. § 25-1401 (Reissue 2008) of the survival and abatement statutes to conclude that such a claim endures. In particular, we indicated that predeath pain and suffering was an injury to a "personal estate" as referred to in § 25-1401. Section 25-1401 states in full:

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[10] § 30-810 (emphasis supplied).

[11] See *Nelson v. Dolan*, 230 Neb. 848, 434 N.W.2d 25 (1989).

[12] See, *id.*; *Hindmarsh v. Sulpho Saline Bath Co.*, 108 Neb. 168, 187 N.W. 806 (1922).

[13] See *Nelson v. Dolan, supra* note 11. See, also, *Weatherly v. Blue Cross Blue Shield*, 2 Neb. App. 669, 513 N.W.2d 347 (1994).

[14] *Nelson v. Dolan, supra* note 11. See, *Wilfong v. Omaha & C. B. Street R. Co.*, 129 Neb. 600, 262 N.W. 537 (1935); *Weatherly v. Blue Cross Blue Shield, supra* note 13. See, also, *Brandon v. County of Richardson*, 252 Neb. 839, 566 N.W.2d 776 (1997); *Muller v. Thaut*, 230 Neb. 244, 430 N.W.2d 884 (1988).

> In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to real or personal estate, or for any deceit or fraud, shall also survive, and the action may be brought, notwithstanding the death of the person entitled or liable to the same.

[9] The defendants argue that our jurisprudence holding that predeath pain and suffering is a distinct cause of action under § 25-1401 is wrong. They argue that pain and suffering cannot be an injury to a "personal estate" and that, at common law, an action for pain and suffering abated with a victim's death. But defendants fail to recognize that in *Wilfong v. Omaha & C. B. Street R. Co.*,[15] we clearly held that under the organic law of this state, the right to bring a personal injury action survives the death of the victim. While it was the rule under English common law that such claims abate upon the victim's death, the Legislature had mandated that Nebraska adopt only "[s]o much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the Legislature of this state . . . ."[16] We found the English common-law rule to be, by many accounts, the least rational of its rules. Moreover, the English rule was in part justified by the need to quell the vindictive and quasi-criminal nature of suits brought by the decedent's estate, and we said that this policy was inapplicable in Nebraska because we do not allow for punitive damages.

[10] Finally, we concluded that the English rule was contrary to the Nebraska Constitution, which mandates that "every person . . . shall have a remedy by due course of law."[17] We stated:

> In view of the obvious evil sought to be prevented or remedied by the constitutional provision quoted, so far as

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[15] *Wilfong v. Omaha & C. B. Street R. Co., supra* note 14.

[16] Neb. Rev. Stat. § 49-101 (Reissue 2008).

[17] Neb. Const. art. I, § 13.

> "personal injuries" are concerned, the purport of its language is to wholly invalidate and destroy the legal effect and force of the [English] common-law maxim, viz., *actio personalis moritur cum persona*.[18]

Thus, we held that under our constitution, a cause of action existed for personal injury that "neither expressly nor by necessary implication requires the institution of a suit prior to the injured person's death as a condition precedent to recovery by his administrator, nor in any manner conditions the remedy it provides on that fact."[19] "[T]he amount that the injured person would be entitled to recover in his lifetime would amount to damages to his personal estate, which on his death would go to his next of kin to be distributed as personal estate."[20]

[11] Perhaps some of the defendants' confusion about the state of our common law stems from the fact that we have distinguished these "survival actions"[21] from revival of actions brought by the decedent prior to death, which, under our common law, do abate upon the victim's death.[22] Also, we have said somewhat obliquely that an action "for the death of a human being" did not exist at common law.[23] This statement, however, refers only to the cause of action which is based on damages stemming from *the death itself*. That cause of action inures solely to the next of kin, and exists only by virtue of

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[18] *Wilfong v. Omaha & C. B. Street R. Co., supra* note 14, 129 Neb. at 609, 262 N.W. at 541.

[19] *Id.* at 611, 262 N.W. at 542.

[20] *Id.*

[21] 22 Am. Jur. 2d *Damages* § 429 (2003).

[22] See *Wilfong v. Omaha & C. B. Street R. Co., supra* note 14 (and cases cited therein).

[23] *Wilson v. Bumstead*, 12 Neb. 1, 3, 10 N.W. 411, 412 (1881). See, also, *Smith v. Columbus Community Hosp.*, 222 Neb. 776, 387 N.W.2d 490 (1986); *Rhein v. Caterpillar Tractor Co.*, 210 Neb. 321, 314 N.W.2d 19 (1982); *Luckey v. Union P. R. Co.*, 117 Neb. 85, 219 N.W. 802 (1928); *Swift v. Sarpy County*, 102 Neb. 378, 167 N.W. 458 (1918); *Warren v. Englehart*, 13 Neb. 283, 13 N.W. 401 (1882).

the wrongful death statutes.[24] We conclude that § 25-1401 is applicable in establishing a "survival claim" as a proper cause of action, separate and distinct from the wrongful death statutes, because a survival claim is an action "which survive[s] at common law."[25] And, as we explained in *Hindmarsh v. Sulpho Saline Bath Co.*,[26] a claim for predeath pain and suffering may be either prosecuted independently or joined with a wrongful death action.

[12] While we have never directly addressed the applicable statute of limitations for a survival claim, we find no logical reason to conclude that a survival claim falls under the wrongful death statute of limitations. This is especially true when we have heretofore taken pains to distinguish survival claims from claims for wrongful death. We find the case of *Rhein v. Caterpillar Tractor Co.*[27] instructive. The personal representative in *Rhein* had filed suit more than 2 years after an accident which had killed the victim, but the personal representative sought to distinguish the action from a wrongful death action by seeking recovery for damages which the decedent would have been entitled to recover had he lived, including decedent's alleged loss of future earning capacity and enjoyment of life. In affirming the district court's dismissal for failure to bring the claim within 2 years, we did not state that all damages stemming from any tortious incident resulting in death would be encompassed by the wrongful death statute of limitations. Instead, we explored in great detail the facts of the case in order to determine whether there were any injuries that occurred to the decedent prior to and apart from the death itself. We concluded that because the facts were undisputed that the decedent died instantaneously, such damages did not exist.

The Nebraska Court of Appeals once stated succinctly that a decedent's survival claim had "nothing to do with the wrongful

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[24] See, e.g., *Nelson v. Dolan, supra* note 11; *Smith v. Columbus Community Hosp., supra* note 23; *Wilson v. Bumstead, supra* note 23.

[25] § 25-1401.

[26] See *Hindmarsh v. Sulpho Saline Bath Co., supra* note 12.

[27] *Rhein v. Caterpillar Tractor Co., supra* note 23.

death statutes."[28] We agree. We accordingly find no reason to apply the wrongful death statute of limitations.

There being no particular statute of limitations set forth for survival actions described in § 25-1401, we conclude that the applicable statute of limitations is the 4-year period set forth in § 25-207. Since the evidence is that Maria filed her survival actions within 4 years, the district court erred in dismissing those claims as barred by the statute of limitations. It did not err, however, in dismissing Maria's wrongful death claims.

MULTI-VEST

[13] Multi-Vest argues that regardless of whether any of Maria's claims are barred by the statute of limitations, the court properly dismissed Multi-Vest as a party defendant because it owed no duty to the decedents. Although this was not the reason stated by the district court, where the record adequately demonstrates that the decision of the trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.[29]

[14,15] A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.[30] After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment

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[28] *Weatherly v. Blue Cross Blue Shield, supra* note 13, 2 Neb. App. at 672, 513 N.W.2d at 351. See, also, e.g., *Peters v. Columbus Steel Castings Co.*, 115 Ohio St. 3d 134, 873 N.E.2d 1258 (2007); *Georgia Pacific v. Benjamin*, 394 Md. 59, 904 A.2d 511 (2006); *Ratka v St. Francis Hosp.*, 44 N.Y.2d 604, 378 N.E.2d 1027, 407 N.Y.S.2d 458 (1978) (superseded by statute as stated in *Adelman v. Adelman*, 191 Misc. 2d 281, 741 N.Y.S.2d 841 (2002)); *Blackstone v. Blackstone*, 282 Ga. App. 515, 639 S.E.2d 369 (2006); *Gibbs v. Magnolia Living Center, Inc.*, 870 So. 2d 1111 (La. App. 2004).

[29] See *Harvey v. Nebraska Life & Health Ins. Guar. Assn.*, 277 Neb. 757, 765 N.W.2d 206 (2009).

[30] *Kline v. Farmers Ins. Exch.*, 277 Neb. 874, 766 N.W.2d 118 (2009).

if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.[31]

[16] In this case, Multi-Vest presented a prima facie case that it had no ownership interest in the Colonial Apartments, or any other duty in relation to the fire that caused the decedents' pain and suffering prior to their deaths. Maria presented no evidence at the summary judgment hearing to rebut this prima facie case and, indeed, does not argue on appeal how Multi-Vest had a duty to the decedents. A legal duty on the part of a defendant to protect the plaintiff from injury is an essential element to an actionable negligence claim.[32] We therefore affirm the district court's dismissal of both causes of action against Multi-Vest.

CONCLUSION

For the foregoing reasons, we affirm the district court's dismissal of defendant Multi-Vest. As to the remaining defendants, we affirm the dismissal of the wrongful death causes of action, but reverse the dismissal of the survival actions.

AFFIRMED IN PART, AND IN PART REVERSED.

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[31] *Id.*

[32] See *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994).

IN RE ADOPTION OF CORBIN J., A MINOR CHILD. RUSTI M. AND ILJA M., APPELLEES, V. JOHN J., APPELLANT.

775 N.W.2d 404

Filed December 4, 2009. No. S-09-355.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose 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.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against

whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.
4. **Paternity: Adoption.** Consent of the father of a child born out of wedlock who has been adjudicated to be the father by a court is required for an adoption to proceed unless the Nebraska court having jurisdiction over the custody of the child determines otherwise pursuant to Neb. Rev. Stat. § 43-104.22 (Reissue 2008).
5. **Paternity: Words and Phrases.** An adjudicated father is an individual determined to be the father by a court of competent jurisdiction.
6. **Paternity: Adoption: Proof.** For an adoption to proceed, the consent of the biological father who has established a familial relationship with his child is required unless, under Neb. Rev. Stat. § 43-104(2) (Reissue 2008), the party seeking adoption has established that the biological parent (1) has relinquished the child for adoption by a written instrument, (2) has abandoned the child for at least 6 months next preceding the filing of the adoption petition, (3) has been deprived of his or her parental rights to such child by the order of any court of competent jurisdiction, or (4) is incapable of consenting.

Appeal from the County Court for Arthur County: EDWARD D. STEENBURG, Judge. Reversed and vacated, and cause remanded for further proceedings.

Brian J. Davis, of Berreckman & Davis, P.C., for appellant.

Kelly N. Tollefsen, of Morrow, Poppe, Watermeier & Lonowski, P.C., for appellees.

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

MILLER-LERMAN, J.

NATURE OF THE CASE

The issue in this case is whether a putative biological father who had established a familial relationship with his child is constitutionally required to comply with certain father registry and adoption statutes found at Neb. Rev. Stat. §§ 43-104(3), 43-104.04, and 43-104.22(7) (Reissue 2008) to preserve his rights in a subsequent adoption. The county court for Arthur County determined that John J.'s consent to the adoption of Corbin J. was not required because John failed to comply with the registry statutes. We reverse, because on this record, these statutes do not constitutionally apply to a putative

biological father who has established a familial relationship with his child.

STATEMENT OF FACTS

This case arises from the petition to adopt Corbin filed by Ilja M., the child's stepfather. The appellant is John, and the appellees are Rusti M. and Ilja. The minor child, Corbin, was born out of wedlock to Rusti and John in August 1999. Rusti and John are named as Corbin's mother and father on Corbin's birth certificate issued by the State of Colorado, and neither party is disputing that John is Corbin's biological father.

Corbin lived with Rusti and John for the first 3 years of his life. In May 2002, Rusti left the family home with Corbin, without notice to John or indication of where she and the child were going. After leaving, on May 31, Rusti filed a petition to establish paternity, custody, support, and equitable relief in the district court for Keith County, Nebraska. In the petition, Rusti identified John as the biological father of Corbin and requested that the court award child support.

On October 11, 2002, the district court for Keith County entered a temporary order granting John visitation rights with Corbin and ordering that John pay child support and provide health insurance for Corbin.

John's visitations with Corbin had begun in July 2002. John states that the parties would meet halfway between their homes to exchange Corbin. On February 21, 2003, Rusti married Ilja. John states that in September, he went to pick up Corbin in Colorado and that Rusti never arrived. John states he attempted to call Rusti and her mother but that both telephone numbers had been disconnected.

On July 8, 2003, the district court for Keith County dismissed the paternity action for lack of prosecution. Up to that date, John states that he had paid child support amounting to $3,790 and that he has maintained health insurance for Corbin up to the time of the adoption proceedings.

The parties assert different accounts of John's efforts to locate Corbin after the dismissal of the paternity action. John claims that he had no knowledge of Corbin's whereabouts and that he did what he could to locate Corbin. Rusti contends that

after leaving John, she returned to live on her family ranch in Keith County and that at all times, John knew the location and telephone number of the ranch, but that John did not attempt to contact her or Corbin.

In September 2008, the attorney representing appellees contacted John and informed him that Ilja was petitioning to adopt Corbin and that adoption papers had been prepared for John to sign. John acknowledges that on December 15, he received a notice titled "In Re Relinquishment of Corbin . . . for Adoption." John further acknowledges that after receipt of this document, he did not file a "Notice of Objection to Adoption and Intent to Obtain Custody" within 5 business days.

On January 7, 2009, appellees filed a petition for adoption in the county court for Arthur County. On January 20, John filed an objection to adoption proceedings and motion to dismiss. In January, John also filed a complaint for determination of paternity and custody in the district court for Arthur County. The issue of abandonment of Corbin by John was not raised in the pleadings, and we do not consider it in our analysis.

All parties filed motions for summary judgment in the county court action. Appellees requested that the court find that the consent of the putative father, John, was not required in this adoption, and John requested that the county court dismiss the case and transfer the proceedings to the district court. John, as the biological father who had previously established a familial relationship with Corbin, challenged the constitutionality of certain adoption statutes as applied to him. The county court entered an order finding that John was a putative father and that he had failed to file the requisite Notice of Objection to Adoption and Intent to Obtain Custody, as provided variously in Neb. Rev. Stat. §§ 43-104 to 43-104.25 (Reissue 2008). As a consequence of these failures, the court reasoned that John's consent was not needed for the adoption to proceed.

After the county court granted appellees' motion for summary judgment, a final adoption hearing was held on March 3, 2009. The recording device malfunctioned, and there is no bill of exceptions from the final adoption hearing. On March 3, an adoption decree was entered allowing Corbin to be adopted by Ilja. John appeals.

ASSIGNMENTS OF ERROR

John argues, restated and summarized, that the county court erred in (1) finding that the provisions of certain adoption statutes found at §§ 43-104 to 43-104.25, regarding the Notice of Objection to Adoption and Intent to Obtain Custody, which on their face eliminate the requirement of John's consent to the adoption proceedings, were constitutionally applied in this case; (2) finding that John is a putative rather than an adjudicated father; (3) overruling John's objection at the final adoption hearing and entering a final adoption decree; and (4) failing to record the final adoption hearing held on March 3, 2009. Given our resolution of this appeal, we do not reach the fourth assignment of error.

STANDARDS OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose 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. *Hauptman, O'Brien v. Turco*, 277 Neb. 604, 764 N.W.2d 393 (2009). In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment is granted and give such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] Statutory interpretation presents a question of law. When reviewing questions of law, we resolve the questions independently of the conclusions reached by the trial court. See *Allen v. Immanuel Med. Ctr., ante* p. 41, 767 N.W.2d 502 (2009).

ANALYSIS

John Is a Putative Biological Father With a Familial Relationship to Corbin: On This Record the Adoption Statutes Allowing Corbin's Adoption to Proceed Without John's Consent Were Unconstitutional as Applied to John.

The county court for Arthur County determined that John was the putative father of Corbin and that because of his failure to comply with the relevant adoption statutes, John's consent

to Corbin's adoption by Ilja was not required. The court noted that John had failed to file the requisite Notice of Objection to Adoption and Intent to Obtain Custody and relied, in part, on §§ 43-104(3), 43-104.04, and 43-104.22(7) in reaching its conclusion. John asserts that his consent to the adoption of Corbin is required because he is the adjudicated father. In the alternative, he claims his consent is required under constitutional principles. In this regard, John claims that the provisions of the adoption statutes relied on by the court, which on their face eliminate the need for his consent, were unconstitutional as applied to him, because the record establishes that he is Corbin's biological father and that he had established a familial relationship with Corbin. Although we do not agree with John that he is an adjudicated father, we do agree with John's constitutional analysis. We conclude that the challenged statutes were unconstitutionally applied to John, and the court erred on this record when it concluded that John's consent to the adoption was not required.

The following sections of the adoption statutes are relevant to our analysis in this case.

Section 43-104 requires:

> (1) Except as otherwise provided in this section and in the Nebraska Indian Child Welfare Act, no adoption shall be decreed unless written consents thereto are filed in the county court of the county in which the person or persons desiring to adopt reside or in the county court in which the separate juvenile court having jurisdiction over the custody of the child is located . . . .
>
> . . . .
>
> (3) Consent shall not be required of a putative father who has failed to timely file (a) a Notice of Objection to Adoption and Intent to Obtain Custody pursuant to section 43-104.02 and, with respect to the absence of such filing, a certificate has been filed pursuant to section 43-104.04 . . . .

Section 43-104.01(7) provides:

> A person who has been adjudicated by a Nebraska court of competent jurisdiction to be the biological father of a child born out of wedlock who is the subject of a

> proposed adoption shall not be construed to be a putative father for purposes of sections 43-104.01 to 43-104.05 and shall not be subject to the provisions of such sections as applied to such fathers. Whether such person's consent is required for the proposed adoption shall be determined by the Nebraska court having jurisdiction over the custody of the child pursuant to section 43-104.22, as part of proceedings required under section 43-104 to obtain the court's consent to such adoption.

Section 43-104.02 provides:

> A Notice of Objection to Adoption and Intent to Obtain Custody shall be filed with the biological father registry under section 43-104.01 on forms provided by the Department of Health and Human Services (1) within five business days after the birth of the child or (2) if notice is provided after the birth of the child (a) within five business days after receipt of the notice provided under section 43-104.12 . . . .

Section 43-104.04 provides:

> If a Notice of Objection to Adoption and Intent to Obtain Custody is not timely filed with the biological father registry pursuant to section 43-104.02, the mother of a child born out of wedlock or an agent specifically designated in writing by the mother may request, and the Department of Health and Human Services shall supply, a certificate that no such notice has been filed with the biological father registry. The filing of such certificate pursuant to section 43-102 shall eliminate the need or necessity of a consent or relinquishment for adoption by the putative father of such child.

Section 43-104.08 provides:

> Whenever a child is claimed to be born out of wedlock and the biological mother contacts an adoption agency or attorney to relinquish her rights to the child, or the biological mother joins in a petition for adoption to be filed by her husband, the agency or attorney contacted shall attempt to establish the identity of the biological father and further attempt to inform the biological father of his right to execute a relinquishment and consent to

adoption, or a denial of paternity and waiver of rights, in the form mandated by section 43-106, pursuant to sections 43-104.08 to 43-104.25.

Section 43-104.12 provides:

> In order to attempt to inform the biological father or possible biological fathers of the right to execute a relinquishment and consent to adoption or a denial of paternity and waiver of rights, the agency or attorney representing the biological mother shall notify, by registered or certified mail, restricted delivery, return receipt requested:
>
> (1) Any person adjudicated by a court in this state or by a court in another state or territory of the United States to be the biological father of the child;
>
> . . . .
>
> (3) Any person who is recorded on the child's birth certificate as the child's father;
>
> (4) Any person who might be the biological father of the child who was openly living with the child's biological mother within the twelve months prior to the birth of the child.

Section 43-104.22 provides:

> At any hearing to determine the parental rights of an adjudicated biological father or putative biological father of a minor child born out of wedlock and whether such father's consent is required for the adoption of such child, the court shall receive evidence with regard to the actual paternity of the child and whether such father is a fit, proper, and suitable custodial parent for the child. The court shall determine that such father's consent is not required for a valid adoption of the child upon a finding of one or more of the following:
>
> (1) The father abandoned or neglected the child after having knowledge of the child's birth;
>
> . . . .
>
> (7) Notice was provided pursuant to sections 43-104.12 to 43-104.14 and the putative father failed to timely file a Notice of Objection to Adoption and Intent to Obtain Custody pursuant to section 43-104.02.

Section 43-104.25 provides:

> With respect to any person who has been adjudicated by a Nebraska court of competent jurisdiction to be the biological father of a child born out of wedlock who is the subject of a proposed adoption:
>
> (1) Such person shall not be construed to be a putative father for purposes of sections 43-104.01 to 43-104.05 and shall not be subject to the provisions of such sections as applied to such fathers[.]

For his initial argument, John claims that as a result of the Keith County paternity action, he is an adjudicated father, and that consequently, his consent for an adoption is required on this basis. In this case, the county court concluded that John had not been adjudicated to be the father of Corbin. We agree with the court's analysis in this regard.

[4,5] Based on our ruling in *In re Adoption of Jaden M.*, 272 Neb. 789, 725 N.W.2d 410 (2006), and the recent amendments to the adoption statutes found in 2007 Neb. Laws, L.B. 247, consent of the father of a child born out of wedlock who has been adjudicated to be the father by a court is required for an adoption to proceed unless the Nebraska court having jurisdiction over the custody of the child determines otherwise pursuant to § 43-104.22. See § 43-104.01(7). An adjudicated father is an individual determined to be the father by a court of competent jurisdiction. See *id.*

The only court order entered addressing John's paternity was a temporary order in the district court for Keith County, requiring John to pay child support and to provide medical insurance and designating visitation. The action in which the temporary order was entered was ultimately dismissed for lack of prosecution. This temporary order was not a final court-ordered determination that John was Corbin's father. We agree with the county court that John was not adjudicated as Corbin's father.

Because John was not adjudicated as Corbin's father, the issue presented in this case is whether, consistent with constitutional principles, in order to proceed with the adoption in the absence of an allegation of abandonment, the parties needed the consent of John, a putative father, whom the parties

acknowledge to be the biological father of the child and who had established a familial relationship with the child. We conclude on this record that applying §§ 43-104(3), 43-104.04, and 43-104.22(7) infringed on John's constitutionally protected parental rights.

The record is undisputed that appellees provided John with notice of the adoption proceedings on December 15, 2008. Indeed, they obtained and attached to the petition for adoption a certificate obtained pursuant to § 43-104.04 from the Nebraska Department of Health and Human Services dated December 29, 2008, stating that John did not file a Notice of Objection to Adoption and Intent to Obtain Custody. Appellees claim that under the statutes, because they provided John with notice of the adoption proceedings and he did not file a Notice of Objection to Adoption and Intent to Obtain Custody within 5 business days, John's consent is not required. See §§ 43-104(3), 43-104.04, and 43-104.22(7). Contrary to appellees' analysis, we conclude that John's failure to file within 5 days does not resolve the issue of whether John's consent was required, because we are persuaded that these statutory requirements were unconstitutionally applied to John.

Recently, in *In re Adoption of Jaden M., supra*, we noted that this court has adopted and applied the reasoning of the U.S. Supreme Court in *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983), regarding the constitutionally protected rights of unwed fathers under the 14th Amendment's Due Process Clause. In *Lehr*, the U.S. Supreme Court stated that "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child' [citation omitted] his interest in personal contact with his child acquires substantial protection under the Due Process Clause." 463 U.S. at 261. When we consider John's constitutional challenge in our analysis, it is this constitutionally protected right that guides our decision.

Prior to *Lehr*, the Court had addressed the interests of unmarried biological fathers in a series of cases. In *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972), the Court held an Illinois law which presumed that all

unmarried biological fathers were unfit parents was unconstitutional. In *Quilloin v. Walcott*, 434 U.S. 246, 256, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978), the Court permitted the adoption of a child by his stepfather over the objection of his biological father because the biological father had "never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child." In *Caban v. Mohammed*, 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979), the Court held that a New York statute that required the consent of an unmarried mother to the adoption of her children but contained no similar requirement for the consent of an unmarried biological father violated equal protection where the unmarried biological father had developed a substantial relationship with his children, had lived with the children and their mother during the period in which both children were born, and had provided financial support for the family.

In a concurring opinion, Chief Justice Lewis of the Supreme Court of Florida observed, and we agree, that "[a] unifying premise between [sic] these cases is that the Court draws a distinction between unmarried biological fathers who have developed a relationship with their child and fathers without such a relationship." *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 204 (Fla. 2007) (Lewis, C.J., concurring in result only). Similarly, in *In re Adoption of Jaden M.*, 272 Neb. 789, 725 N.W.2d 410 (2006), we concluded that the predecessor to the current § 43-104.22(7), which eliminated the consent requirement of certain biological fathers, infringed upon the constitutionally protected parental rights of the father of the child proposed for adoption. In so concluding, we noted that because the father in *In re Adoption of Jaden M.* had "provided support and established familial ties with his biological child, his interest in personal contact with his child has acquired substantial protection." 272 Neb. at 796, 725 N.W.2d at 415. We noted in *In re Adoption of Jaden M.* that our holding therein was anticipated by prior Nebraska jurisprudence. See, *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987); *White v. Mertens*, 225 Neb. 241, 404 N.W.2d 410 (1987).

In this case, the record shows that after Corbin's birth in August 1999, Rusti, John, and Corbin lived together for 3 years and John established familial ties with Corbin. There is no dispute that John is the biological father of Corbin and is named as the father on the birth certificate. Based on these facts and the relevant jurisprudence explained above, we conclude that John's interest in his child had acquired substantial constitutional protection and that the court erred when it ruled John's consent to the adoption was not required and granted summary judgment in favor of appellees.

[6] We conclude that for an adoption to proceed, the consent of the biological father who has established a familial relationship with his child is required unless, under § 43-104(2), the party seeking adoption has established that the biological parent:

> (a) has relinquished the child for adoption by a written instrument, (b) has abandoned the child for at least six months next preceding the filing of the adoption petition, (c) has been deprived of his or her parental rights to such child by the order of any court of competent jurisdiction, or (d) is incapable of consenting.

Accordingly, the court erred when it allowed the adoption of Corbin to proceed without John's consent due to John's failure to file certain notices. Because John has acquired substantial protection in his right to have contact with Corbin, §§ 43-104(3), 43-104.04, and 43-104.22(7) were unconstitutionally applied to John. The grant of summary judgment in favor of appellees, based on the determination that John's consent was not required, was error.

The Trial Court Erred in Granting the Decree of Adoption.

Because we have concluded that the court erred in granting summary judgment in favor of appellees, we further conclude that the county court erred in granting the adoption of Corbin by Ilja without John's consent. We therefore reverse the grant of summary judgment, vacate the adoption decree entered on March 3, 2009, and remand the cause for further proceedings consistent with this opinion.

CONCLUSION

On this record, where no issue of abandonment has been raised, the statutory adoption provisions allowing the adoption of Corbin to proceed without John's consent, where John is the biological father of Corbin and had established a familial relationship with him, were unconstitutionally applied to John. Therefore, the grant of summary judgment and the entry of the adoption decree by the county court in reliance on these statutory provisions was error. The grant of summary judgment is reversed, the adoption decree is vacated, and the matter is remanded for further proceedings consistent with this opinion.

REVERSED AND VACATED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

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